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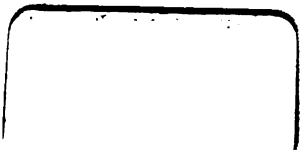

WEST COAST REPORTER

ISSUED IN WEEKLY PARTS.

CONTAINING ALL THE DECISIONS AS FAST AS FILED

OF THE FOLLOWING COURTS:

UNITED STATES CIRCUIT AND DISTRICT COURTS OF CALIFORNIA, COLORADO, NEVADA, AND OREGON, AND THE SUPREME COURTS OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON, AND WYOMING.

ALSO

LEGAL ESSAYS AND EDITORIAL NOTES.

EDITORS: JOHN NORTON POMEROY, LL. D.
CARTER P. POMEROY.

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CLASSIFICATION:

The Common Law Doctrine; West Coast Doctrine.

I. Prior appropriation of water on the public lands of the United States.

II. Prior appropriation of water thus made upon the public domain, and the rights thus acquired by it, are good also as against any subsequent grantee from the government.

III. The two foregoing general doctrines apply only to the public lands of the United States.

IV. Doctrines which control the appropriation and define the rights of the appropriators of waters on the public domain of the United States.

The last doctrines to be classified as follows:

1. The methods by which an appropriation is effected.
2. The time from which the rights under an appropriation become vested.
3. The property and other rights in general of the prior appropriator.
4. The amount of water embraced in an appropriation—or the extent of the appropriation.
5. Subsequent appropriation, and the relations between successive appropriators of the same stream.

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WEST COAST REPORTER.

No. 1. JANUARY 3, 1884. VOL. I. No. 1.

INTRODUCTORY.

IN commencing the publication of a new legal periodical, it is expected, as a matter of course, that the editors should announce its general purposes and objects, and the plan upon which it is to be conducted.

The WEST COAST REPORTER is devoted especially to the administration of justice in the states and territories bordering on, or adjacent to, this Western Coast. Its *primary* object is to promote the interests of the Bench and Bar throughout the vast and rapidly growing commonwealths of the Pacific Slope; but its editors confidently hope that its advantages will not be confined to any single locality, and that its benefits will reach and be recognized by the profession in all parts of the Union, in the Atlantic and Southern States, as well as in those of the Ohio and Mississippi valleys. The following are the prominent and distinctive features of this periodical:

I. As the name indicates, its chief object is the publication, within the shortest possible time after their delivery, of all the opinions in cases decided by the United States Circuit and District Courts, and by the Supreme State and Territorial Courts of the Pacific Slope, as enumerated in the list annexed. These reported decisions will occupy the larger part of each weekly number. The most pressing need of the profession, at the present day, is the *immediate* publication of judicial opinions—a practical want which the regular volumes issued by the official reporters do not, and can not, supply. Even in England, where the official reports are issued in monthly parts, so that the full opinions are never more than two months in arrear, they are anticipated by "Weekly Notes" of all important decisions. Ample arrangements have been perfected by which the editors will be furnished with all opinions immediately upon their delivery, and they will then be published in the weekly numbers of the REPORTER without any

unnecessary delay. In reporting all cases, great care will be taken in the preparation of accurate head-notes; statements of facts will be added whenever necessary to the full understanding of any decision; the names of counsel will be given, but the argument of counsel will, as a rule, be necessarily omitted. It will be the constant endeavor of the editors to do their work of reporting in such manner that the volumes of the WEST COAST REPORTER may be cited as authority before any tribunal in the country.

For many reasons the decisions to be contained in the REPORTER are of peculiar interest and of the highest importance to the profession in other parts of the United States. Some of these reasons we briefly mention: (1) In regard to the courts themselves, it is certainly a moderate statement to say, that the Federal, Circuit, and District Courts embraced within the scope of this periodical are second to none others in learning, ability, and reputation, and their jurisdiction is *practically* more extensive and varied than that of the similar tribunals in the Central and the Atlantic States; while the authority of all the other courts confessedly stands very high in the estimation of the American Bar. (2) Upon legal questions common to all parts of the country, cases of the greatest magnitude and importance are constantly adjudicated. It is a fact which can not be disputed—patent to every intelligent observer—that in these young and developing commonwealths of the Pacific Coast, litigations of the utmost magnitude and importance, involving momentous and often new questions, or new applications of general doctrines, are relatively more frequent than in the older and more settled communities of the East. The Bar and Bench of the Pacific States and even territories are often compelled to grapple with more difficult questions, and to decide controversies embracing far greater interests and far larger amounts, than those which generally arise before the tribunals of—for example—New York, Massachusetts, or Pennsylvania. (3) Cases involving constitutional law, the interpretation of the Federal Constitution, and especially the relations of the states to the United States, are very frequent, and often of the gravest character, growing out of the state legislation and the state constitutions. (4) All the states, and nearly if not quite all the territories, embraced within the scope of the REPORTER, have adopted the Reformed Procedure; and their courts have uniformly accepted and carried out its true spirit and intent unaffected by the traditions of common-law methods. The decisions based upon this procedure, interpreting and applying its principles, settling its doctrines concerning actions, pleadings, parties, judgments, remedies, the union of legal

and equitable causes of action and reliefs, counter-claims, and all similar matters, must necessarily be of great assistance to the Bench and Bar in all the other states of the Union which have adopted the same system. For this reason alone, if there were no others, the WEST COAST REPORTER will, we trust, merit an extensive circulation throughout all of the so-called code states—states in which the Reformed Procedure prevails. (5) Cases are constantly decided by these courts presenting certain classes of legal questions, not common in all parts of the country, but peculiar to particular districts or localities, and within these localities of the highest possible interest. Among the most important of such questions we merely mention the following: Those concerning land titles under United States legislation, grants, and patents. The unique litigation concerning the validity of Mexican land grants is practically ended; but in all the Pacific states and territories cases are arising involving the United States land system, the legislative grants of land to states, grants to railways, legislation of Congress concerning mineral and other lands, and all the varieties of title acquired under these Federal methods of dealing with the public domain. The decisions upon these and kindred topics are of the utmost interest and importance in all the other states of the Mississippi and Ohio valleys, or of the Northwest, where titles are affected by or depend upon similar legislation. Questions concerning mines and mining. So far as the decisions relate to the business and operations of mining, and not merely to the titles to mineral lands under the special legislation of Congress, they must be of interest and assistance to the profession in all the other states where mining of any kind is carried on so extensively as to form a distinct department of the local jurisprudence. Water-rights. Questions of the highest interest concerning the rights to use the water of lakes, and of navigable or unnavigable streams, and the rights of riparian proprietors, are becoming more and more frequent and important, as the agricultural resources are developed. The settlement of these questions will also be a matter of interest to the profession at the East. Finally, we may mention the special and unique jurisdiction held by the United States Circuit Court in the Ninth Circuit, for the review of the decisions of the international tribunals created by the treaties made by the United States with China and with Japan.

For these reasons, among others, we confidently trust that the WEST COAST REPORTER, as the vehicle of the judicial opinions, will meet with approval from the profession, not only of the Pacific states and territories, but of the entire country.

II. A second feature consists of original articles. While the plan of this periodical contemplates a reporter rather than a mere review, a reasonable amount of space will be devoted to original articles upon legal topics of a living and real interest. These will, as a rule, be practical rather than speculative; although they will, when occasion requires, propose and advocate any needed legislative amendments of the existing law. One object will be especially kept in view—the perfecting of our codes, so that they shall fully realize the benefits of codification. In this respect the example of California will be anxiously watched and studied by the profession of other states. The editorial articles will mainly deal with subjects either peculiar to the jurisprudence, or specially interesting to the profession, of the Pacific states and territories, with the purpose of rendering some practical assistance to the Bench and Bar in the discharge of their professional duties. To this end, they will often be continued from number to number, and will be elaborate and exhaustive essays upon the topics discussed.

III. Another feature of the REPORTER will consist of notices and reviews of new publications, legal treatises, and other works connected with or relating to the science of jurisprudence. It is the intention of the editors that all such book notices shall be fair, candid, impartial, and careful, so that they may furnish some real assistance to the profession in the selection and purchase of recent works. While a reviewer should not deal out indiscriminate and equal commendation to all books alike, he should not, on the other hand, confine himself to a criticism of actual or supposed omissions, errors, and imperfections. In this department the REPORTER certainly is not, and will not be, the organ of any law publishing house.

IV. Finally, some space will be given, as circumstances may permit or require, to what may be called legal miscellany, special information, news, notes of remarkable cases, and the like, which may be of peculiar interest to the profession. The editors hope to be favored with an occasional foreign correspondence, from a very eminent source, connected with the English Bar.

It is intended that the WEST COAST REPORTER shall thus faithfully represent the jurisprudence of the Pacific commonwealths, and reflect the learning, ability, and culture of their Bench and Bar.

JOHN NORTON POMEROY,
CARTER P. POMEROY,

SAN FRANCISCO, January 3, 1884. *Editors.*

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

No special branch of the law of California, Nevada, and other commonwealths of the Pacific coast, is more practically important, and none is more uncertain, unsettled, and contradictory, than that which deals with the right to appropriate or use the waters of lakes and running streams, navigable or unnavigable, and with the conflicting rights of riparian proprietors to the same waters. The whole subject imperatively demands the most careful and complete legislation, which shall define the rights of all interested parties, and establish a code of rules regulating them upon a comprehensive and just basis, entirely independent, it may be, of the common-law doctrines. The great danger is—and the danger *is* very great—lest such legislation should be enacted wholly in favor of some one interest, to the exclusion of the other interests equally real, but, perhaps, not so strongly pressed upon the legislature. To prevent such unjust discrimination, which would inevitably retard, if not completely stop, the development of the most valuable and permanent natural resources of these states, the following preliminary conditions are essential: (1) The common-law rules concerning water-rights should be accurately apprehended, in order that it may be seen how far, and in what particulars, they are unfitted for the industrial pursuits, the mining, agricultural, grazing, manufacturing, and municipal interests of these Pacific communities. (2) The existing law of these states and territories, as founded upon statutory legislation, Spanish-Mexican laws, customs, and judicial decisions, should be carefully examined and formulated, as far as possible, so that its imperfections, omissions, advantages, and defects would be clearly disclosed and understood. With the knowledge obtained from such an investigation, only, can the legislature construct a system of statutory rules which shall represent, harmonize, and protect *all* conflicting interests, as far as it is possible to provide for and protect all by a compromise in which each must make some surrender, must submit to some curtailment. Common justice requires some partial surrender by each in order that all may be benefited; and the chief difficulty lies in making an *equitable* apportionment of such burdens among all the classes of proprietors. Statutes which recognized the rights of riparian owners alone, by simply enacting the common-law rules, would destroy the main usefulness of our streams, and stop the development of the great

agricultural resources, by rendering any extensive system of irrigation practically impossible. On the other hand, statutes which should wholly ignore the interests of riparian proprietors would invade vested rights, and produce evils equally grave and far-reaching.

As well for the purpose of furnishing a slight contribution towards such amendatory legislation, as for the purpose of discussing a subject of great importance to the legal profession, I intend, through several numbers of the WEST COAST REPORTER, to examine the existing law concerning Water-Rights and the Rights of Riparian Owners, as it prevails in the southern states and territories of the Pacific slope; to ascertain, as far as practicable, the rules which have been established by statute or by judicial decision; to point out the omissions, imperfections, contradictions, or questions left unsettled, and to compare these results generally with the common-law and the Spanish-Mexican systems. I may, in conclusion, suggest some amendments which might properly be made by the legislature.

In these Pacific states and territories, water is the one essential element of all productiveness and consequent prosperity. Its use for mining operations first attracted attention, and was the subject of some partial legislation. Its use for agricultural purposes of every kind has become far more important and beneficial, and more closely connected with the permanent welfare of these communities. Regions which are apparently most desert and sterile, can, with a sufficient supply of water, be turned into gardens, and made to "blossom as the rose." Nature has arranged abundant means and facilities for such an artificial supply. For example, in the great San Joaquin valley east of the San Joaquin river—which at times seems to be an expanse of dry sand—there is hardly an acre which can not be reached by a well-constructed system of irrigation utilizing the water of the streams which rise in the high sierras, cross the valley at nearly equal intervals, and empty into the San Joaquin. With such irrigation, the whole valley would be, perhaps, the most fertile district in the world. I may remark in passing that never before did I so fully appreciate this wonderful transforming power of water, as after riding, three years ago, a whole day over the foot-hills, parched and browned and barren, I drove the few miles from the ferry at Merced Falls to the village of Snelling, through what was in fact a rural paradise—through green fields, roads overarched with rows of magnificent trees, and door-yards filled with flowers—all the effect of irrigation obtained from the Merced. Similar illustrations may be seen in all parts of this state. But these uses of water for mining, for irrigation, for

municipal purposes, necessarily diminish, to a very considerable extent, the natural and normal supply of the lakes and streams from which it is taken, and therefore conflict with the common-law rights of the riparian owners, and violate the settled doctrines of the common law. It is simply impossible to utilize water for any of these purposes, and then to return it, substantially unchanged in amount and condition, to its original channels. The problem is to reconcile, or rather to adjust, these necessary uses, and the common-law rights and interests of all other and riparian proprietors. It will be expedient to state by way of preface, for purposes of comparison and illustration, the general doctrines of the common law.

The Common-law Doctrine.—The common-law doctrine in its most general form is, that the water of permanent running streams and of inland lakes is sacred to the common use alike of all the riparian proprietors upon their borders. This doctrine extends both to navigable and unnavigable streams and lakes which are wholly inland and territorial. Each proprietor may use the water for all reasonable purposes as it passes through or by his land, provided that he does not interfere with the public easement of navigation in all navigable lakes and streams; but he must, after its use, return it without substantial diminution in quantity or change in quality to its natural bed or channel, before it leaves his own land, so that it will reach his adjacent proprietor in its full, original, and natural condition. No priority of use or appropriation by any one proprietor can give him any higher or more extensive rights than these, as against other proprietors either higher up or lower down on the stream, or abutting on either side of him upon the shores of the lake. More extensive or exclusive rights than these against other riparian proprietors can only be acquired by grant from them, or by prescription which presupposes a former grant. Even the state, by its power of eminent domain, can not give any more extensive or exclusive rights to one proprietor, under color of a public use, without making provision for compensation to all other proprietors whose natural rights would thus be invaded. This general doctrine, and all the detail of subordinate rules to which it leads, are fully sustained by the almost unanimous consensus of modern decisions; although there may be some *partial* deviations from its consequences in certain particulars in a few of the states. In the well-considered case of Heath *v.* Williams, 25 Me. 209, Mr. Justice Shepley briefly but accurately stated the general doctrine: "The cases decide that priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian pro-

prietor, who owns both banks of a stream, has a right to have the water flow in its natural current, without any obstruction injurious to him, over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for more than twenty years." In Tyler *v.* Wilkenson, 4 Mason, 397, Judge Story said: "Of a thing common by nature there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietorship the right to the use in common, as an incident to the land; and whosoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now this may be, either by a grant from all the proprietors whose interest is affected by the particular appropriation, or by a long, exclusive enjoyment without interruption, which affords a just presumption of right." In Pugh *v.* Wheeler, 2 Dev. & Bat. 55, Ruffin, C. J., stated the general doctrine in the following somewhat fuller manner: "If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built he could only recover for the natural uses of the water, as needed for his family, his cattle, and irrigation; but, if instead of building a mill he had diverted the stream itself, he can not justify it against a proprietor below, upon the ground that he had thus made an artificial use of the water before the other had made any such application of it. The truth is, that every owner of land on a stream necessarily and at all times is using water running through it, if in no other manner, in the fertility it imparts to his land, and the increase in the value of it. There is, therefore, no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a particular new application or artificial use of the water does not, therefore, create the right to that use; but the existence or non-existence of that application at a particular time, measures the damages of a wrongful act of another in derogation of the general right to the use of the water as it passes to, through, or from the land of the party complaining. The right is not founded in user, but is inherent in the ownership of the soil, and when a title by use is set up against another proprietor, there must be an enjoyment for such length of time as will be evidence of a grant, and thus constitute a title under the proprietor of the land. * *

The use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of land on the stream, he can enjoy *on* his land, and as an appurtenant to it."[1]

The same doctrine concerning the particular uses and appropriation of water by riparian owners is extended to inland lakes and streams which are navigable. This subject was very recently considered by the New York Court of Appeals, in the case of Smith *v.* City of Rochester, 92 N. Y. 463. In a very elaborate and learned opinion, that court decided (in June, 1883) that "Riparian owners of land, adjoining fresh-water non-navigable streams, as an incident of their ownership acquire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream. This is also true of the fresh-water navigable streams and small lakes within the state where the tide does not ebb and flow; save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right to use, regulate, and control the waters for the purposes of navigation. This public easement gives the state no right to convert the waters, or to authorize their conversion, to any other uses than those for which the easement exists, that is, for the purposes of navigation. The right to divert the water for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making just compensation. This doctrine concerning the rights of riparian owners does not, however, apply to the vast fresh-water lakes or inland seas between the United States and Canada, nor to streams forming the boundary lines of states. The rights of riparian owners on the Hudson and Mohawk rivers, in New York, are derived from the rules of the civil law as it prevailed in the Netherlands during the colonial period." The facts of this case well illustrate the workings of the common-law rules. Hemlock lake is a small lake in the interior of New York, about seven miles long and one and a half wide. It is to a certain extent navigable, and has been navigated with small craft by the residents on its borders. The decision, it will be seen, treats it as navigable. Its surplus waters form a stream which is unnavigable. On this stream, near the outlet of the lake, the plaintiff has a mill, and the water of the stream was

[1] See also the elaborate editorial note to Heath *v.* Williams, 43 Am. Dec. 269–279, in which numerous cases, English and American, are collected, and the special rules established by them are formulated.

sufficient to keep the mill in operation throughout the entire year. In 1873, under authority conferred by the legislature of the state, the city of Rochester constructed a conduit or aqueduct from this lake to the city, for the purpose of furnishing a supply of water to its inhabitants. By this aqueduct over 4,000,000 gallons daily were drawn from the lake, and the flow of surplus water through the natural outlet was so diminished that the operations of the plaintiff's mill were seriously interfered with, and in some parts of the year entirely stopped. No compensation was paid or offered by the city to the plaintiff. On these facts the court held, in pursuance of the doctrines above quoted, that the plaintiff was entitled to relief against the city.

From this general doctrine, the following more specific rules necessarily follow. A riparian proprietor need not have actually appropriated the water of a stream, in order that he may be entitled to complain of a diversion by another proprietor; actual damages are not necessary, for damage is conclusively presumed from any such diversion. A riparian proprietor can not consume the entire stream for any purpose. He may appropriate the water for his own necessary uses, but this right must be reasonably exercised, and there must be no substantial diminution or waste.[2] The editorial note quoted below sums up the common-law doctrine, as the result of the American and English cases, as follows: "The general principle is, that every owner of land through which a natural stream of water flows (or abutting on a natural inland lake), has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription."

J. N. P.

(TO BE CONTINUED.)

[2] See Adams *v.* Barney, 25 Vt. 225; Townsend *v.* McDonald, 12 N. Y. 381; Pillsbury *v.* Moore, 44 Me. 154; Bliss *v.* Kennedy, 43 Ill. 67; and other cases cited in the editorial note in 43 Am. Dec. 274, 275.

CIRCUIT COURT, DISTRICT OF COLORADO.

UNITED STATES *v.* SOUTHERN COLORADO COAL AND TOWN COMPANY ET ALS.

Filed November 1, 1883.

BURDEN OF PROOF IS ON THE COMPLAINANT TO SHOW THAT NEGATIVE ALLEGATIONS are at least *prima facie* true, when such allegations are made the basis of his suit.

PROOF OF THE NON-EXISTENCE OF PERSONS NAMED IN UNITED STATES PATENTS AS GRANTEES may be made by the evidence of witnesses who lived in the neighborhood of the lands granted, and who would probably have known such grantees if they had lived at the time and in the place in question.

AMOUNT OF EVIDENCE REQUIRED TO SUPPORT A NEGATIVE ALLEGATION, and to shift the burden of proof, varies according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into.

COMPLAINANT IN A SUIT TO SET ASIDE CERTAIN LAND PATENTS, alleged to have been obtained through a fraudulent conspiracy between the officers of the land office and others, need not call such persons as witnesses to prove the fraud if he can make out a *prima facie* case without doing so. On the other hand, the failure of the respondents to call such persons to disprove the fraud, when no reason appears for not having done so, is a strong circumstance of suspicion.

GRANTEE IS AS NECESSARY TO A CONVEYANCE AS A GRANTOR, and it follows that a United States land patent to a fictitious grantee is absolutely null and void.

PURCHASER OF LAND, WHO CLAIMS PROTECTION AS A BONA FIDE PURCHASER for value and without notice, must hold the legal title, or be entitled to call for it; for if his title is merely equitable, it must yield to a legal and equitable title in an adverse party.

ONE WHO HAS ACQUIRED TITLE BY FRAUD MAY MAKE A VALID CONVEYANCE to a *bona fide* purchaser; but one who has never acquired the title can not convey it, nor can the title be transferred by fraudulently obtaining from the owner a deed purporting to convey it to a fictitious person, and then forging a conveyance from such fictitious person to another, however innocent the latter may be.

NEITHER THE DEFENSE OF THE STATUTE OF LIMITATIONS NOR THAT OF LACHES can be pleaded against the United States, although, as a general rule, whenever the government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man.

COURTS OF EQUITY MAY REFUSE TO ENTERTAIN A CONTROVERSY when the lapse of time since the cause of action accrued is so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead, and the proofs lost or destroyed.

NOTICE OF THE GRANTOR'S INTENTION TO RESCIND THE CONVEYANCE and demand a return of the property conveyed, on account of fraud in obtaining such conveyance, is not necessary where the grantee is a fictitious person.

UNITED STATES NEED NOT RETURN OR TENDER THE MONEY RECEIVED in consideration of a fraudulent patent, as a condition precedent to its right to maintain a suit to set aside such patent, where the same has been made to a fictitious patentee.

UNITED STATES CAN NOT BE ESTOPPED BY THE FRAUDS or crimes of its public officials.

BILL in equity brought to set aside certain land patents on the ground of fraud. The facts are sufficiently stated in the opinion, rendered on final hearing.

W. S. Decker, Special Assistant U. S. Attorney, for the complainant.

Lyman K. Bass, *Wolcott & Milburn*, and *John M. Waldron*, for the respondents.

MCCRARY, Circuit Judge. The important allegation of the bill is that the patentees named in the patents sought to be set aside—sixty-one in number—as well as the witnesses by whom proof of pre-emption purports to have been made, were all fictitious persons, having no existence in fact. It is averred that the pre-emption papers, together with the signatures thereto, were fraudulently manufactured by certain conspirators

named, or other persons unknown, for the purpose of cheating and defrauding the complainant out of its title to the lands in question. In other words, the contention of the complainant is that the officers of the general land office were by fraud induced to execute patents to fictitious persons, so that there were in fact no grantees capable of taking title. We will first inquire whether the proof sufficiently shows that this is true as a matter of fact.

The bill sets out the names of the supposed pre-emptors and patentees, to the number of sixty-one, and charges that they are myths and fictitious persons, and that the names are fictitious names; that no persons by such names have ever lived or been known in the county of Las Animas, Colorado, where said lands are situated. It also sets out the names of persons purporting to have appeared as witnesses in these several cases, and makes the same averments as to them.

Although these averments are negative in character, yet, as the complainant has made them the basis of its suit, the burden is upon it to show that they are at least *prima facie* true: Greenleaf's Evidence, sec. 78; Wharton's Evidence, chap. 7.

The complainant has acccordingly called fourteen witnesses, who have resided in Las Animas county for a number of years, and who testify that they were well acquainted there at, before, and since the dates of the several patents, and that during the years from 1870 to 1874 none of the persons named as patentees, with the exception of Juan B. Martine, were known in the county; and as to Martine, the proof is that a common laborer was known in Trinidad of that name, but that he never occupied any of the land in question. It is not probable that he was an actual pre-emptor if all the other sixty were myths. It clearly appears by the evidence that none of the lands were occupied or in any way improved prior to the issuing of the patents, although, in each case, what purports to be an affidavit of the claimant is filed, setting forth that he is a citizen of Las Animas county, and has made settlement on and improved the land in good faith, etc., describing the improvements.

The proof is very clear that, with the possible exception of Martine, no such persons as those named as patentees either occupied the land or resided within the county at the time that the pretended entries were made. It was then a very new country, but sparsely populated, and it is incredible that so large a number of persons could have lived in the community and that all could have been unknown to the leading citizens. At all events, the proof produced by the complainant is sufficient to shift the burden and make it necessary for respondents to come forward with proof to show that these supposed patentees were real persons. If such be the fact, it would have been easy for respondents to show it, although quite difficult for complainant to prove the negative. If sixty-one persons bearing the names of these patentees ever existed and actually appeared before the land officers at Pueblo as applicants for pre-emption, and if they produced living witnesses to testify for them, it certainly would not be difficult for respondent to identify them, or at least some of them; but if they never existed, it must in the nature of the case be difficult, if not impossible, to prove the fact of their non-existence by clear and positive evidence. All that is possible in such case is to call as witnesses those who would probably have known them if they had lived at the time and place in question. The fact of their non-existence could be shown in no other way. It is suggested in argument that the proof is

insufficient, because it only goes to show that none of the patentees or witnesses ever lived in Las Animas county, and does not tend to prove that they did not exist elsewhere. It would, however, be manifestly impossible for complainant to call witnesses to testify as to all localities, and besides, each of the supposed patentees must have resided in Las Animas county and actually occupied and improved the land patented to him, in order to be entitled to a patent at all, and each was required to swear to such residence, occupancy, and improvement. If none of them were ever in the county, and no improvements were ever made upon the land, then the proofs upon which the patents issued were false, and the inference that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees is not more unreasonable than would be the inference that sixty-one actual persons committed perjury themselves, and suborned as many others to perjure themselves as witnesses, in order to acquire the title. At all events, I am clearly of the opinion that complainant can be required to do no more than to show that the supposed patentees did not live in Las Animas county, and that the lands in question had neither been occupied nor improved.

If this is not sufficient to shift the burden, then it must follow that we should require the complainant to make the same showing with respect to every other community in the United States, and this can scarcely be seriously insisted upon. It would be very difficult to prove that these supposed persons did not exist in all space. "But jurisprudence has to do with no such vague domains. Its territory is limited. It inquires whether in a particular spot, at a particular time, open to human observation, a particular thing existed. * * * It is possible within such limited range to call all witnesses who were likely to have been at the given spot, or observed the given persons, at the particular time, and so to approach the negative by gradually exhausting the affirmative:" Wharton on Evidence, sec. 356. The amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into: Stephen's Digest of the Law of Evidence, art. 96. In the present case, to hold the respondents bound to produce evidence in support of the affirmative of the proposition—that these supposed patentees were actual persons—is, under the circumstances, both reasonable and just, because the proof of that fact, if it be a fact, is within their reach. The papers could not have been fabricated, as alleged, in the names of fictitious persons without the knowledge of the register and receiver of the land office at Pueblo, and the bill distinctly charges that both of these officers were parties to the fraud and conspiracy. What purport to be transfers from each of the supposed patentees to one Jackson as trustee for the Colorado Coal and Town Company, are shown in evidence. Jackson, however, swears that he dealt only with one A. C. Hunt, who brought him the receiver's certificates properly assigned, and he never saw or knew any of the pre-emptors or patentees. He bought the lands from Hunt and paid him for them, receiving what appeared to be the usual evidence of title. It is fair to presume that Hunt dealt with the actual pre-emptors, if any existed, or if he did not, he could state with whom he did deal, and thus put the inquirer on the road

which would lead him to the original parties, if any such actually existed. It is conceded that the receiver is dead, but no reason appears for not calling either the register or Hunt; and the failure to do so is a circumstance the significance of which the court is not at liberty to overlook. If the court could suppose that an innocent official thus accused by a bill filed by the attorney general of the United States would fail to demand or at least request opportunity to vindicate himself under oath, it would be impossible to doubt that the respondents would have called him if the truth had been otherwise than as the bill alleges. It is insisted that it was the duty of the complainant, to call these witnesses; but the court does not think so. The complainant, having charged these persons with fraud and conspiracy, should not be driven to the necessity of calling them as its witnesses if it is possible for it to make out a *prima facie* case without doing so. The respondents, whose defense rests, at least in part, upon a denial of the charge of fraud and conspiracy made against these persons, could with perfect safety have called them if the charge is false.

Thus far no notice has been taken of the testimony of experts upon the question whether the signatures to the papers in question appear to be genuine signatures of different persons. The opinions of the expert witnesses differ, as is usual in such cases; but in my judgment, this testimony, considered as a whole, confirms the theory that the papers were fabricated.

Having thus reached the conclusion that the supposed patentees in each and all the patents sought to be set aside were fictitious persons having no existence, it only remains to determine what the consequences are with respect to the present respondents. And for purposes of this inquiry, I will assume that it sufficiently appears that respondents had no actual notice of or participation in the frauds whereby the patents were obtained. The rule of law that a grantee, capable of taking the title, is necessary to the validity of a deed, is elementary. A grantee is as necessary to the conveyance of land as a grantor, and it follows that a grant to a fictitious person is simply void: 3 Wash. on Real Prop., 4th ed., 265; Muskingum Turnpike v. Ward, 13 Ohio, 120; Hulich v. Scovil, 4 Gilm. (Ill.) 175.

"By the common law all grants between individuals must be made to a grantee in existence, or capable of taking; otherwise there could be no such thing as livery of seisin:" Miller v. Chittenden, 2 Iowa, 368.

"A patent for land to a fictitious person not in existence carries no title, vests no interest in any one:" Thomas v. Boemen, 25 Mo. 27; Galt v. Galloway, 4 Pet. 332; Galloway v. Finley, 12 Id. 297.

The case of Sampeyreac et al. v. The United States, 7 Pet. 222, was a bill for review to set aside a former decree in favor of Sampeyreac vesting title in him, under an alleged grant from the governor of Louisiana, while it was a province of France, and which inured to the benefit of the claimant by virtue of the treaty of 1803. The grant and the decree founded thereon were attacked by the United States on the ground that Sampeyreac was a fictitious person. The court, *per* Thompson, J., said: "The original party to the decree being a fictitious person, no title could pass under the patent, if issued. It would remain to the United States:" Id., p. 241.

I must hold, therefore, that the patentees in this case, being fictitious persons, no title passed from the United States by virtue of the patent in question.

There could be no conveyance of the title where there was no grantee to take the title. The patents were and are absolutely null and void.

The respondents claim protection as *bona fide* purchasers for value without notice of the fraud; but this defense can only be maintained by showing that the legal title has passed to them. The original patents being void for the want of the necessary grantees, as we have already seen, the title never passed from the United States, and the doctrine in question can not be invoked. "The purchaser in all cases must hold the legal title, or be entitled to call for it, in order to give him a full protection of this defense; for if his title is merely equitable, then he must yield to a legal and equitable title in the adverse party: Story's Eq. Jur., sec. 64, c. In the case of Sampeyreac v. United States, *supra*, this defense was interposed by the respondent, Joseph Stewart, who was allowed to intervene and plead that he was a *bona fide* purchaser for value and without notice. The court, however, upon hearing, overruled the defense, upon the ground, among others, as stated in the opinion, that "on general principles, it is incontestable that a grantor can convey no more than he possesses. Hence, those who come in under the holder of a void grant can acquire nothing." In that case, Stewart purchased upon the faith of a grant which had been confirmed by a decree of a court of equity in Arkansas territory. He was not protected, because both grant and decree were afterwards held fraudulent and void, on the ground that the supposed grantee in the one and complainant in the other was a fictitious person. The case is certainly as strong as the one before us. See Gray v. Jones, 14 Fed. Rep. 83; S. C., 4 McCrary.

In the light of these principles and authorities, it is impossible to hold that the respondents, or any of them, have acquired a right to the land in controversy by reason of their standing in the character of *bona fide* purchasers. The title has never passed from the United States. A person who has acquired title by fraud may make a valid conveyance to a *bona fide* purchaser; but one who has never acquired the title can not convey it, and much less can the title be transferred by fraudulently obtaining from the owner a deed purporting to convey it to a fictitious person, and then forging a conveyance from such fictitious person to another, however innocent the latter may be.

The counsel for respondents have argued very earnestly that, as this is a suit to rescind and set aside a deed for fraud, the rule which requires the injured party, upon discovering the fraud, to give notice of his intention to rescind without delay, applies and bars relief. The bill was filed in January, 1880. It is insisted that complainant had notice of the fraud as early as November, 1873, through a letter received at the general land office at Washington, from one E. J. Hubbard. The letter is in evidence, and is as follows:

"LAW OFFICE OF GRAHAM,
"TRINIDAD, COLORADO, Nov. 28, 1873.

"Honorable Commissioner of United States Land Office:

"Sir—The most gigantic frauds upon the department you control are being perpetrated in this portion of Colorado. Coal lands are being entered as agricultural lands by straw men, and conveyances made to the procurers of these perjuries (who pretend to be innocent in the matter). This portion of Colorado is all coal land. Townships 33, 32, and 30, in range 64, are coal lands (every section), except a little of the river bottom. There are over thirty townships north of range 33, and west of

63, that have coal on every section, and the agricultural land does not exceed three sections. These parties even sell out, and then apply to the general land office to change the location of the lands patented. Of this latter I am advised by common rumor.

"The people rely on the law to protect, and ask the department to assist, them in their rights. There is something out of proportion in our land office.

"The register and receiver are charged with complicity in these things.

"If the United States attorney will take the matter in hand, the matter can be fastened on the proper parties, but in the mean time, unless your department is vigilant and dishonest men thwarted, the government is defrauded of thousands of acres of its most valuable coal lands.

"I am, very respectfully,

"E. J. HUBBARD."

Indorsed. Letter K., No. 78,067, to E. J. Hubbard, Trinidad, Colorado Territory, November 28, 1873. Alleges fraud on the government, etc. Answered December 11, 1873. Referred to D. N. Received (G. L. O.), December 3, 1873.

It will be observed that this letter designates no particular entries as fraudulent, and describes no particular lands that were being fraudulently entered. The writer's purpose, which was most laudable, seems to have been to induce the land department to institute an investigation. It is more than doubtful whether this letter can be regarded as a sufficient notice to the United States of the existence of the particular frauds now in question, even assuming that a volunteered communication from a private citizen to a bureau officer in the interior department could in any case be held to charge the government with notice of its contents. Waiving, however, the consideration of this question, I am constrained to hold that laches can not be imputed to the government. It is true, as a general proposition, that when the government becomes a party to a suit in its own courts, it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. But this general rule has its limitations, and one of them is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States. "The general principle is that laches is not imputable to the government; and the maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions:" United States v. Kirkpatrick, 9 Wheat. 736; United States v. Hoar, 2 Mason, 311; United States v. Williams, 5 McLean, 133; Gibson v. Chouteau, 13 Wall. 92; United States v. Thompson, 98 U. S. 486; Ganson v. United States, 97 Id. 584.

If, indeed, the lapse of time since the cause of action accrued has been so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead and the proofs lost or destroyed, a court of equity may, no doubt, on that ground refuse to entertain the controversy: United States v. Beebe, 4 McCrary, 12. But this can not be claimed upon the facts of the present case. At most, the lapse of time here was only six or seven years, and it is not claimed that the witnesses who could testify from personal knowledge of the facts are all dead, nor

that the proofs have been lost or destroyed. Independently of these considerations, it is difficult to see upon what principle this doctrine concerning the duty promptly to rescind can be applied to a case of this kind, where there never was a contract in the sense of an agreement between contracting parties. The rule requires the defrauded party to give notice to the party guilty of the fraud, of his purpose to rescind and demand a return of the property conveyed. But where the other party has no existence, where the conveyance has been made to a myth, how can this rule be applied? To whom shall notice be given? Upon whom shall demand for a return or reconveyance of the property be made? It is also insisted that the United States has not returned the money received for these fraudulent conveyances, and that therefore this suit can not be maintained. Without considering whether the government is bound, as a condition precedent to its right to file a bill to set aside a fraudulent patent, to pay or tender to the patentee the consideration received, it is sufficient to say in the present case that there no patentees, and therefore no one in existence to whom such payment could properly be made.

The counsel for the respondents insist that the complainant ought to be bound by the patents issued, even though the patentees were myths, because the respondents have acted in good faith, upon the assumption that they were valid, relying upon the record. It is insisted that the facts present a case of equitable estoppel, upon the theory that "when one of two innocent persons must suffer a loss, it should be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible." It is a conclusive answer to this contention to say that the respondents are not innocent purchasers within the meaning of the rule, as we have already seen. But I think it proper to add, that so far as I know it has never been held that the United States can be estopped by the frauds—not to say crimes—of the public officials; and it is apparent that the consequences of such a doctrine would be ruinous. In my opinion, the doctrine of estoppel does not apply.

Upon the whole case my conclusion is, that there must be a decree for complainant in accordance with the prayer of the bill, and it is accordingly so ordered.

CIRCUIT COURT, DISTRICT OF NEVADA.

HAMPTON, Executor, etc., v. TRUCKEE CANAL COMPANY.

Filed November 24, 1883.

MECHANICS' LIENS—JURISDICTION—ASSIGNMENT.—In actions, begun in this court by an assignee to foreclose mechanics' liens, the jurisdiction of the court as to all of the original lien claimants, whose liens are sought to be enforced, must be affirmatively shown by the bill of complaint.

WHERE IT APPEARS FROM THE BILL THAT ANY OF THE ORIGINAL LIEN HOLDERS, by reason of their citizenship, could not maintain an action in this court to foreclose or enforce their liens, the bill must be dismissed for want of jurisdiction.

SUIT in equity to foreclose certain mechanics' liens. The opinion states the facts.

Before SAWYER, circuit judge, and SABIN, district judge.

W. E. F. Deal and *R. M. Clarke*, for the complainant.

C. S. Varian and *R. H. Lindsey*, for the defendant.

SABIN, D. J. This action was brought in this court by C. P. Hubbell, since deceased, a citizen of the state of California, against the defendant, a Nevada corporation, to foreclose certain liens, usually called mechanics' liens, set forth in the bill of complaint. The liens sought to be foreclosed and enforced against defendant are one hundred and twenty-two in number, aggregating one hundred and fifteen thousand and fifty-nine dollars and sixty-six cents in amount. They are classified as contractors', subcontractors', material-men's and laborers' liens. Complainant, Hubbell, derived title to these liens through various assignments, direct and intermediate, to himself. Of these liens, one hundred and twelve were assigned by the original lien holders to J. C. Hampton, and by him assigned to Hubbell; three were assigned to J. C. Hampton and Company, and by said firm to Hubbell; two to S. W. Lee, and by him to Hubbell; and five were assigned by the original lien holders directly to Hubbell.

The original bill of complaint was silent as to the citizenship of all of the original lien holders, and also as to the citizenship of J. C. Hampton, J. C. Hampton and Company, and S. W. Lee, intermediate assignees of one hundred and seventeen of these liens, and the immediate assignors of complainant. Objection having been raised as to the sufficiency of the bill on this point, complainant filed an amended bill, June 5, 1882, alleging that one hundred and thirteen of the original owners of said liens, named in the amended bill, were Chinamen, and subjects of the emperor of China at the date of the filing of both the original and amended bill of complaint. The amended bill, however, was wholly silent as to the citizenship of the other nine original lien owners, and also as to the citizenship of J. C. Hampton, J. C. Hampton and Company, and S. W. Lee, intermediate assignees of one hundred and seventeen of the liens sought to be foreclosed. The demands of the nine lien holders whose citizenship is not set forth aggregate the sum of four thousand eight hundred and ninety dollars and fifty-two cents, in amounts varying from two thousand five hundred and eighty-four dollars and sixty-six cents to thirty-three dollars.

This omission, in the amended bill, of any averment as to the citizenship of these nine original lien claimants, may be considered as an admission that they were citizens of Nevada at the time of the commencement of this action, since, had their citizenship been such as to bring them within the statute giving this court jurisdiction, it certainly would have been set forth in the amended bill, prepared and filed expressly to obviate any supposed jurisdictional defect in the original bill.

If, however, this presumption is not in fact true, still the bill is fatally defective on this point. The jurisdiction of the court as to all parties must affirmatively and clearly appear by the pleadings, and this not by way of description, or recital, but by positive averment.

The rulings of the supreme court upon this point have been uniform and without exception. In Brown v. Keene, 8 Peters, 112, the court says: "The decisions of this court require that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

In 94 U. S. 455, Ex parte Smith, the court says: "No presumptions arise in favor of the jurisdiction of the federal courts."

The statute of March 3, 1875, controlling the jurisdiction of the court in this matter, reads as follows: "Nor shall any circuit or district court

have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange."

In this case it does not appear by the original or amended bill that any one of these nine original lien owners whose citizenship is not set forth in the amended bill could have prosecuted an action in this court, upon any of those liens, "if no assignment had been made." But such fact must appear, or the court has not jurisdiction.

Section 11 of the judiciary act of 1789 does not materially differ, upon the point here involved, from the act of 1875, above cited, and the rulings of the supreme court upon section 11 of the act of 1789 are applicable in this case: Brown v. Keene, 8 Peters, 112; Jackson v. Ashton, Saun. 148; Mantalet v. Murray, 4 Cranch, 46; Corbin v. County of Black Hawk, 105 U. S. 659; Serè v. Pitot, 6 Cranch, 332; Bradley v. Rhein's Adm'rs, 8 Wall. 393; Mollan v. Torrence, 9 Wheat. 537; Morgan's Ex'rs v. Gray, 19 Wall. 81. We think there is no conflict upon the point here involved in the rulings of any of the national courts.

It was suggested upon argument that the citizenship of these nine original lien holders was immaterial, since complainant owned all of the one hundred and twenty-two liens, and hence none of the other lien claimants could be prejudiced; and further, that the amount claimed by them is embraced in the lien filed by Linn Chung and Company, as original contractors, for fifty thousand dollars, and is also embraced in the lien filed by Ah Wan, as a subcontractor, for the same amount. The merit of the suggestion is not clear; but were it so, it could scarcely prevail against the positive provision of the statute.

While the national courts may be invoked, in proper cases, to give effect to and enforce statutory liens and remedies provided by a state, yet in such proceedings they are guided by the state statute, and follow as nearly as possible the course indicated therein.

Should the court proceed to examine this case upon the merits, it would be as necessary for it to investigate and determine how much, if anything, was due upon each of these nine liens, as it would to investigate and determine how much might be due upon any or all of the other one hundred and thirteen liens.

The liens can not be singled out, or segregated, and some of them considered and others not considered. Some of the liens might be valid under the state statute, and others be fatally defective, for non-compliance with the statute in perfecting them.

It might appear that the lien of Linn Chung and Company, and that of Ah Wan, for fifty thousand dollars each, were defective and could not be enforced, and that all of the other liens were valid and binding upon the defendant, and complainant entitled to judgment thereon. The liens must each be examined, and their validity under the statute determined, as well as the amount due, and the rank of each declared: Stat. Nev. 1875, chap. 64, sec. 11.

And this is evidently the theory on which the bill of complaint was framed. If it was immaterial to complainant whether or not these nine liens be adjudicated upon, why were they set forth in the bill, and judgment invoked upon them as well as upon the other one hundred and thirteen liens, and why did complainant purchase them if not beneficial to him in some way? And if beneficial he is entitled to such benefit.

It is further insisted by complainant, "that the liens in this case are

in no sense of the word contracts," and hence are not within the act of congress. While it may be true that a lien *per se* is not a contract, yet all liens of the nature set forth in the bill in this action arise and are based upon contract, express or implied. The lien itself is merely an instrumentality, a special remedy given, by which the contract may be enforced. The assignment of a mere lien would be idle, would confer no right of action upon the assignee thereof, if such assignment did not also transfer the debt secured by the lien. A debt is a sum of money due upon contract, express or implied, or established by judgment. The debt transferred is the substantial thing, the lien is an incident thereto, a statutory remedy, which the assignee may pursue, or he may waive it and pursue his common-law remedy to recover the debt. The lien itself may expire by limitation, if suit be not commenced to enforce it within six months after the same has been filed for record: Stat. Nev. 1875, chap. 64, sec. 8.

But the debt would not be extinguished by the expiration of the lien, and it could be enforced by proper remedy. The statute above cited can not bear the construction sought to be put upon it. Section 5 of the act makes it obligatory upon the lien claimant that he state in his claim the " terms, time given, and conditions of his contract;" and the entire act is based upon the supposition of a contract, express or implied, between the parties. The words " contractor," " subcontractor," "debt," " creditor," etc., are of constant recurrence in the act. And it is not clear how a state can authorize or empower one person to charge an arbitary lien against the property of another person, no privity, or contract, express or implied, existing between such persons.

Without considering this objection further, it will be sufficient to observe that this action is certainly brought to enforce the terms of a contract, fully set forth in the bill of complaint.

As it does not appear from the amended bill that any of these nine original lien holders, whose citizenship is not set forth, could have maintained an action in this court to foreclose or enforce any of those liens, it follows that their assignee could not do so. On this point there is no conflict in the decisions.

We do not deem it necessary to decide whether or not this action could be maintained by complainant, as the assignee of J. C. Hampton, J. C. Hampton and Company, and S. W. Lee, intermediate assignees of a portion of the liens, they being presumably citizens of Nevada, and defendant being a Nevada corporation. The decisions on this point seem to be somewhat conflicting: Bradley v. Rhein's Adm'rs, 8 Wall. 396; Mollan v. Torrence, 9 Wheat. 537; Morgan's Ex'rs v. Gray, 19 Wall. 81. *Contra*, see Wilson v. Fisher's Ex'rs, Baldwin, 133; Dundas v. Bowler, 3 McLean, 204; Milledollar v. Bell, 2 Wall. C. C. 334.

But upon the case as presented in the original and amended bills, we think this court has no jurisdiction in this case. We call attention to the fifth section of the act of March 3, 1875, and to the ruling of the supreme court thereon, in Williams v. Nottawa, 104 U. S. 209.

It is a matter of regret that the decision of the court on this question of jurisdiction was not had before the case had gone to the extent to which it has proceeded, it being now submitted for judgment upon the testimony and proofs taken. But we can not examine the case upon the merits. It must therefore be dismissed from this court, for want of jurisdiction, without costs, and without prejudice to complainant. Let decree be entered accordingly and without prejudice.

CIRCUIT COURT, DISTRICT OF OREGON.

HUGHES *v.* NORTHERN PACIFIC RAILWAY COMPANY ET AL.

Filed October 29, 1883.

VERIFICATION OF BILL IN EQUITY.—A bill in equity, even for an injunction, need not be verified, unless it is intended to be used as evidence on an application for a provisional injunction.

JURISDICTION UNDER A LAW OF THE UNITED STATES.—A suit arises under a law of the United States, when the controversy involved therein turns upon the existence, effect, or operation of such a law, and, therefore, a suit by a riparian owner to enjoin the construction of a bridge contiguous and injurious to his property, upon the ground that the defendant is not authorized to build the same by a certain act of congress, as it pretends and claims, arises under said act and is within the jurisdiction of the proper circuit court.

IN WHAT COURTS THE NORTHERN PACIFIC MAY SUE OR BE SUED—CITIZENSHIP OF. *Semble:* that the Northern Pacific Railway Company, being created by an act of congress, may sue or be sued in the proper circuit court of the United States in all cases; and, *quære*, of what state, if any, is it a citizen, for the purpose of jurisdiction in such courts?

ACT INCORPORATING THE NORTHERN PACIFIC, CONSTRUCTION OF.—The act of July 2, 1864 (13 Stat. 365), incorporating the Northern Pacific Railway Company, and the acts amendatory thereof, are a grant by the public to a private corporation, and must therefore be construed most strictly against the latter, so that no authority, right, or privilege can be held to pass thereby unless the same is therein plainly expressed or clearly implied.

NORTHERN PACIFIC AUTHORIZED TO BRIDGE A NAVIGABLE WATER ON THE LINE OF ITS ROAD.—The Northern Pacific Railway Company was authorized by said acts "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railway" from Lake Superior to Portland, Or., "with all the powers, privileges, and immunities necessary to carry into effect the purpose" of said acts; the same "to be constructed in a substantial and workmanlike manner, with all the necessary draws, * * * bridges, etc., * * * equal in all respects to railways of the first class;" and it is necessary to cross the Wallamet river with such road in order to reach Portland from the eastward. *Held*, that the right of the Northern Pacific Railway Company to build and maintain a drawbridge across said river or other navigable water on the line of its road to Portland, without causing any unnecessary injury or obstruction to the usefulness thereof, is clearly implied in said acts; but that congress, not having prescribed the exact location or particular character of said bridge, the right of the corporation to construct it is subject to the judgment of the proper court, as to whether it is being constructed without unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby or likely to be.

FORFEITURE OF CORPORATE RIGHTS.—The legislature may provide that a corporation shall cease to exist or forfeit a particular right or privilege, unless it does certain things within a given time, and in case of such failure the prescribed consequence will follow, of course, without the intervention of a court or any proceeding to declare or establish the same; but the provisions in the acts aforesaid, to the effect that the grants thereby made to the Northern Pacific Railway Company are made upon the condition that the road will be completed within a certain time, have no such effect, but are simply conditions subsequent without any special consequence prescribed for a breach of them, and therefore no one can complain of any such breach or take advantage of it, except the government of the United States, and it only, as declared in the act, for the purpose of securing "a speedy completion of the said road."

SUIT in equity for an injunction. The opinion states the facts.

George H. Williams, and *E. G. Hughes*, *in propria persona*, for the plaintiff.

Joseph N. Dolph and *Cyrus A. Dolph*, for the defendants.

DEADY, J. The plaintiff brings this suit to enjoin the defendants or any of them from building a bridge across the Wallamet river at the

north end of Portland. The bill alleges that the plaintiff is the owner of the river blocks numbered 11, 12, and 13, and the south half of 14, in Watson's addition to Portland, lying on the west bank of the Wallamet river, between north Front street and said river, with the usual right of wharfage and dockage in front thereof; that the port of Portland is a seaport, where sea-going vessels enter, and that said river is navigable above and to the southward of said property for such vessels for the distance of two miles; "that the defendants, or some one or more of them, are now engaged in and threaten to continue the construction of a bridge across said river, within the limits of the port of Portland, and down the stream from and to the north of said property, and to maintain and to operate the same when built; and that said bridge, if constructed and maintained, will be a great and lasting obstruction to the use of the Wallamet river to the south and up the stream of said river from said bridge for the passage of boats, ships, and vessels to the wharf property there situate, and will thereby greatly and in a lasting manner damage all the wharf property situate up the stream of said river from and to the south of said bridge, and therewith will work a great and lasting damage to the property aforesaid, and also constitute a great and lasting obstruction and hindrance to the commerce of the port of Portland;" that said property has no wharf upon it at present, but may be used for such purpose, "and is of great value therefor;" that the several defendants, through "separate corporations," are all under the control of the same persons, so that plaintiff is unable to determine which of them is in fact engaged in constructing said bridge, or proposes to maintain and operate the same; that the said persons claim that "some one or more of said defendant corporations" are authorized by the state of Oregon and the United States to build and maintain the said bridge, but that neither of said defendants has any "such power or authority at this time," nor has the state consented to the construction of the proposed bridge or the secretary of war approved of the location thereof.

The cause was argued and submitted on a demurrer to the bill by each of the defendants.

The grounds of the several demurrers are substantially these: 1. The bill is not verified; 2. The bill is without equity, and the plaintiff is not entitled thereon to an injunction; and, 3. The court has no jurisdiction of the subject-matter or the parties to the suit.

On the argument it was admitted by the counsel for the defendants that the bridge was being built by the Northern Pacific Railway Company alone, under the act of congress of July 2, 1864 (13 Stat. 365), and the acts amendatory thereof, and the act of the legislative assembly of the state of Oregon of October 28, 1874 (Ses. L., p. 101). This being so, it would have been proper for the other defendants to have answered, and denied or disclaimed any interest or participation in the structure or controversy.

However, the case will be considered by the court, as it was argued by counsel, upon the theory that the controversy is now one between the plaintiff and the Northern Pacific Railway only.

By the first section of the act of July 2d, aforesaid, entitled "An act granting lands to aid in the construction of a railway and a telegraph line from Lake Superior to Puget sound on the Pacific coast, by the northern route," congress provided that the persons therein named, and others who might be associated with them, should constitute a corpora-

tion by the name of the Northern Pacific Railway Company, with power and authority, among other things, "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railway and telegraph line, with appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin; thence westerly by the most eligible railway route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch *via* the valley of the Columbia river *to a point at or near Portland*, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from the western terminus;" and it was also declared by said section that said company "is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth."

By sections 2 and 3 of the act, the company is granted the right of way through the public lands, and certain odd-numbered sections thereof on either side of said way, for the purpose of aiding in the construction of its road.

Section 5 provides "that said Northern Pacific railway shall be constructed in a substantial and workman-like manner, with all the necessary draws, culverts, *bridges*, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railways of the first class, when prepared for business, with rails of the best quality, manufactured from the best iron."

The act further provides that the company is authorized, within certain limits, "to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road," and prescribes a mode of ascertaining the value thereof, in case the owner and the company can not agree thereabout (sec. 7); that "each and every grant, right, and privilege" thereby made to the company is made upon the condition that the road shall be completed by July 4, 1876 (sec. 8); that the road "shall be a post-route and military road, subject to the use of the United States" for all government service (sec. 11); and that the company "shall obtain the consent of the legislature of any state through which any portion of said railway may pass previous to commencing the construction thereof."

This consent was obtained from the state of Oregon by the act of October 28, 1874, *supra*, which provides: "That the consent of this state be and is hereby given to the Northern Pacific Railway Company, a corporation chartered by an act of the congress of the United States, approved July 2, 1864, to construct its road and telegraph line or any portions of the same, within the boundaries of this state, and to enjoy, within said boundaries, the rights and privileges which said corporation has or may have, under the laws of the United States, by virtue of said act of congress, and the amendments thereto."

Subsequently, congress extended the time for the completion of the road to July 4, 1878: See act of May 7, 1866 (14 Stat. 435), and of July 1, 1868 (15 Stat. 255).

By the joint resolution of April 10, 1869 (16 Stat. 57), the company was authorized "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget sound, to be determined by said company, and also to connect the same with its main line west of

the Cascade mountains, in the territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto, being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional or amendatory thereof;" and by that of May 31, 1870 (16 Stat. 378), it was further authorized "to locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, *via* the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound;" and required to complete twenty-five miles of said main line between Portland and the sound by January 1, 1872, and forty miles a year thereafter until it was completed between said points.

By this summary it appears that the Northern Pacific railroad is authorized, since May 31, 1870, to construct its "main line" down the Columbia river, and *via* Portland, instead of across the Cascade mountains to the sound, and thus make the former place the practical western terminus of the road, with an extension or branch northward to some point on the latter.

And what has been done in this respect is a matter of such common notoriety that the court may take judicial notice of it.

The company has constructed its main line from the eastern terminus to the Wallula junction—a point two hundred and fourteen miles east of Portland—where it connects with the road of the Oregon Railway and Navigation Company, extending from Portland up the Columbia river to said junction, and is operated in connection therewith as one road, from the latter place to St. Paul. Its extension northward has also been constructed from Portland to Tacoma, on the sound, a distance of one hundred and forty-three miles, thus making a continuous line of road from Lake Superior to tide-water on the Pacific.

The objection that the bill is not verified is immaterial. A bill in equity is not required to be sworn to, unless it is sought to be used as evidence upon an application for a provisional injunction or the like.

The first question to be considered is, Has the court jurisdiction of this suit? The defendant by its demurrer raises the question of jurisdiction, but did not press it upon the argument.

By section 1 of the act of March 3, 1875 (18 Stat. 470), jurisdiction is conferred on this court of a suit in equity, arising under a law of the United States. The bill alleges that the defendant claims the right to construct the bridge in question by authority of an act of congress and of the state, but denies that it is so authorized. A controversy which turns upon the existence, effect, or operation of an act of congress arises under such act, and a suit brought to determine the same is a case arising under such act, within the meaning of the statute.

On the argument counsel for the defendant insisted that it was authorized to build the bridge by the act of its incorporation, in connection with the act of the state consenting thereto. This, coupled with the denial of such authority by the plaintiff, is an admission that the court has jurisdiction of the suit on account of the subject-matter. The defendant claims the right to build a bridge across the Wallamet river under a law of the United States, which right the plaintiff denies, and this suit which is brought to determine this claim is necessarily a suit

arising under such law of the United States: Hatch v. Wallamet Iron Bridge Co., 7 Saw. 131; Bybee v. Hawkett, 6 Id. 598.

There is no controversy in the case arising under the law of the state. The state has not given the defendant any absolute right to construct a railway or bridge within its limits, but only consented that it may do in this respect whatever it is authorized to by the act of its incorporation. So that the only question in the case is, Has congress, by the act of July 2, 1864, empowered the defendant to construct a railway bridge across the Wallamet at this point? If it has, the plaintiff admits that this suit can not be maintained, and if it has not, it is equally clear that the defendant in attempting it is guilty of a nuisance to the special injury of the plaintiff, and therefore ought to be restrained from so doing.

There is also involved in this suit the effect to be given to the clause in section 2 of the act of February 14, 1859 (11 Stat. 383), providing for the admission of the state into the Union, which declares that "all the navigable waters of said state shall be common highways" to all citizens of the United States. In effect, this statute prohibits the erection of any bridge across the Wallamet river, unless it be one so far above the stream as not to interfere in any degree with its navigation, without the consent of the United States, even if authorized by the state: Wheeling Bridge Case, 18 How. 431; Hatch v. Wallamet Iron Bridge Company, 7 Saw. 135. The question whether the proposed bridge is contrary to or in conflict with the injunction of this statute is a national one, and a suit to determine it arises under a law of the United States, and is therefore within the jurisdiction of this court: Osborn v. U. S. Bank, 9 Wheat. 816; Hatch v. Wallamet Iron Bridge Co., 7 Saw. 131.

Whether the court also has jurisdiction of the suit on account of the citizenship of the parties, it is not now necessary to determine. The plaintiff is a citizen of Oregon, and it is assumed by the demurrer that the defendant is also. But the status of the defendant in this respect is not settled by any adjudication that I am aware of. It has been sued in this court by a citizen of another state as a citizen of Oregon, and submitted without question to a trial of the case, and a judgment against it accordingly.

It is a corporation created by an act of congress, with ability "to sue and be sued" in all the courts "within the United States," and is authorized and empowered to construct and operate a railway in this and other states of this Union. The capacity "to sue and be sued" does not of itself authorize the defendant to sue or be sued in any court, irrespective of the jurisdiction pertaining to the same. It only enables it to sue or be sued as a natural person might, in any court having otherwise jurisdiction of the controversy: Man. N. B. etc. v. Black, 8 Blatch. 138.

But of what state, if any, the defendant is a citizen, is not so clear. In Orange N. B. v. Traver, 7 Saw. 210, this court was inclined to the opinion, that a banking corporation formed under the national banking act of June 3, 1864 (13 Stat. 99), to do business in Massachusetts, was a citizen of that state. And such was the conclusion reached by Mr. Justice Blatchford in Man. N. B. etc. v. Black, *supra:* See Main v. Second N. B. etc., 6 Biss. 26. But the defendant is organized to exist and do business in more states than one, without any declaration or provision indicating a particular domicile or principal place of business in any.

But in Osborn v. United States Bank, 9 Wheat. 816, it was held by the supreme court, that a corporation, created by an act of congress,

might be thereby authorized "to sue and be sued" generally, in the circuit courts of the United States, and the power of congress to give such court jurisdiction of such a suit was sustained on the ground that any suit by or against such a corporation was necessarily a case arising under the laws of the United States, and therefore within the scope of its judicial power. And since the decision in that case, congress, by the act of 1875, *supra*, has conferred upon the circuit courts jurisdiction in all cases arising under the law of the United States. The effect of this legislation, under the ruling in Osborn v. United States Bank, *supra*, is equivalent to a special clause in the charter of the Northern Pacific authorizing it to sue and be sued in the circuit courts in all cases. To the same effect, see Fisk v. W. P. R'y Co., 6 Blatch. 365.

But the jurisdiction of the court on the ground of the nature of the controversy being clear, the question as to the authority of the defendant to construct the bridge is next to be determined.

And first, it is manifest that the defendant is authorized to construct and operate its road to Portland, either as a point on the main line to Puget sound or the northern extension of the branch thereto.

At the passage of the act of 1864, it is quite likely that congress knew but little about the relative situation of Portland, or whether the construction of the branch road to this point involved the crossing of the Wallamet river or not. But as time passed, Portland grew in importance. The observation of the company, derived from those engaged in the survey and construction of the western end of its road, induced it to obtain from congress, in 1869, the authority to extend its branch from Portland northward to Puget sound, and in 1870 to construct its main line down the Columbia river valley instead of across the Cascade mountains. This legislation was a practical admission by congress and the company of the mistake made in the original act, concerning the location of the main line of the road, and in effect gave the company the right to construct it to Portland with an extension northward from there to the sound.

To accomplish this, the river must be crossed, at or near this point, either by a bridge or a ferry, and this must have been then known to congress. Under the authority to construct its road to Portland, the right of the company to cross the river by a ferry or a bridge so high above the stream as in no way to interfere with its navigation will be readily conceded.

The power to construct and operate its road to and from Portland is given in express terms; and undoubtedly it may erect a bridge, as a part of said road, that does not interfere with the navigation of the river.

It is admitted that the act incorporating the defendant is a public grant, which is not to have effect beyond what is plainly expressed or clearly implied therein, or contrary to the manifest purpose of it. Any material doubt or ambiguity in its terms or provisions must be resolved against it and in favor of the public. Nothing is to be taken as conceded but what is granted in plain terms, or by clear or necessary implication: Coolidge v. Williams, 4 Mass. 144; Charles River Bridge v. Warren Bridge, 11 Pet. 544, 600; Perrine v. C. & D. Canal Co., 9 How. 192; Fertilizing Co. v. Hyde Park, 97 U. S. 666; Burns v. Multnomah R'y Co., 8 Saw. 553; Wells, Fargo & Co. v. O. R. & N. Co., 8 Saw. 616; Cooley's C. L. 394.

It is also a well-settled rule that a bridge which in any way or degree

interferes with or obstructs the navigation of a navigable water, unless authorized by the proper public authority, is a public nuisance, and may be abated, or the building thereof restrained, at the suit of any private person who may suffer special damage therefrom: Angel on W. C., sec. 555; The Wheeling Bridge Case, 13 How. 564; Hatch v. Wallamet Iron Bridge Co., 7 Saw. 127.

As was said by this court in Hatch v. Wallamet Iron Bridge Co., *supra*, 132: "The power to authorize the erection of a bridge over a navigable water of a state, for the convenience of the inhabitants thereof, belongs to the state as a part of its general police power. Congress does not possess this power directly, *eo nomine*, but its control over the navigable waters of the state, as a means of commerce, gives it a practical veto upon the power of the state in this respect. Therefore, no state can authorize or maintain the erection of a bridge over a navigable water, which, in effect, contravenes or conflicts with a law of congress concerning the navigation of the same. And the fact that such water is wholly within the state is immaterial, if it is accessible from another state, or forms a part of a highway between itself and other states."

But this is not to be understood as denying the right of congress to bridge, or authorize the bridging, of navigable waters, under its constitutional power "to establish post-offices and post-roads," or make war or provide for the common defense: Wheeling Bridge Case, 16 How. 431.

There is no express permission or authority in the charter of the Northern Pacific for bridging a navigable water on the line of its road, and the act of the state goes no further than to consent that the defendant may bridge the river if authorized thereto by congress. It is said, and the fact is admitted, that it has already constructed a bridge, without question, across the Missouri river, at Bismarck, under the authority of its charter. But that is understood to be a high bridge, that in no way impairs the navigability of the stream. On the other hand, it is claimed that the defendant impliedly admitted the want of authority, in this respect, in its charter, when it obtained from congress, on February 27, 1873, special permission to construct and maintain a drawbridge across the St. Louis river, between Rice's point, in the state of Minnesota, and Connor's point, in the state of Wisconsin:" 17 Stat. 477. But in reply, it is said that this bridge is not on the main line of the Northern Pacific, and was built by the company for some collateral purpose; and this appears probable from the provisions of the act, one of which is, that any railway company may use the bridge under regulations to be prescribed by the secretary of war.

It is claimed by the defendant that section 5 of the act of 1864 contains authority to build the bridge. But while it does mention "draws" and "bridges" as things to be provided in the construction of the road, I think the primary purpose of this section is to lay upon the defendant a rule or standard of conduct, in the construction and equipment of its road, rather than to confer upon it power to build drawbridges over navigable waters. At the same time, it is not to be denied that the mention of "draws" and "bridges" as things "necessary," or that may be "necessary" in the construction of the defendant's road, and requiring them to be made "in a substantial and workman-like manner" does imply, in some measure at least, that it was the intention of congress to authorize it to build "drawbridges" on the line of its road, whenever necessary to make it equal in that respect to railways of the first class. And it will

not do to say that this provision is satisfied by the erection of substantial bridges across the non-navigable waters, ravines, and gulches on the line of its road, for in such bridges "draws" are not needed or used.

My impression is, and nothing has been shown or suggested to the contrary, that the term "draw," as used in this section, means a contrivance by which a section of a bridge across a navigable water is turned upwards or at right angles to itself, and parallel with the direction of the stream, so as to admit of the passage of vessels through the open space that could not otherwise pass the point. The definition in the lexicon is, "That part of a bridge which is made to be drawn up or aside:" Worcester's Dictionary, "Draw." If this exposition is correct, the term "draw," as used in the act, is redundant and without significance, unless the defendant is authorized to, and must if necessary, construct a low bridge across the navigable water, but so as to admit the passage of vessels through it.

What effect is to be given to the word "necessary" in this section, and who is to be the judge of what is "necessary" to the construction and equipment of the road in the manner therein contemplated, may also be a question. For the purpose of entitling the defendant to a patent for the lands coterminous with the completed sections of the road, it is probably enough that it is constructed with such "draws, culverts, and bridges" as the commissioners appointed to examine the same, under section 4 of the act, may deem sufficient.

But the judgment of these commissioners, in this respect, can not have the effect to limit or restrain the right of the defendant to construct or provide additional or more costly and convenient draws and bridges or other means of maintaining and operating its road as a first-class one. Whatever, in the judgment of the commissioners, is required to bring the road up to the standard prescribed by section 5 of the act, is "necessary" to be done before the defendant is entitled to the land devoted by congress to its construction. But in crossing a navigable water on the line of its road, the company is not limited to the use of such means only as are absolutely necessary. Within certain limits it may use those which it thinks most convenient. A ferry may be all that is absolutely necessary for the transport of passengers and freight, or even trains. But the company may prefer, and the exigencies of its business may require, the more safe and expeditious, though costly, method of a bridge.

As has been said, the power to bridge this river is not given by the act to the defendant in express terms. Neither is the power so given to cross it at all. Therefore, unless it appears by a clear and necessary implication from what is expressly provided, that it was the intention of congress to authorize it to cross the river by means of a drawbridge, or at all, the attempt to do so is unlawful.

The power "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad" from Lake Superior to Portland, "with all the powers, privileges, and immunities necessary" to that end, is expressly conferred upon the company.

Portland can not be reached from Lake Superior or any point on the line between here and there without crossing the Wallamet river. The right to cross it is then clearly implied in the express authority to construct a "continuous" line of railway from a point to the eastward of it to a town on its western bank. Argument can not make this proposition plainer than the mere statement of it. The express power to construct

the road can not be exercised without the implied power of crossing the river in some way.

But by what means may this crossing be effected? Only two methods are known or suggested—a ferry or a bridge.

The former may be sufficient to entitle the company to the land grant, but where the construction of a bridge is practicable, I think a ferry is considered an inferior method of prolonging a railway across a stream. If the river was not navigable, it would be absolutely necessary to bridge it. And if, being navigable, the defendant is not authorized to do so, it must be, not from want of power to build a bridge, but from want of authority in so doing to obstruct or impair the navigability of the stream.

The allegations in the bill concerning the character and location of the bridge, and the degree of obstruction it may cause to navigation, are very general and indefinite. The most that can be inferred from them is, that the proposed bridge is not a high one, and therefore will at least be some obstruction to navigation.

During the past seventeen years congress has authorized the construction of drawbridges on railway lines across the Ohio, Missouri, and Mississippi rivers; and on June 23, 1874 (18 Stat. 281), it authorized the Oregon and California Railway Company to bridge the Wallamet at this point, provided the draw should not be less than three hundred feet. See Hatch v. Wallamet Iron Bridge Co., 7 Saw. 138.

In endeavoring to ascertain what was the intention of congress in this matter, account may be taken of its action in similar cases, and when it appears that it has commonly consented to the construction of drawbridges for the use of railways over important navigable streams, the inference may be more safely and reasonably made that such was its intention in this case.

The act of congress expressly provides for a first-class continuous road to Portland, to be constructed with all the necessary "draws" and "bridges." This, of itself, implies that the defendant may cross whatever waters are on the line of its road by the means usual in such cases, and particularly by those especially mentioned — drawbridges. And when we see, from the express action of congress in other similar cases, that drawbridges are commonly used with its consent, the implication is much strengthened that such was the intention in this case.

In the Union Pacific Railway Co. v. Hall, 91 U. S. 343, it was held that the bridge across the Missouri river, between Omaha in Nebraska and Council Bluffs in Iowa, is a part of the line of the Union Pacific Railway, and that the company was therefore authorized to construct it under section 14 of the act of July 1, 1862 (12 Stat. 489), which simply provided for the construction of a line of railway by that company "from a point on the western boundary of the state of Iowa" to the one hundredth meridian west of Greenwich. The company claimed that the bridge was built under section 9 of the amendatory act of July 2, 1864 (13 Stat. 360), which expressly authorized it to bridge the river, provided the same should "be constructed with suitable and proper draws for the passage of steamboats" and should "be built, kept, and maintained at the expense of the company in such manner as not to impair the usefulness of said river for navigation to any greater extent than such structures of the most improved character necessarily do," and was therefore not a part of its road, and need not be operated as such.

In delivering the opinion of the court, Mr. Justice Strong said: "From

that act [July 1, 1862] alone we have deduced the conclusion that the company was authorized and required to build their railway to the Iowa shore. That authority included within itself power to build a bridge over the Missouri. No express grant to bridge the river was needed. Whatever bridges were necessary on their line were as fully authorized as the line itself; and the company were as much empowered to build one across the Missouri as they were across the Platte or any other river intersecting the line of their road."

The demurrer to the bill only raises the question of the authority of the defendant to build a drawbridge at this point that will, in some measure, impair the navigability of the river. My deliberate conclusion is, though not reached without hesitation, that the act of congress authorized the construction of such a bridge. And this conclusion is directly supported by the authority of U. P. v. Hall, *supra*. For although, as suggested by counsel for the plaintiff, the question in that case arose in a proceeding to compel the company to operate its road and bridge as a continuous line of railway for the benefit of the public, still the question of its power under an act similar to the charter of the Northern Pacific, to bridge a navigable water in the line of its road, was squarely presented to the court and unqualifiedly decided by it in the affirmative. See also People v. S. & R. Ry. Co., 15 Wend. 129.

But the plaintiff also maintains that, admitting the defendant once had the right to bridge the river, it has lost it by the failure to keep the condition upon which the grant to it was made—namely, the completion of the road by July 4, 1878.

The argument is, that the defendant in the construction of this bridge, and the appropriation of the space over the river therefor, is attempting to exercise the right of eminent domain after the practical expiration of its charter, and therefore without authority of law. But admitting this, the defendant is not attempting to take the plaintiff's property for any purpose; and the river way is a public easement which the defendant may be authorized by the legislature to cross with a bridge without condemnation or compensation. If the defendant, in the exercise of this privilege, negligently or unnecessarily injures or impairs the value of the private property of the plaintiff, he may have his action on that account for damages: Transportation Co. v. Chicago, 99 U. S. 639; Pumpelly v. Green Bay Co., 13 Wall. 174; Cooley's C. L. 541.

And this is really the complaint of the plaintiff, that in consequence of the erection of this bridge his river property immediately above it will be impaired in value, and not that the defendant is attempting or intending to take or condemn his property to its use.

But waiving this question, it must be admitted that if the defendant has forfeited its right to further construct its road, by reason of its failure to complete it within the time allotted, then it has no right to obstruct a public easement, as the navigation of this river, by the construction of a bridge thereover, and if it attempts to do so to the special injury of the plaintiff, it may be restrained.

But the defendant did not lose its corporate existence by the failure to complete its road within the allotted time, either as to the whole of it or the part not so completed, and the numerous authorities cited in support of the affirmative of the proposition are not in point. It is not necessary to notice them all. Two of them—In the Matter of the B. W. & N. R. Co., 72 N. Y. 248, and Brooklyn S. T. Co. v. Brooklyn, 78 Id. 527—are

among the leading ones. In these it was held that a corporation organized under a special act to construct a railway, with a special provision that unless the road, or some portion of it, was completed within a specified time, the corporate existence and powers should cease or be deemed at an end, could not exercise the right of eminent domain after a failure to comply with the act in respect to the time required.

But the case at bar is very different from these. The charter of the defendant in no way limits its existence to the time allotted for the completion of the road, or provides that any of its powers or privileges shall be forfeited or circumscribed in case it fails to complete it within that time. Section 8 of the act of 1864, upon which the plaintiff rests this branch of his argument, is simply a condition subsequent, to the effect that the corporation will complete the road by a certain time. Nothing is better established than that a failure to keep such a condition does not forfeit the corporate existence or privileges, and that no one can take advantage of it or complain of it, except the government making the grant and imposing the condition: Schulenberg v. Haneman, 21 Wall. 62; Southern P. R'y Co. v. Orton, 6 Saw. 179; Natoma W. & M. Co. v. Clarken, 14 Cal. 552; Cowell v. Spring, 101 U. S. 60.

And this doctrine is recognized and well stated, with its limitations, by Earl, J., in the very case cited by plaintiff from 78 N. Y. (p. 529). The learned judge says:

"The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not, *ipso facto*, lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney general in behalf of the people; but it can not be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty, or violation of its charter, or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used."

But the condition imposed upon the defendant by section 8 of the act is even modified by the provisions in section 9, from which it plainly appears that, so far from congress intending that the powers of the corporation should cease or become forfeit in any particular, by reason of its failure or inability to keep any of the conditions imposed by said section 8, it expressly reserved to itself the right, in case of such failure for the period of one year, to "do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

In this way congress undertook to secure the completion of this great national work in any event, and so plainly declared in advance what might otherwise have been left to inference and argument from analogous cases, that it reserved to itself the right to deal with the defendant for any failure to comply with the conditions of the grant, and to excuse or enforce the same as it might, under all the circumstances, deem just to the defendant and best for the public good. Indeed, in view of the magnitude and hazard of the undertaking, it was expressly provided, that even congress should not take advantage of a failure to perform any of the conditions for any period less than a year. And even the land set apart by congress to aid in the construction of the road was not left liable

to revert to the public domain, or be otherwise disposed of by congress, for the failure of the company to construct or complete the work as required by the act, but as was said in United States v. Childers, 8 Saw. 174, it was devoted to the construction of the road in any event, and it is the duty of congress to see that it is so applied. See also on this point Southern Pacific Railway Company v. Orton, 6 Saw. 178.

And this position is fortified by the fact that when congress intended that the corporate existence of the defendant should be forfeited or affected by its failure to keep a condition imposed upon it, it has expressly said so; as in section 19, where it is provided that unless two millions of the stock is subscribed, and ten per cent. paid thereon within two years from the passage of the act, "it shall be null and void."

The demurrer to the bill must be sustained, as the defendant has at least a right to build a drawbridge across the river on the line of its road to Portland from the eastward or the sound.

But it is to be regretted that the legislative authority has not gone further and provided more particularly and definitely for the site and character of the proposed bridge. As it is, these matters, within certain limits, must either be determined by the company or the courts—by the former in the first instance, and the latter ultimately. For it is not to be presumed for a moment that congress or the state, in consenting to the erection of a drawbridge at this point, intended to remit the whole matter to the judgment or convenience of the defendant, and permit it to thereby obstruct or impair the navigation of the river at its pleasure. On the contrary, it will be presumed, until the contrary is declared, that congress intended, as provided in the act aforesaid concerning the bridge at Omaha, that the defendant should locate and construct its bridge "in such manner as not to impair the usefulness of said river for navigation to any greater extent than such structures of the most approved character necessarily do."

A bridge across the river immediately in front of the city would be a serious obstruction to the usefulness of the river, as compared with one a mile or more above or below, and the latter even more so than the former. So a wagon-road bridge, intended as an ordinary thoroughfare between the two sides of the river, and in which the draw is usually closed, would cause much more obstruction to navigation than a railway bridge, in which the draw is only occasionally closed. Until congress provides some specific directions in the matter, the courts must determine, if the question is made, how far the defendant may impair the usefulness of the river in the construction and operation of the bridge. In determining what is a reasonable use of the river, in this respect, reference may be had to the general legislation of congress, providing in detail what bridges railway companies may construct across navigable streams, and how far the convenience of the water travel and transportation may be impaired for the benefit of that on land. The bridge which congress has impliedly authorized the defendant to build across the Wallamet may be presumed to be equal in these respects to those which it has expressly provided for under similar circumstances.

As has been stated, the bill is indefinite as to the location of the bridge and substantially silent as to its character. But the general facts as to both are well understood in this community, and may even be taken notice of by the court. A detailed description of the structure and location

is given in the annual report of the secretary of the board of trade, published in the "Daily Oregonian" of September 25, 1883.

The location of the bridge is opposite Albina and over a mile north of Stark-street ferry—the western end is two hundred feet to the north of the intersection of Front and Sixteenth streets and the eastern end thirty-two feet south of the end of the Northern Pacific Terminal Company's dock. The length of the bridge between the end piers is one thousand one hundred and eighty-six feet. It consists of three fixed spans of two hundred and sixty-four feet each in length, and a draw span, which is the third from the western shore, of three hundred and ninety-four feet in length. These spans are of iron and steel, with a double-track railway thereon, and rest on six stone piers. The draw will be worked by steam, and when open will allow a clear channel for the passage of vessels of one hundred and seventy-four feet in width on either side of the pier, with a depth of twenty-five feet therein at extreme low water. The structure will be eleven feet and six tenths in the clear above extreme high water, or about thirty-eight feet above extreme low water.

In general, and particularly in the width and operation of the draw, this plan compares favorably with the bridges elsewhere allowed by congress, and is more favorable to the passage of vessels than the bridge authorized at this point by the act of June 23, 1874.

The demurrer is sustained and the bill dismissed.

WELLS, FARGO & COMPANY *v.* OREGON RAILWAY AND NAVIGATION COMPANY.

Filed November, 1883.

COMMON CARRIER, SUCH AS A RAILROAD, MAY BE REQUIRED TO FURNISH another carrier, such as an express company, with the accommodations and facilities necessary for carrying on the business of the latter.

SUIT for an injunction. The opinion states the facts.

Clarence A. Seward, M. W. Fechheimer, Wallace, Greathouse & Blanding, J. R. Lewis; and *Fechheimer & Ach*, for the complainant.

Dolph, Bonaugh, Dolph & Simon, for the defendants.

FIELD, J. The bill of complaint alleges that the plaintiff is a corporation organized under the laws of Colorado, and is engaged and has been for many years, on the Pacific coast and in other parts of the country, in what is known as the express business. The defendants are corporations formed under the laws of Oregon, and own steam-vessels, which ply on the waters of British Columbia, Oregon, and California, and on the ocean along the Pacific coast, and are employed in the transportation of freight and passengers. They also own different lines of railway in Oregon and adjoining territories, which are also employed in the transportation of freight and passengers. The business of the plaintiff is that of a carrier of parcels by the most rapid means of conveyance in use on its routes, under the direct supervision of agents accompanying them from the domicile or office of the owner, or shipper, and delivering them at the office or domicile of the party to whom they belong or are consigned.

The special advantage of the carrying business thus conducted consists in this personal supervision over the articles by the agents of the express company during their transportation, from their receipt to their delivery

to their destination, thus giving greater security against loss and accident. Railroad companies and other common carriers usually confine their supervision to securing safe carriage from one to another of their stations, depots, or wharves. Their responsibility is limited, in the absence of special contract, to safe carriage over their own routes between such places, and, when transporting with connecting lines, to safe delivery to the next connecting carrier. The express company, in exercising personal supervision over articles intrusted to it from their receipt until their delivery to their destination, performs a most important and valuable service to the public. Its business, though comparatively of recent origin, has been conducted in the states and territories of the country with such general care and fidelity, by companies organized like the plaintiff, that they have become a favorite means of transporting small articles, and particularly those containing great value, or requiring special care in handling. The express business has thus become a recognized branch of the carrying trade, and the question is, Shall the railway companies and steamship companies engaged in that trade be required to furnish facilities to the express companies in the transaction of this business? The business would entirely fail and come to an end if certain facilites for its transaction were not afforded them, such as allowing to them special cars, or apartments, or definite spaces in them, for the transportation of such articles, with a messenger in charge thereof, having sufficient room for the assortment of the articles by him while in transit, so as to facilitate their delivery at the different stations to which they may be destined. It may be difficult to define with accuracy what should be deemed proper facilities in each case. That will depend very much upon the extent of the business and the character of the articles carried by the express companies. In the present cases, it is not necessary to designate what those facilities should be. The object of the two suits is to restrain the defendants from denying to the plaintiff the facilities which have heretofore been furnished to it.

The question presented for determination is, Can one common carrier be required to furnish accommodations for the business of another common carrier, and, if so, to what extent? The question is one of much difficulty, and its correct solution will be far-reaching in its consequences. It has been before different circuit courts of the United States in some cases, but has never been brought before the supreme court. In the case of the Southern Express Company v. The St. Louis, Iron Mountain, and Southern Railroad Company, in the eighth circuit, it was considered by Mr. Justice Miller of that court, sitting with Judge McCrary in holding the circuit court. The railroad company in that case was enjoined by them from refusing or withholding the usual express facilities from the plaintiff. In giving his conclusions, Mr. Justice Miller, among other things, held that the express business is a branch of the carrying trade, which, by the necessities of commerce and the usages of persons engaged in transportation, has become known and recognized so as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads; that the object of this express business is to carry small and valuable packages rapidly in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attend the transportation of heavy or bulky articles of commerce; that it is one of the necessities of this business that the packages should be in the immediate charge of an

agent or messenger of the company, or parties engaged in it, without any right on the part of the railway company to open and inspect them; that it is the duty of every railroad company to provide such conveyance, by special car or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads; that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business, at fair and reasonable rates of compensation, to be determined by the court when the parties can not agree thereon; and that a court of equity has authority to compel the railroad companies to carry this express matter and to perform the duties in that respect.

The same question has been decided substantially in the same way in other cases.

From the decisions rendered in some of them, appeals have been taken to the supreme court, and the cases are now on its calendar. Under these circumstances, I have come to the conclusion to follow the view expressed in them rather than to go into an extended consideration of the question. The following cases are now pending in the supreme court: The Memphis and Little Rock Railroad Company v. The Southern Express Company; St. Louis, Iron Mountain, and Southern Railroad Company v. The Southern Express Company; and the Missouri, Kansas, and Texas Railroad Company v. Dinsmore, President of Adams Express Company. In their determination the question presented will be definitely and authoritatively settled.

As a matter of form, therefore, I shall yield to the conclusions of the circuit court of the eighth circuit, which are in conformity with those expressed by Judge Deady on the application for injunction in these cases, and will order a decree for the plaintiff in both. The defendants will thus be enabled to take an appeal at once to the supreme court and have their cases argued in connection with those now pending on the calendar of that court.

Let a decree be entered in both cases for the plaintiff, adjudging that it has a right to have express facilities furnished by the defendants, as heretofore, and continuing the injunction granted.

DISTRICT COURT, DISTRICT OF OREGON.

IN RE LEE TONG.

Filed November 3, 1883.

GAMING—ACT OF 1876 DEFINING.—Section 1 of the act of 1876 (Ses. L. 39) includes not only the games therein enumerated, but also any game played for anything of value with any device or means suitable and convenient for that purpose; and in which the game depends largely on chance, or more on chance than skill.

THE CHINESE GAME OF "TANTAN" is a game of pure chance, and when played for anything of value, constitutes gambling within the inhibition of said statute.

POWERS OF A MUNICIPAL CORPORATION.—Apart from the few faculties incident to the existence of a municipal corporation, such as the capacity to sue and be sued and have a common seal, it has no power to do any act except such as are essential to the plain purpose of its creation, or are authorized by the express provisions of its charter, or a clear or necessary implication therefrom.

POWER "TO SUPPRESS" WHEN NOT POWER "TO PUNISH."—A grant of power to a city "to suppress gaming and gambling-houses," includes the power to suppress "gaming;"

but when the crime of gaming is defined and the punishment therefor prescribed by the law of the state, the city is not authorized to suppress any game not prohibited by such law, nor to punish any person playing thereat; but it is confined to the use of such means as may be within its power to enforce the state law within its limits.

DUE PROCESS OF LAW.—A person arrested and imprisoned for the violation of a void ordinance of a municipal corporation is imprisoned by the state without due process of law, and therefore in violation of the fourteenth amendment, and may be discharged therefrom by the writ of *habeas corpus* issued from the proper court of the United States.

PETITION for writ of *habeas corpus*. The opinion states the facts.

Rufus Mallory and *W. Scott Beebe*, for the defendant.

Ralph C. Dement, for the city of Portland.

DEADY, J. This is an application for a writ of *habeas corpus*, to deliver the prisoner, Lee Tong, from the custody of the chief of police of this city, upon the ground that he is thereby deprived of his liberty without due process of law, and therefore contrary to the fourteenth amendment to the constitution of the United States.

Notice was given of the application to the city attorney, who appeared and was heard against the petition.

A stipulation as to the facts was made and filed by counsel, from which and the petition it appears that, by section 37, subdivision 5 of the act of October 24, 1882 (Ses. L., p. 151), incorporating the city of Portland, "the council have power and authority," within the city, "to suppress bawdy-houses, gaming and gambling-houses, places kept for smoking opium and opium-smoking, and to punish inmates of bawdy-houses, houses of ill-fame, keepers of places kept for smoking opium, and opium smokers," and that in pursuance of the authority supposed to be thus conferred, the common council of the city of Portland, with the approval of the mayor, on August 24, 1883, passed ordinance numbered 3911, and entitled "An ordinance to suppress gaming and gambling-houses," which reads as follows:

"Section 1. It is hereby forbidden and declared unlawful for any person, either as owner, proprietor, manager, employee, or lessee, or otherwise, to play, deal, set up, open, or cause to be opened, or carry on, or cause to be carried on, or permit to be or engage in any game of faro, monte, roulette, rouge-et-noir, rondo, twenty-one, poker, draw-poker, bluff, brag, tantan, or fan-tan, for or with anything of value, or for or with anything the representative of value, whether said games or any of them be played, dealt, set up, or carried on with cards, checks, or any other device, in any store, shop, building, hotel, or in any room, park, street, or public or private yard or place; and it shall be unlawful for any person to bet at or upon any such game or games, and any store, shop, or hotel, room or building within which is played, dealt, opened, set up, or carried on any game mentioned in this section is to be deemed a gaming and gambling-house.

"Sec. 2. Any person who shall be convicted of violating any provision of this ordinance shall be punished by imprisonment not exceeding ninety days, or by fine not exceeding three hundred dollars, or both such fine and imprisonment."

At the date of this ordinance it was made a crime by the law of the state (Ses. L., 1876, p. 39), for any one to "deal, play or carry on, open or cause to be opened," or to "conduct, either as owner, proprietor, or employee," any of the games enumerated in said ordinance, except "tan-

tan," or "any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, or credits, or any other representative of value."

On August 29, 1883, a complaint in writing, duly verified, was made to the police judge of Portland, accusing the petitioner, by the name of John Doe, "with playing, setting up and carrying on and engaging in gambling at tantan, on August 24, 1883, at Portland;" whereupon a warrant, reciting the substance of said complaint, was issued by said judge, directed to the chief of police commanding him to arrest the said John Doe, and take him before said judge, "to be dealt with according to law;" and in obedience to said warrant said chief of police, on August 29, 1883, caused the petitioner to be arrested thereon, and now holds him in custody by virtue thereof and without any other authority.

The power of this court to allow the writ and discharge the prisoner in case he is "in custody in violation of the constitution, or of a law or treaty of the United States," is given by sections 751–755 of the revised statutes. And if the petitioner is imprisoned without due process of law he is deprived of his liberty in violation of the fourteenth amendment, which provides that no "state shall deprive any person of life, liberty, or property without due process of law:" Parrot's Case, 6 Saw. 376; In re Ah Lee, Id. 410. The only question, then, open to dispute or consideration in the case is, Is the petitioner restrained of his liberty without due process of law?

Counsel for petitioner insist that he is so restrained, because the ordinance under which the warrant issued for his arrest is void for want of power in the city to enact it. If the premise is admitted, the conclusion follows. A person imprisoned upon a warrant issued under a void law—a no-law—is certainly deprived of his liberty without due process of law. And if such warrant is issued by a person deriving his authority from the state—as the police judge of Portland—such deprivation is, in contemplation of the constitution, the act of the state: Ex parte Virginia, 101 U. S. 346. But is the premise true? Is the ordinance void?

Counsel for the petitioner argues that this ordinance is not directed at "gambling-houses," but at gaming; and that the petitioner is in custody, not upon a charge of keeping a "gambling-house," but of "gambling at tantan;" that the word "gaming," in the clause "to suppress *gaming* and gambling-houses," is there used as an adjective, and not as a substantive, and therefore the clause does not give the city authority to suppress "gaming"—at least directly—but only to suppress gambling-*houses*—places kept for gaming; and if this is held otherwise, that the ordinance is nevertheless void, because the authority of the city to suppress "gaming" does not extend to any games but such as are made unlawful by the law of the state, and that "tantan" is not mentioned or included in the games enumerated and prohibited in section 1 of the act of 1876, *supra*, "to prevent and punish gambling," and therefore this ordinance for its suppression is void; and further, that the power to suppress either gambling-houses or gaming does not authorize the passage of an ordinance providing for the punishment of persons who merely keep or play in such houses or at such games; but that the power of the city in this respect is limited to such measures as may be found necessary and convenient for the better enforcement, within its limits, of the law of the state defining the crimes of gaming and keeping a gambling-house and prescribing the punishment therefor.

Assuming for the present that the word "gaming" is used in section 37 of the charter as a substantive and not as an adjective, and that, therefore, the power of the council "to suppress" extends to gaming as well as keeping a gambling-house, does it include the game of "tantan"?

In State v. Gitt Lee, 6 Or. 426, the game played was evidently "tantan," but the court held the indictment insufficient, because it only alleged that the game was played "with copper devices for money as representatives of value"—in other words, that the copper devices were used to represent money, and were the stakes played for instead of the device by means of which the game was played. At the same time the court, Watson, J., said that it was not essential that either the statute or the indictment should "give the name of the game or of the device by which it is played;" and that so much of section 1 of the act of 1875 as "prohibits 'any banking or any other game played with cards, dice, or any other device,' whether the same be played for money, checks, credits, or any other representative of value, is sufficiently definite, and renders unlawful all games not previously enumerated in that section, and which are played for 'money, checks, credits, or any other representative of value' with 'cards, dice, or other device.'"

Unlike the narrow, purblind ruling in State v. Mann, 2 Or. 238, by which section 666 of the criminal code was declared void for uncertainty, this opinion evidently assumes that laws against gaming should be construed with some reference to the nature of the subject, and with a view to make them effective.

According to it, "tantan," as described by counsel for the petitioner, and understood by the court, is prohibited, and made criminal by section 1 of the act of 1875. It is a simple game of chance; something like "odd or even." The device by which it is played are little brass disks, called "cheen," about the size of a twenty-cent piece, with a square hole in the center, in which the conductor of the game inserts a pointed stick for the purpose of conveniently and publicly moving them on the table as he draws them from the pile. He has probably two or three hundred of these near him. On the table when the game is played a small square is described, with its sides marked 1, 2, 3, 4. The player takes up, at random, a handful of the brasses and puts them on the table before him, and as he does so, covers them more or less with a hollow vessel, so that no one can tell what number is in the pile, or whether it is an odd or even one. The players then put down their money on the sides of the square, as they may fancy. When this is done, the conductor uncovers the brasses and picks them out of the pile, four at a time, until only four or a less number are left. If the number left is an even one—either two or four—the player who put his money on this figure wins a like amount from the table, less a rebate of seven per centum to the conductor, and the table wins what is laid on the other even number, while those who put their money on the odd numbers withdraw it. If the number of brasses left is an odd one—either one or three—that number wins, and the process is reversed.

If this is a "device" within the statute, the game when played for money is gambling within the same.

The device mentioned in the statute is not cards, dice, or other "like" device, but simply "other" device. And if it were a "like" device, the question would arise, Like in what respect? Like which of them? Cards and dice are in most respects very unlike; indeed, they have no re-

semblance, except that they may both be used for gaming. But then, anything which may be used for that purpose is so far a like device. The coin of the realm, when used to play the game of "match," "heads or tails," "odd or even," for money or anything of value; a long and short straw when used to play the game of "draw straws" for the same purpose; a "wheel of fortune," a "raffle," or a "grab-bag," when used at church fairs or festivals or elsewhere, to dispose of articles of value upon the chance of getting something for comparatively nothing, are each and all of them, so far, just as much gambling devices as cards or dice can be. In short, anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill, is so far a gambling device: Whart. C. L., sec. 1465.

My conclusion is, that the game of "tantan" is within the purview of the act of 1875, "to prevent and punish gaming;" and if the word "gaming" is used in the charter as a substantive and not as an adjective merely qualifying "houses," then the council has the power to suppress it, as well as any of the games enumerated therein.

Whether the word is here used as an adjective or substantive is a nice question. In the decision of it a court ought not to lose sight of the object and the purpose of the statute, and the crying evil it was intended to prevent. My impression is, that it is intended to be used as a substantive, and ought to be so construed. It is evident that there is as much propriety and necessity for giving the council power to suppress "gaming" as a "gambling-house." They are simply different phases of the same evil—the one being an end and the other a means.

And even if my impressions were otherwise, in the absence of any final construction of the statute by the supreme court of the state, I should hesitate upon such a question as this, to say that the petitioner is imprisoned without due process of law, and discharge him therefrom in disregard of the state process under which he is held.

The sufficiency of the complaint and warrant of arrest in this case are also open to serious question. The name of the game is given, but nothing is said of the nature of the device or means with which it is played; nor is it alleged that the game was played for money or other thing of value, unless the allegation that the petitioner was engaged in "gambling" at tantan, sufficiently implies that he was playing thereat for money.

But whether these omissions render the proceedings null and void for want of jurisdiction in the court to issue the warrant, so that the petitioner is held without due process of law, or are only errors or irregularities for which the party must seek his remedy in the state courts, it is not necessary now to decide: In re Ah Lee, 6 Saw. 416, and cases there cited.

The ordinance in question is entitled "An ordinance to suppress gaming and gambling houses." But it does not provide for the punishment of a keeper of a gambling-house, as such; nor does it provide any means for suppressing gaming or gambling-houses, but by defining the crime and providing for the punishment for gaming "for or with anything of value" in Portland—the games enumerated therein being only such as are enumerated in the state statute, except "tantan," while the punishment therefor is increased to fine and imprisonment instead of a fine only. It is also peculiar in that it not only prohibits the playing of any of the enumerated games for anything of value, but also with anything

of value. While it can hardly be supposed that the council intended to make it a crime to play at a game merely for amusement, yet it seems that such is the effect of the ordinance in case the cards, dice, or other device with which it is played have any value.

But the question here is, Does the power conferred by the charter on the council "to suppress" gaming authorize it to define and punish the crime of gaming generally?

By the original charter of October 14, 1864 (Ses. L. 10), the provision in subdivision 5 of section 37 only authorized the council "to suppress bawdy-houses, gaming, and gambling-houses." The act has been amended or revised at every subsequent session of the legislature, except those of 1866 and 1878, for some purpose—and generally to secure a change of officers—but this clause has only been changed twice in that time. The act of October 26, 1880 (Ses. L. 99), added the words "and to punish inmates of bawdy-houses or houses of ill-fame;" while that of October 24, 1882 (Ses. L. 151), added the provision for the suppression of places for smoking opium and opium-smoking, and the punishment of opium-smokers and the keepers of places for smoking opium, as already stated.

There is no law of this state for the punishment of an inmate of a bawdy-house, or of persons who smoke opium or keep places for that purpose; while there is provision made by such law (Or. Crim. Code, sec. 651; Ses. L. 1876, pp. 39–41) for the punishment of a person who keeps a bawdy-house or gambles or keeps a gaming-house.

From this it appears that the legislature expressly authorized the council: 1. To simply suppress bawdy-houses, gaming, and gambling-houses; and, 2. To suppress certain other acts and conduct, and also to punish any person who may engage therein.

The difference in the authority granted in the two classes of cases appears to be based upon the fact that the state had already provided for the punishment of persons engaged in the acts or conduct which the council is only authorized to suppress.

Even if it be admitted that authority to suppress gambling-houses and gaming would empower the council to define and punish the crime of gaming, if the law of the state was silent on the subject, still when the general law of the state has defined the crime of gambling and keeping a gambling-house and prescribed the punishment therefor, the power of the council to suppress, must be exercised within those limits. The council can not suppress a game that the general law has not prohibited. Its power to suppress "gaming" must be understood as only applicable to games which the state has made illegal. Nor do I think it can suppress such games by prescribing a different or additional punishment therefor, from that prescribed by the state. And this conclusion is, I think, deducible from general principles. But it is much strengthened in this case by the fact that the legislature has for so many years maintained the distinction in the charter between the power granted to the council to suppress and that to punish, the latter never being granted only in those cases where punishment was not provided in the general law. Under such circumstances there is no ground for the inference that the power to punish is implied in the power to suppress. The latter is not even necessary to the exercise of the former. The punishment provided by the state is sufficient, and if the council under its authority to suppress will endeavor by all the means in its power to enforce the state law within its limits, it will do as much to suppress gambling-houses and

gaming as it could by endeavoring to enforce punishments prescribed by itself.

And this conclusion is further fortified by the application of the rule for construing grants of legislative power to municipal corporations.

Apart from the few faculties considered incident to its existence, such as the capacity to sue and be sued and have a common seal, a municipal corporation has no power to do any act except such as are essential to the plain purpose of its creation or are authorized by the express provisions of its charter or a clear or necessary implication therefrom: Dillon on M. C., sec. 89 (55); Cooley's C. L. 194.

Under this rule, before it can be concluded that the power to punish persons for keeping gambling-houses and gaming is included in the power to suppress the same, it must clearly appear from the language of the grant, read by the light of the circumstances of the case, that such was the intention of the legislature. If there is a reasonable doubt about the implication of the power it must be resolved against its exercise.

The only case directly in point, that has been cited, is The City etc. v. Breeze, 11 Iowa, 399, in which it was held that a general grant of power to the city council "to suppress gambling," did not authorize it to pass an ordinance providing for the punishment of a person for keeping a "gambling device." Say the court: "The city council can not *punish* that which they are only authorized to *suppress* under the general power."

My conclusion is, that the council has no power to punish persons for gaming, and therefore the ordinance, No. 3911, and the proceedings under it for the arrest of the petitioner are void. This being so, he is restrained of his liberty without due process of law, in violation of the constitution of the United States, and is therefore entitled to the writ of *habeas corpus* for his deliverance.

Upon the delivery of this opinion, the writ was issued, and the petitioner brought into court by the officer having him in custody, when it was agreed that the case should be formally submitted to the court upon the facts stated in the petition and stipulation aforesaid, without further argument; and thereupon, it appearing that the prisoner is unlawfully restrained of his liberty, it was ordered that he be discharged therefrom, and go hence without day.

SUPREME COURT OF ARIZONA.

LOPEZ, Adm'x, *v.* CENTRAL ARIZONA MINING CO.

Filed January, 1883.

DEFENDANT IN DEMURRING TO A COMPLAINT FOR FAILURE TO STATE FACTS SUFFICIENT to constitute a cause of action, and specifying in his demurrer certain grounds of insufficiency, can only rely upon the defects specified. It is otherwise if the demurrer is general, and without specification.

ABSENCE OF FAULT ON THE PART OF THE PLAINTIFF, in an action to recover for personal injuries caused by the defendant's negligence, need not be averred or proved by him.

PLAINTIFF IN SUCH ACTION CAN NOT RECOVER IF HIS OWN WANT OF CARE or negligence in any degree contributed to the result complained of. It is no defense, however, if the plaintiff's act might have, or did, contribute to the injury. It must have been by his fault, not merely by his act.

OWNER OF A MINE WHO WORKS IT IN A DANGEROUS BUT THE ONLY PRACTICABLE

MANNER, is not liable for injuries to an employee, caused by a fellow-servant in the course of the employment, if such employee had knowledge of the danger, unless the injury complained of resulted from the wrongful act, neglect, or default of the owner.

APPEAL from a judgment in favor of the plaintiff, in an action to recover for the death of her husband by reason of the defendant's negligence, and from an order denying the defendant a new trial. The further facts appear in the opinion.

Tweed & Hancock, and *Caleb Dorsey*, for the appellant.

Alsop, Baker, Cox, and *Campbell*, for the respondent.

FRENCH, C. J. This action is necessarily brought under the statute by the representative of the deceased, Florence Lopez. For about seven years prior to his death he had been employed in working as a miner in appellant's mine, the Vulture mine. On June 21st he was killed while working in said mine. The place in which he was at the time working was an open cut about one hundred and fifty feet wide at the top and about fifty or sixty feet deep. The rock was blasted and excavated, and pried down the side of the open cut, from near the surface, by other miners who were accustomed to give notice of the blasts and descent of the rock. Lopez's location was in the bottom of the cut, his work being the removal of the rock, thus thrown down by the miners above, to a chute. He was killed by some rock falling on him while so working.

The case was tried by a jury, which returned a verdict for plaintiff. Defendant moved for a new trial, which was denied. Defendant appeals to this court, from both the judgment and the order denying it a new trial.

The complaint does not state that the dangerous condition of the mine was not known to deceased, nor that it could not, with reasonable effort, have been discovered by him, nor that deceased was free from negligence, nor that he prudently attempted to avoid the danger.

Defendant demurred to the complaint, on the ground of want of sufficient facts to support the action, but specified the defects, and the omission to charge that the accident occurred without the fault of deceased is not among the specifications, and the practice is, that the party shall be confined to his specifications, although, if no specification be made under this ground of demurrer, it might stand on any defect.

But this specific defect is raised on the introduction of plaintiff's testimony, and on the motion for a nonsuit it became a proper subject for consideration. On this point, in this class of cases, there is very nearly an equally balanced conflict of practice in the courts of the different states, and we are not disposed to hold that absence of fault on the part of plaintiff must be averred and proved by plaintiff, while probably the preponderance of authority and practice hold it to be matter for the answer and defense. An examination of authorities will show that the rule is not inflexible, even in the courts that hold respectively to the one or the other practice, but must depend, in some cases at least, on the facts, exigencies, and circumstances of the particular pleadings and cases.

The court did not, then, err in refusing the nonsuit so far as this point is concerned.

Then did the evidence on the part of plaintiff at this stage of the case show contributory negligence on the part of deceased? In McGlyn v. Brodie, Justice Sawyer, on page 380, 31 Cal., speaking for the court, says: "The risk of the accident was a risk incident to the employment in

which the plaintiff was engaged. Possessed of all the knowledge which the defendants had as to the condition of the cupola, and with an opportunity of becoming better informed in the progress of the work in which he was engaged, plaintiff accepted the employment, and continued in it down to the moment of the accident. Where a party works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and can not maintain an action for injuries sustained and arising out of accidents resulting from such defective condition of the machinery. This is the principle established by all the cases."

This is the doctrine laid down, not only in all the cases, but in the elementary works of Shearman & Redfield on "Negligence," Thompson on "Negligence," and other treatises on the same subject.

Without passing upon the question whether plaintiff's evidence shows that deceased knew of the danger at the point where he was working or had the means of knowing, does not the whole testimony in the record show without substantial conflict that he had such knowledge?

As to the general rule that a plaintiff can not recover for the negligence of the defendant if his own want of care or negligence has in any degree contributed to the result complained of, there can be no dispute: 48 Cal. 421, and cases there cited.

But it is necessary to distinguish between the act and fault of the complaining party. It is no defense to an action of this kind that the act of the deceased might have, or did, contribute to the injury. It must be by his fault, not merely his act.

Was there negligence on the part of defendant? or, in the language of the statute, was there wrongful act, neglect, or default on its part?

Plaintiff alleges in her complaint: "That defendant wrongfully and carelessly neglected to keep in good and safe condition and repair [said mine], by building and maintaining in its tunnels, shafts, and excavations proper and sufficient supports and pillars, to prevent said tunnels and excavations from caving in," etc.

This is a broad allegation as to the mine generally, but the question in the case is as to the point only where the accident occurred. This was neither a tunnel nor shaft, but an open cut, and the work at this point consisted in blasting and prying down the rock, not in supporting it in place, and the evidence of defendant shows that this was the only practicable way of working the mine at this place, and there is no conflicting evidence to this whatever.

In order to recover, the plaintiff in an action of this kind must show that the act complained of was caused by the wrongful act, neglect, or default of defendant. It must also appear, by implication or otherwise, that the injured party did not in any degree contribute to the injury by his fault.

All proceedings, rulings, or instructions which conflict with, or even ignore, these last two propositions are erroneous in all trials. Tested by this rule, the statement on motion for a new trial in this case shows good, broad, cogent, decisive, and most ample grounds in support of the motion.

The judgment and order denying a new trial must be reversed, and the cause remanded for a new trial, and it has been so ordered.

PINNEY, A. J., concurred.

In re Waldrip.

Filed January, 1883.

An Imprisonment is Legal, under Section 19 of the Habeas Corpus Act, where the commitment, which in this territory is a certified copy of the judgment, fully shows the character of the court rendering the judgment, the names of the judge and clerk, and the date of the judgment, although such judgment does not contain the usual recitals.

Return to a Writ of Habeas Corpus, Which Sets out in Full the Record of the proceedings under which the petitioner is held, is a full and complete answer to every allegation contained in the petitioner's application for his discharge, and being admitted as true, negatives the same.

Application for a writ of *habeas corpus*. The opinion states the facts.

A. C. Baker, for the petitioner.

A. E. Davis, for the respondent.

French, C. J. On the petition of said Waldrip, a writ of *habeas corpus* was granted at the January term against C. V. Weeden, in charge of the territorial prison at Yuma, where the said petitioner was imprisoned, returnable at the adjourned term, to show cause for holding petitioner in custody. The petition claiming that the commitment—which in this territory is a certified copy of the judgment—was defective and insufficient in law to warrant the detention of the petitioner in custody.

Section 2218 of compiled laws, being section 19 of *habeas corpus* act, reads as follows:

"It shall be the duty of such court or judge, if the time during which such party may be legally detained in custody has not expired, to remand such party if it shall appear that he is detained in custody:

"1. By virtue of process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction.

"2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree."

The commitment in this territory is a certified copy of the judgment.

The judgment in this case does not contain the usual recitals. But it is still a judgment under the section above quoted, and the commitment is a process issued upon such judgment, and fully shows the character of the court rendering the judgment, name of the judge, clerk, and the date of such judgment.

We are therefore of the opinion that the imprisonment of Waldrip was legal under both the first and second provisions of said section 19, as tested by the *habeas corpus* act.

But Weeden, the custodian of the prisoner, in his answer to the writ, returns the whole record of the court in the case, including the presentment of the indictment, the indictment itself, the demurrer thereto, affidavit for change of venue, the record of the impaneling of the trial jury, the action of the court at all stages of these proceedings, charge to the jury, and the verdict in the trial, and all the minutes and proceedings of the court thereon.

This return (which is unquestioned) constitues a full, complete, and decisive answer to every allegation contained in the petition and application of petitioner, and being admitted as true, negatives the same.

It was ordered by the court that the writ be discharged and the prisoner remanded.

Pinney, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

PEOPLE *v.* LEE HUNG.

In Bank. Filed December 5, 1883.

REFUSAL TO GIVE AN INSTRUCTION TO THE JURY, WHICH HAS ALREADY BEEN GIVEN in substance, is not error.

IMMATERIAL ALLEGATION IN AN INDICTMENT CHARGING THE DEFENDANT with the crime of arson need not be proved. An allegation in such indictment that the defendant occupied the building that was burned is immaterial, and the court may charge the jury that it need not be proved.

DEFINITION OF THE CRIME OF ARSON MAY BE GIVEN TO A JURY in the language of the code, and it is not error for the court to refuse to instruct them that "arson is a crime against the security of the dwelling-house as such and the possession, and not against the dwelling as property.

APPEAL from a judgment of the superior court of Sacramento county, entered upon a verdict convicting the defendant of the crime of arson, and from an order denying him a new trial. The further facts appear in the opinion.

C. T. Jones, for the appellant.

Marshall, attorney general, for the respondent.

THE COURT. The seventh and ninth instructions asked by defendant's counsel were substantially given in the charge of the court. Therefore the refusal of the request was not error.

The court did not err in instructing the jury that it was not necessary to prove that the defendant occupied the building which was burned, or that he was ever at any time the tenant of M. Graff, although it was so alleged in the indictment. The allegation was wholly immaterial, and it was unnecessary to prove it. The refusal to give an instruction the exact reverse of the one given on this point was not error.

It was not error to refuse to give the following: "Arson is a crime against the security of the dwelling-house as such and the possession, and not against the building as property." The court gave the code definition of arson. That was sufficient.

Judgment and orders appealed from affirmed.

KEATING *v.* EDGAR, Auditor, etc.

In Bank. Filed December 8, 1883.

BOARD OF NEW CITY HALL COMMISSIONERS ARE AUTHORIZED TO ALLOW THE CLAIM of a contractor for extra work done under the direction of their architect, and for losses suffered by him through the action and incompetency of their former architect.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The plaintiff in this case had entered into a written contract with the new city hall commissioners of said city and county, to do certain brick-work, in accordance with the directions to be given him by their architect. After considerable delay he performed part of the work contracted for, in accordance with the lines and levels furnished him by the then architect, one Clifford. Before the completion of the work, Clifford was removed from his position, and one

Hatherton appointed in his place. Hatherton, upon discovering that the lines and levels heretofore furnished by Clifford were wrong, caused the work already done to be torn down and reconstructed in accordance with new lines and levels furnished by him. The plaintiff, having presented his claim for such extra work, and damage caused him by the delay, to the new city hall commissioners, and the same being allowed by them, demanded of the defendant, as auditor of the city and county of San Francisco, that he audit the same. This the defendant refused to do, whereupon the plaintiff brought this action for a *mandamus* to compel him so to do.

William Craig, city and county attorney, for the appellant.

Scrivner & McKinne, *Robert Crockett*, and *Talcott & Crockett*, for the respondent.

The COURT. No points were filed by appellant prior to the day on which the cause was set for argument, as required by rule, nor has appellant filed a brief within the time allowed by the court. We feel justified in treating the appeal as abandoned, but have looked into the record and are not satisfied that error was committed by the court below.

Judgment and order affirmed.

KNOWLES *v.* SEALE.

In Bank. Filed December 10, 1883.

ALLEGATION IN AN ANSWER IN AN ACTION FOR THE FORECLOSURE of an assessment lien for replanking a street in the city and county of San Francisco, to the effect that such street had not been graded to the official grade, is immaterial, and a failure to find on such allegation is not error, if it appears that the grade and width of such street had been established by the board of supervisors before that body ordered it planked.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff in an action for the foreclosure of an assessment lien, for replanking the northerly half of Clementina street, from First street to a point one hundred and fifty feet westerly therefrom, in said city and county, under a contract made by the superintendent of public streets and the assignor of the plaintiff. The further facts appear from the opinion.

Stewart, Vanclief & Herrin, and *D. H. Whittemore*, for the appellant.

Parker, Shafter & Waterman, for the respondent.

The COURT. The allegation of the defendant that the portion of the street which the board of supervisors ordered planked had not been graded to the official grade did not raise a material issue. Therefore the omission to find on it was not error. The board had jurisdiction after notice of its intention had been published to order a street, the grade and width of which had been officially established, planked; and it was not denied that the grade and width of this street had been officially established before the board ordered it planked, or gave notice of its intention to order it planked.

Judgment affirmed.

HEINLEN ET ALS. v. SULLIVAN ET ALS., Judges, etc.

In Bank. Filed December 10, 1883.

POWER OF APPOINTING POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO, vested in the judges of certain of the district courts by the act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the state.

SUCH POWER WAS NOT CONTINUED IN FORCE by section 11 of article 22 of the constitution of 1879, and does not now devolve upon the judges of the superior court in the city and county of San Francisco.

APPLICATION for a writ of mandate, commanding the respondents, as judges of the superior court of the city and county of San Francisco, to appoint a board of police commissioners for said city. The further facts appear from the opinion.

Heinlen & Baggett, for the petitioners.

No appearance for the respondents.

THE COURT. Conceding that the terms of office of the police commissioners of the city and county of San Francisco have expired, the power of appointment does not devolve upon the judges of the superior court for the city and county aforesaid.

The power of appointment of the commissioners referred to, vested in the judges of the fifteenth, twelfth, and fourth judicial districts of this state by the act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the state; consequently it was not continued in force by section 11 of article 22 of the constitution now in force, and the power of appointment in question did not devolve on the superior judges above mentioned.

Application for writ of mandate denied.

PEOPLE ex rel. PROBERT ET ALS. v. ROBINSON ET ALS.

In Bank. Filed December 10, 1883.

RIGHT OF TRANSFEREE OF UNRECORDED STOCK TO VOTE AT CORPORATE ELECTION. Transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election.

CROSS-APPEALS from a judgment of the superior court of the city and county of San Francisco, ousting the defendants from the offices of trustees of the St. Lawrence Mining Company, and determining that the relator, McGrath, was the only legal occupant of such office. The further facts appear in the opinion.

A. L. Hart, attorney general, *Wilson & Wilson*, and *Crittenden Thornton*, for the plaintiffs.

Lloyd, Newlands & Wood, for the defendants.

SHARPSTEIN, J. This action was brought to oust the defendants from the offices of trustees of the St. Lawrence Mining Company, and to procure a judgment to the effect that the relators are entitled to said offices. The defendants claim to have been elected at a regular election held on

the ninth day of January, 1880, the day on which it is conceded an election of trustees might properly be held. But the relators claim that the election is invalid because a majority of the capital stock of said corporation was not represented at said election.

It appears that one Bennett, who appeared by the books of the corporation to be the owner of thirty-seven thousand one hundred and twenty-one shares, cast the number of votes which that number of shares entitled him to, although he had previously sold thirty-six thousand of said shares to Probert, one of the relators. But such transfer had not been entered on the books of the company. It does not appear that the right of Bennett to vote as he did was challenged, or that Probert attempted or claimed the right to cast the votes which the relators now insist he had a right to cast by virtue of his owning said shares. The validity of the election depends upon the right of Bennett to cast the votes which he might rightfully have cast, if he had not sold said thirty-six thousand shares.

By section 5 of the act of 1853, under which the company was incorporated, it is provided that each stockholder shall be entitled to as many votes as he owns shares of stock; and by section 9, that "the stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books of the company, as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer:" Stat. 1853, p. 88.

A transfer not entered on the books of the company has no validity outside of the parties to such transfer. If not, could it affect the validity of an election at which trustees of the company were elected? If so, would not a transfer, although not entered on the books of the company, be valid outside of the parties to such transfer? The construction which we feel compelled to give to this clause is, that a transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election: State v. Ferris, 42 Conn. 560; Hopkins v. Buffum, 9 R. I. 513; Gilbert v. Manufacturing Iron Co., 11 Wend. 627; Bank of Utica v. Smalley, 2 Conn. 770; Kirtright v. Bank of Buffalo, 22 Wend. 348; State v. Pettinelli, 10 Nev. 141.

"As between a corporator and the corporation, the records of the corporation, or its stockbook, as it is called, is the evidence of their relation. Meetings of the stockholders, elections, and dividends, etc., are regulated by this record. The certificate is but secondary evidence, and is never demanded except when the stockholder deals with the corporation in a contract relation:" Bank of Commerce's Appeal, 73 Pa. 59.

Whatever rights the purchaser of a certificate of stock may acquire as between himself and his vendor, it is well settled as between himself and the corporation he acquires only an equitable title, and until he secures a transfer on the books of the company he is not a stockholder, and has no

claim to act as such: N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 80; Grymes v. Hone, 49 Id. 17.

We could not hold that this election was invalid by reason of Bennett's voting as he did without holding that, as between him and Probert and the company, the transfer without being entered on its books was valid. This would be going further than the law, as we construe it, would justify us in going.

The conclusion at which we have arrived renders it unnecessary to consider the question raised by the appeal of the plaintiff and relators, Probert, Myer, and Myer.

So much of the judgment as adjudges that defendants S. L. Robinson, E. N. Robinson, and Hale Rix are not entitled the offices of trustees of the said corporation, and that they and every one of them be ousted and excluded from the said offices, and that they and each of them do not intermeddle with or concern themselves in or about the offices of trustees of the St. Lawrence Mining Company, or the liberties, privileges, and franchises thereunto belonging; but that they and each of them be forejudged absolutely and excluded from exercising or using the same, or any of them, for the future, is reversed; in other respects affirmed.

MORRISON, C. J., and ROSS, MCKINSTRY, and MCKEE, JJ. concurred.

MYRICK, J., concurring. The court found that the stock voted by Bennett at the meeting of January, 1880, stood in his name, and that at such meeting no objection was made to his casting the votes of the stock so standing in his name. Under such circumstances, I do not think the voting was void; nor that it vitiated the election. I therefore concur in the judgment.

ESTATE OF HARLAND.

In Bank. Filed December 14, 1883.

APPEAL FROM AN ORDER DENYING A WIDOW'S APPLICATION FOR A HOMESTEAD, to be set apart to her out of the estate of her deceased husband, must be taken within sixty days after the entry of such order.

MOTION to dismiss an appeal from an order of the superior court of Tulare county, denying the appellant's application for a homestead out of the estate of her deceased husband. The further facts appear in the opinion.

Bennett & Wiggington, for the appellant.

Brown & Daggett and *Atwell & Bradley*, for the respondents.

The COURT. On the twenty-sixth day of December, 1882, the court denied the application of appellant to have a homestead set aside to her out of the estate of her deceased husband. Notice of appeal was filed and served on the seventh day of June, 1883.

We think the appeal should have been taken within sixty days after said order, decree, or judgment was entered: C. C. P. 1715; Estate of Burns, 54 Cal. 223.

Appeal dismissed.

SUPREME COURT OF NEVADA.

STATE ex rel. CARDWELL *v.* GLENN ET AL., Funding Comm'rs, etc.

Filed June 29, 1883.

PROVISIONS OF THE CONSTITUTION REGULATING THE MANNER IN WHICH BILLS and joint resolutions which have passed the legislature shall be signed, are mandatory and not directory.

EVIDENCE THAT AN ENROLLED ACT HAS BEEN CERTIFIED TO BY THOSE OFFICERS who are charged by the constitution with the duty of deciding what laws have been enacted, that it has been signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, is conclusive as to the passage of such act as enrolled, and the only evidence thereof.

PROVISIONS OF THE CONSTITUTION REGULATING THE PASSAGE OF BILLS, and providing for their authentication, should be construed with reference to existing customs in legislative and parliamentary bodies. And in cases of doubt, the courts will give due consideration to the contemporary construction which has been deliberately given to such provisions by the legislative and executive departments of the government.

SIGNING AN ACT OF THE LEGISLATURE BY THE ASSISTANT SECRETARY OF THE SENATE is a substantial compliance with the provision of the constitution requiring all acts and joint resolutions to be signed by the secretary of the senate.

PRESIDENT OF A CORPORATION IS AUTHORIZED TO DONATE LAND to a county, to be used for public purposes, by virtue of a resolution of the board of trustees, empowering him to deed and convey to purchasers such land, at his discretion.

VOLUNTARY CONVEYANCE OF LAND TO A COUNTY, BY DEED OF BARGAIN AND SALE, which recites that such conveyance is made "for the purpose of erecting thereon county buildings, to which the same is hereby dedicated, for the use and benefit of the party of the second part, its successors and assigns forever," vests as complete a title in the county, if the land is used for such purpose, as if it had obtained the same by purchase, without such words of dedication.

MORTGAGE EXECUTED BY A RAILWAY COMPANY ON ITS ROAD-BED, rolling-stock, and buildings, together with all lands which are or may be necessary for the use and operation thereof, and also "all rights, privileges, franchises, and property whatever, now belonging, or hereafter to be acquired by" said company, will be construed to convey only such property as was or would be useful or necessary in the construction, operation, preservation, or security of the railroad mortgaged, and not lands which were to be used for other purposes.

APPLICATION for a *mandamus*. The opinion states the facts.

Thomas H. Wells and *A. C. Ellis*, for the relator.

Bennett & Reddy, for the respondents.

HAWLEY, C. J. This proceeding was instituted for the purpose of compelling respondents "to issue bonds for the purpose of creating a fund for the erection of county buildings:" Stat. 1883, p. 104.

Its real object, however, is to determine whether the "act to remove the county seat of Esmeralda county from the town of Aurora to the town of Hawthorne" (Stat. 1883, p. 95) is valid.

Respondents claim that this act is invalid, because the enrolled bill is not attested by the signature of the secretary of the senate.

The bill was signed by the presiding officers of the respective houses, by the chief clerk of the assembly, and by the assistant secretary of the senate. As thus attested, it was approved by the governor and regularly deposited with the secretary of state.

Section 18 of article 4 of the constitution declares that "a majority of all the members elected to each house shall be necessary to pass every bill or joint resolution, and all bills or joint resolutions so passed shall be signed by the presiding officers of the respective houses, and by the secretary of the senate and clerk of the assembly."

Relator claims that this provision—relative to the signing of the bill—is directory merely. This view, in the light of the decision in State ex rel. George v. Swift, 10 Nev. 176, can not be maintained. It was decided in that case that the courts could not look beyond the enrolled act certified to by those officers who are charged by the constitution with the duty of deciding what laws have been enacted, and that when an act has been signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, "it constitutes a record which is conclusive evidence of the passage of the act as enrolled."

The necessity of having some fixed and definite rule by which the existence of a law may be established, is so thoroughly and ably discussed in that opinion that it needs from us no further comment. If the rule of evidence as there established is right, and its correctness is not questioned by relator, then it follows, as clearly as the night follows the day, that the provisions of the constitution, as to the signing of bills and joint resolutions, is mandatory and must be complied with; otherwise there is no evidence of the passage of a bill or joint resolution by the legislature that can be considered by the courts.

Nearly all of the decisions cited by relator, to establish the doctrine that this provision of the constitution is directory, were examined, and several of them reviewed in State ex rel. Chase v. Rogers, 10 Nev. 250. We shall not, therefore, again enter into the general discussion of this subject, but will confine ourselves to such questions as have a direct bearing upon the particular question here presented.

When the acts required to be done are of the essence of the thing, the provisions of the constitution, whether negative or affirmative in their terms, are imperative. Things which are not of the essence may be declared directory.

The provision in question might be held directory by the courts in the various states where it has been decided, in opposition to the rule announced in State v. Swift, that the courts could look at the journals of the respective houses in order to determine whether any act had been passed by the legislature. The signature of one officer, or of all the officers, might be omitted without invalidating the law: Cottrell v. State, 9 Neb. 128; Commissioners v. Higginbotham, 17 Kan. 75.

But it can not consistently be said by a court which adheres to the principles announced in State v. Swift, that this provision is merely directory. We can not look at the journals in order to determine whether the bill received the constitutional majority necessary for its passage. We must look to the enrolled bill, and to that alone. The constitution says that if the bill received the requisite majority it "shall be signed by the presiding officers of the respective houses, and by the secretary of the senate and clerk of the assembly."

What was the object of this provision? There can be but one answer. It was to furnish the evidence that the bill, thus attested, had regularly passed the respective houses. It was intended that the bill thus attested, when signed by the governor and deposited with the secretary of state, should, upon its face, furnish the evidence necessary to make it a law. The signing of the bill by the officers designated in the constitution is absolutely essential to its existence as a law. "This is the mode adopted for the authentication of every bill:" Pacific Railroad v. The Governor, 23 Mo. 364.

The governor's signature to a bill is not required as a means of part of its authentication, but as evidence of his approval.

Cooley, in speaking of the signing of bills, says: "This is a constitutional requirement in most of the states, and therefore can not be dispensed with:" Cooley's Const. Lim., sec. 153.

Burroughs, upon the same question, says: "There are constitutional provisions requiring all laws to be signed by the speakers of both houses. Where this provision exists in the constitution of a state, it is essential to the validity of an act in that state that the bill should be duly signed:" Burroughs' Pub. Securities, 425.

The constitution of Indiana requires that a bill which passes each house "shall be signed by the presiding officers of the respective houses." The supreme court, referring to this provision, uses the following language: "What, then, was the purpose in requiring this attestation by the presiding officers? Was it intended as an idle form? It is not fair so to assume. What possible object, then, was sought to be accomplished by it, unless it was to furnish evidence that the paper thus attested had been, by the proper processes of each house, clothed with the force of law—evidence upon the enrolled act itself, which should be taken as authentication, and prove itself upon inspection?" Evans v. Browne, 30 Ind. 523.

This brings us to the question, whether the act under consideration is signed by the proper officers. Is the signature of the assistant secretary a substantial compliance with the provision of the constitution? Did the framers of the constitution intend that all bills should be signed by the chief clerk and the principal secretary, or was it their intention to allow this duty to be performed by their assistants, when acting, as they often do, in the capacity of clerk and secretary of the respective houses?

This provision of the constitution should be construed with reference to existing customs in legislative and parliamentary bodies. The duties pertaining to the office of secretary and assistant secretary, as prescribed by statute, should also be considered. At the time of the adoption of the constitution it was the custom of legislative bodies to have an assistant secretary of the senate and assistant clerk of the house. In the very nature of the office, independent of any statute, the assistant might take the place of the secretary or chief clerk, and for the time being discharge his duties.

It is the duty of the secretary to be present during the entire session. If he neglects this duty, or is incompetent, he may be removed: 2 Comp. Laws, 2730. But the legislature of this state, with the experience of other legislative bodies, foresaw that, without any fault upon his part, he might not, at all times, be able to attend to all the duties required of him, and provided for an assistant. Cases of emergency might arise. The secretary might be ill, or, for some unavoidable cause, be temporarily called away. Leave of absence for the day might, for good cause shown, be granted him. The assistant could then be called to his desk, take his place, and discharge his duties. Whilst acting in that capacity, is he not, to all intents and purposes, the secretary? If, in this official capacity, he calls the roll of the senate, and keeps the yeas and nays on the passage of the bill, is he not, by virtue of the provisions of the constitution, authorized to attest the vote so taken? Why not? He is authorized by law to discharge the duties pertaining to the office of secretary. He may call the roll and keep the tally of the votes. When he discharges

this duty he is, in his official capacity, advised of the passage of the bill. The constitution does not impose the duty of signing bills and joint resolutions upon the individual, but upon the office. It is the officer who is authorized to act as secretary that must attest the bills and joint resolutions. When the assistant so acts, does not the constitution mean that he may sign the bills and joint resolutions, and that full faith and credit should be given to his signature?

It is true that the offices of secretary and assistant secretary are in one sense separate and distinct. They are held by different persons, who have different duties to perform. But is it not also true that these persons are authorized at times to perform the same duties? Both may and do act as secretary of the senate. In this sense they discharge the duties of the office mentioned in the constitution. The secretary and assistant secretary, in the discharge of this duty, are called upon to exercise judgment and discretion. The power given by the constitution can not be delegated to others.

At the first session of the legislature, after the adoption of the constitution, an act was passed giving the secretary authority to appoint an assistant: Stat. 1864–5, p. 103, sec. 6. Then, as now, it was made the duty of the assistant secretary of the senate, and the assistant clerk of the assembly, to take charge of all bills, petitions, and other papers presented to their respective houses, to file and enter the same in the books provided for that purpose, and perform such other duties as may be directed by the secretary of the senate and chief clerk of the assembly: Stat. 1864–5, p. 102, sec. 4; Stat. 1881, p. 17, sec. 4.

In 1873 the act was amended by providing that "all officers and employees of the senate and assembly * * * shall be elected by the senate and assembly respectively:" Stat. 1873, p. 155, sec. 6.

Whether appointed or elected, the assistant was authorized to act as secretary, when requested so to do. The constitution does not deal in details. In construing the provisions in question, we must consider the modes of thought which gave expression to the language used, in connection with the usage and custom pertaining to the duty of the officer named in the constitution, in order to determine what was meant. The intention of those who framed the instrument must govern, and that intention may be gathered from the subject-matter, the effects and consequence, or from the reason and spirit of the law. Even where the language admits of two senses, "each of which is conformable to common usage, that sense should be adopted which, without departing from the literal import of the words, best harmonizes with the object which the framers of the instrument had in view. Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed:" 1 Story on Const., sec. 405 a. This rule is subject to some qualifications, which it is here unnecessary to discuss: Id. 406.

It was admitted, upon the hearing of this case, that many of the acts passed by the legislature of this state were attested by the assistant clerk of the house, or the assistant secretary of the senate, or by both assistants.

We have taken the pains to examine the enrolled statutes on file in the office of the secretary of state, and find that at the first session of the

legislature (1864–5) eight bills and joint resolutions were so signed, one at the session of 1866, two in 1867, eighty-one in 1869, eighty-four in 1871, forty-six in 1873, majority in 1875, seventy-one in 1877, ninety-seven in 1879, none in 1881, forty-six in 1883.

The civil practice act and other equally important acts are so attested. The legislative and executive departments have always considered that the attestation of the assistant secretary of the senate and assistant clerk of the assembly was a sufficient compliance with the provision of the constitution.

At the different sessions of the legislature there have been many members who were prominent members of the constitutional convention, and they, with others, have always recognized and sanctioned this construction of the constitution. Among these names we mention James A. Banks, Israel Crawford, J. W. Haines, A. J. Lockwood, B. S. Mason, J. G. McClinton, H. G. Parker, F. M. Proctor, F. Tagliabue, and Charles W. Tozer. J. S. Crossman, a member of the convention, was afterwards lieutenant governor, and John H. Kinkead was governor.

At the session of the legislature in 1864–5, Charles W. Tozer was speaker of the assembly. In 1866 J. S. Crossman, as lieutenant governor, was the president of the senate, and James A. Banks was speaker of the assembly. In 1873 Israel Crawford was president *pro tem.* of the senate. In 1879 and 1881 John H. Kinkead was governor.

We glean from this history that the co-ordinate departments of the state goverment, including among its members several persons who were members of the constitutional convention, have for the past nineteen years construed the provision of the constitution as giving the authority to the assistant clerk of the assembly and the assistant secretary of the senate to sign the bills and joint resolutions which passed the respective houses. The people of this state have acquiesced in that construction, and it has received the apparent sanction of the courts, although it has never before, to our knowledge, been called in question. Property and other rights have vested, and ought not to be overthrown unless it is manifest that the construction given by the other departments is absolutely erroneous. Even in such cases, courts of great ability have hesitated, and, in some extreme cases, refused to declare the law unconstitutional. But, from the views we have expressed, it will be observed that we do not consider the construction, as given by the other departments, erroneous. We believe it is correct; still, if it is not free from doubt—and that, it seems to us, is the most that can be said—it is clearly our duty to give some weight to the construction which has been deliberately given by the legislative and executive departments: Evans v. Job, 8 Nev. 338.

"Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provisions, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded:" People v. Green, 2 Wend. 275.

The supreme court of the United States, when the power of the judges of that court to sit as circuit judges was called in question, said: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary

interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. * * * The question is at rest, and ought not now to be disturbed:" Stuart v. Laird, 1 Cranch, 308.

In Georgia, when the question was raised as to the power of the governor of that state to veto bills after the adjournment of the legislature was called in question, the court said: "If this was an original question, independent of any construction heretofore given by the executive department of the state government, to this clause of the constitution, we should be inclined to hold that the governor could not approve and sign any bill after the adjournment of the general assembly; but on looking into the past history of our legislation, we find that it has been the practice for many years for the governor to take five days after the adjournment of the general assembly for the revision of bills passed by that body, and to approve and sign the same within that time, * * * and that a large number of the most important acts now upon the statute books of the state have been so approved and signed, which usage and practice of the executive department of the state government should not now, in our judgment, be disturbed or set aside:" Solomon v. Commissioners, 41 Ga. 161.

The supreme court of Pennsylvania, in discussing the power of the legislature, under the provisions of the constitution of that state, to enlarge the privileges of corporations, said: "This construction is not unsupported by authority. It has not, indeed, received the direct sanction of any express judicial decision. But the legislature, with many members of the convention in it, has always acted upon this interpretation. And this has been done with the silent acquiescence of all the people, including the legal profession and the judiciary. The defendant's counsel has produced us a list of two hundred and seventy-nine acts of assembly, passed only within the last four years, creating one and enlarging the powers of another corporation, or enlarging the powers of two corporations, both municipal and private. Some thousands of such laws have probably been passed since 1838. If we now declare them to be unconstitutional, and sweep away at once all the rights, public and private, which have been acquired under them, we must do an amount of mischief which no man's arithmetic can calculate. This is a proper element of legal judgment on such a subject. We are not to overlook the practice of the legislature, or disregard the consequence of doing so:" Moers v. City of Reading, 21 Pa. St. 202.

To the same effect: Bingham v. Miller, 17 Ohio, 448; Johnson v. Joliet & C. R. R. Co., 23 Ill. 207; Scanlan v. Childs, 33 Wis. 666; Crovise v. Crovise, 54 Pa. St. 263; Commissioners v. Higginbotham, 17 Kan. 80.

These cases are quoted and cited as declaring principles which should govern courts where doubts exist as to the proper construction of the constitution. It is only in cases where the provisions of the constitution are free from doubt that courts follow "the fundamental law as it is written, regardless of consequences." In such cases, courts have frequently declared that the argument *ab inconvenienti* should not "bend the constitution to suit the law of the hour." We agree with Judge Cooley that "we allow the contemporary and practical construction its full legitimate force, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed:" Cooley's Const. Lim. 71, and authorities there cited.

Having decided that the act to remove the county seat to Hawthorne is valid, it becomes our duty to consider certain other questions, preliminary in their character, which relate to the provisions of the act requiring the funding commissioners to issue certain bonds. This act contains a proviso, "that suitable grounds for the erection of such buildings (court-house and jail) thereon at the town of Hawthorne, be donated to the county, free from all incumbrances:" Stat. 1883, p. 105, sec. 4.

The deed to the county is executed by H. M. Yerington, as president of the corporation known as the Southern Development Company. It is contended that he had no authority to execute this deed, and that the deed is not a donation to the county of the land in question. The resolution passed by the trustees of the corporation reads as follows:

"*Resolved*, That the president be and is hereby authorized, on behalf of the company, to deed and convey to purchasers, at his discretion, town lots in the town of Hawthorne."

Does this resolution authorize the president, on behalf of the corporation, to donate the land to the county? We think it does. The use of the word "purchasers" was not intended to limit his authority to only convey land to those who paid a price or value for the same. It is evident that the word "purchasers," as used in the resolution, is more extensive in its meaning. In its broadest sense, it includes the power to donate land, to execute a conveyance by gift, and all other modes of the personal acquisition of real property except by descent or inheritance: 2 Bl. Com. 244; Green v. Blanchard, 40 Cal. 197; Wharton's Law Dic., vol. 2, p. 356. The words "at his discretion" give force and effect to this meaning.

The language of the deed is: "Does grant, bargain, sell, and convey unto the said party of the second part, and to his successors and assigns forever, all of that certain real estate [describing it] for the purpose of erecting thereon county buildings, to which the same is hereby dedicated, for the use and benefit of said party of the second part, its successors and assigns forever." The deed expresses a consideration of one dollar, but it is admitted that no money was paid. It is claimed that the deed dedicates the land to a certain use, and that it is not a donation of the land to the county.

This is too narrow a construction to be adopted. The deed complies with the statute. The land is donated to the county for the purpose of having county buildings erected thereon. If used for such purpose, the county will own the land as absolutely as if it had obtained the same by purchase, without the words of dedication, as expressed in this deed.

It is claimed that the land conveyed is incumbered by mortgage. The mortgage in question was executed by the "Carson and Colorado Railroad Company," and conveys "all that certain railroad now owned and operated, or hereafter to be constructed, owned, and operated, by the party of the first part, in the state of Nevada."

The line of the road is specifically designated. The mortgage includes "all the lands of an average width of sixty feet, more or less, upon which said railroad is located and built, or to be built, * * * which are or may be necessary for the use and operation thereof." It conveys all the stations, depots, and all superstructures of every kind, with the land upon which the same are situated, and all personal property used, or to be used, by the railroad company in the working and operation of its road. After a minute description of the railroad is given, the following

words are employed: "And all rights, privileges, franchises, and property whatever, now belonging or hereafter to belong to, or to be acquired by, said party of the first part." At the time this mortgage was executed the Carson and Colorado Railroad Company owned the land mentioned in the deed of the Southern Development Company to the county of Esmeralda. This land is not within sixty feet of the railroad. But it is contended that by the use of the language last quoted all property owned by the corporation, wherever situate, was conveyed to the mortgagees. This construction can not prevail. All the words employed in giving the description of the property mortgaged must be considered, in order to determine the meaning and intent of any particular clause or sentence.

Upon a careful reading of the entire instrument, we are clearly of the opinion that the mortgage only conveys such property, real and personal, as was or would be employed and be useful or necessary in the construction, maintenance, operation, preservation, repair, or security of the railroad mortgaged, and that property owned by the Carson and Colorado Railroad Company not used, or to be used, in connection with the railroad, in promotion of the direct and approximate purposes of its construction, was not thereby conveyed: Morgan v. Donovan, 58 Ala. 242.

It is ordered that a peremptory writ of *mandamus* be immediately issued as prayed for by relator.

SUPREME COURT OF NEW MEXICO.

STAAB ET AL. *v.* JARAMILLO.

Filed January 25, 1883.

WHETHER AFTER ISSUE JOINED THE PLAINTIFF CAN WITHDRAW CERTAIN COUNTS in the declaration, without leave of the court or consent of the defendant, so as to deprive the latter of a portion of his defense to the plaintiff's case as originally stated, *quære.*

PLEAS OF NON EST FACTUM AND NON ASSUMPSIT, in an action on a promissory note, are not so repugnant or inconsistent as to be inadmissible.

EVIDENCE OF PAYMENT IS ADMISSIBLE UNDER THE PLEA of *non assumpsit*, in an action on a promissory note.

PAPER NOT OTHERWISE PROPER IN A CASE CAN NOT BE ADMITTED for a comparison of handwriting. The admission in evidence of such paper, if calculated to deceive and mislead the jury, is error sufficient to authorize a reversal of the judgment.

APPEAL from a judgment of the district court for the county of San Miguel, entered in favor of the defendant. The opinion states the facts.

W. T. Thornton, for the appellants.

S. M. Barnes, for the appellee.

BELL, J. Although not set out with entire clearness in the record before us, it is to be deduced with sufficient certainty from the record as it stands, and from the representations and admissions of counsel, that this action was commenced by a declaration containing one count only, namely, in *special assumpsit* on the note in suit; that the defendant pleaded *non est factum* and *non assumpsit;* that thereafter the plaintiffs, by permission of the court, on motion filed an amended declaration containing the common count for goods sold and delivered, and a count on account stated, in addition to the original count on the note; that the defendant's pleas were not changed, and they pleaded *non assumpsit* to

the additional counts, and that the case proceeded to the trial, which resulted in the judgment now appealed from, upon this state of pleadings; that after closing their testimony in chief, the plaintiffs withdrew the common counts of their declaration, leaving only the original one on the note.

The plaintiffs insist, that by waiving the counts added to the declaration by amendment, namely, the common counts so added, they confined the defendant to his single plea of *non est factum*. But it is, to say the least, doubtful, if, after issue joined, and the conclusion of the plaintiffs' case before the jury, the plaintiffs could of their own motion, and without asking or obtaining leave of the court or consent of the defendant, neither of which is disclosed by the record before us, so change the pleadings as to deprive the defendant of any portion of his defense to any portion of the plaintiffs' original case.

The pleas of *non est factum* and *non assumpsit* are moreover not repugnant or so inconsistent as to make them inadmissible, and so we think they were both properly left on the record: Burrill's Pl. 174; Chitty's Pl. 563.

We therefore think that the defendant had a right, in the state of the pleadings at the time, to give evidence under his plea of *non assumpsit*, and that there was no error, as is urged, in admitting the following question: Were you indebted to plaintiffs at the date of the note, or at the commencement of this suit? A. No.

Such a question admitted evidence of payment, which under the plea of *non assumpsit* was proper.

The next assignment of error is, however, a serious one.

It is urged that the court erred in admitting in evidence the note of nine hundred and fifty-one dollars and thirty-one cents. We are of the opinion that its admission was clearly improper. That note was dated ten months prior to the date of the note in suit; was for a different amount, and being payable at four months from its date, was presumptively paid, and indeed the defendant was permitted to prove its payment long before the time of the alleged transactions out of which it is claimed that the note in suit in this action arose. It was not proof of payment either of the note in suit, or of the debt for which the note in suit was given; not being a paper otherwise properly in the case, it could not be introduced for a comparison of handwriting; and having been once admitted for any purpose, it was easily liable to abuse as a specimen of the defendant's handwriting and signature.

Its admission was calculated to seriously deceive and mislead the jury in many ways, and we certainly can not therefore say that its admission was immaterial error, which had no effect upon the result of the case. Indeed it is fairly to be inferred that the jury was improperly influenced by its admission. This, together with the objection urged to the admission of evidence of payment above adverted to, are the only allegations of error presented by the record on which we think it material to pass specifically.

But for the error above set forth we are of opinion that the judgment herein should be reversed and a new trial granted.

SUPREME COURT OF OREGON.

HARRINGTON *v.* WATSON.

Filed October, 1883.

DESTRUCTION OF PREMISES, WHEN TERMINATES OBLIGATION TO PAY RENT.—The doctrine of the common law is, that when lands and buildings are leased, and the tenant expressly covenants, without limitation or reservation, to pay rent for a term of years, he is not released from that obligation by the destruction of the building leased by accidental fire.

EXCEPTION TO THIS RULE EXISTS WHEN THE LEASE IS OF AN UPPER STORY or basement, or an apartment in a building, founded upon the idea that it is not the intention of the lease to grant any interest in the land beyond that connected with the enjoyment of the room demised, and when this is destroyed by accidental fire, there is nothing upon which the demise can operate, and the lease terminates with the destruction of the thing rented.

LEASES MUST BE CONSTRUED ACCORDING TO THE INTENTION of the parties, and with reference to the subject-matter.

ACTION OF FORCIBLE DETAINER CAN NOT BE MAINTAINED when the facts and circumstances indicate no purpose or determination upon the part of the defendant to resist the entry of the plaintiff by force.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the plaintiff.

LORD, J. This was an action of forcible entry and detainer. It is brought to this court by an appeal from the judgment of the circuit court for Multnomah county, affirming the judgment of the justice's court for Morrison precinct, and giving judgment in favor of plaintiff for restitution of the premises described in the complaint, and for the sum of one thousand eight hundred and twenty dollars for the use and occupation of the same. Briefly, the cause of action arose out of this state of facts: The plaintiff is the owner of lot 8 in block 15 of the city of Portland, upon which had been erected a wooden building containing several rooms. On the second day of December, 1878, the plaintiff leased to the defendant one of the rooms in said building for the term of five years for a certain monthly rent, payable in advance, and the defendant, by virtue thereof, entered into possession of said room and remained in the quiet and peaceable possession of the same, until the twenty-fifth day of September, 1882, when the building, including said room, was totally destroyed by fire. On the twenty-fifth day of September, 1882, without the knowledge of plaintiff, the defendant moved upon said premises another wooden building, and occupied the same, and, on the first day of November, 1882, the plaintiff served a written notice upon the defendant to quit, and also demanded the possession of the premises, which the defendant refused to deliver up or any portion thereof. Upon this state of facts the plaintiff brought an action of forcible entry and detainer, alleging, among other things, "that on the twenty-eighth day of September, 1882, the defendant unlawfully and by force took possession of said property, and ever since said time has maintained, and does now maintain, possession of said premises unlawfully and by force," all of which the defendant, by his answer, denied, and set up the lease as a defense to his action.

Upon issue being joined, the cause was tried, by agreement of the parties, without the intervention of a jury, with the results as above stated. The findings of fact by the court will be referred to hereafter, so far as

the same may be necessary to the decision of this case. The first question presented for our consideration is, Did the total destruction of the building in which was situated the room occupied by the defendant terminate the lease? The particular language of the lease, out of which this contention arises, is as follows: "That in consideration of the covenants herein contained on the part of the said Thomas Watson, to be kept and performed, I, the said D. F. Harrington, do hereby lease, demise, and let unto the said Thomas Watson, the following property, situate in the city of Portland, county of Multnomah, state of Oregon, to wit: the room on the corner of North First and F Streets, having sixteen feet frontage on North First street, and fifty feet deep on F street, and located in the one-story building now erecting on lot No. 8, in block No. 15, on the corner of said North First and F streets, the same being in Couch's addition," etc. Whatever hardships it may involve, the doctrine of the common law undoubtedly is, that whenever lands and buildings are leased, and the tenant expressly agrees or covenants without limitation or qualification to pay rent for a certain term of years, he is not released from that obligation by the destruction of the buildings leased, by accidental fire.

In Hallett v. Wylie, 3 Johns. 44, the court say: "We think it may be safely said, there is not a case in the books, where the destruction of the demised premises by fire has been held to excuse the tenant from the payment of the rent, on an express covenant; but in every case where a defense on that ground has been attempted, it has failed." And later, in Gates v. Green, 4 Paige Ch. 355, Chancellor Walworth said that "it must now be considered as settled, both in England and in this state, that a lessee of premises which are burned has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease or the landlord has covenanted to rebuild:" 3 Kent's Com. 446; Wood's Landlord and Tenant, p. 814, note. The authorities, however, indicate that there is an exception to this rule, that the destruction of the building does not discharge the liability of the tenant for rent, where the lease is of an upper story or basement or apartment in a building, because in such cases, the courts say, it is not the intention of the lease to grant any interest in the land further than is necessary for the enjoyment of the rooms so demised, and when these are destroyed, there is nothing upon which the demise can operate, and the lease terminates with the estate: McMillan v. Solomon, 42 Ala. 356; Austin v. Field, 7 Abb. Pr. 34; Graves v. Berdan, 26 N. Y. 498; 29 Barb. 100; Kerr v. Merchants' Exchange, 3 Edw. Ch. 316; Winters v. Cornish, 5 Ohio, 477; Womack v. McQuarry, 28 Ind. 103; Stockwell v. Hunter, 11 Met. 448; Ainsworth v. Ritt, 38 Cal. 89; Shawmut National Bank v. Boston, 118 Mass. 128; Whitaker v. Hawley et al., 25 Kan. 674.

Our first inquiry, then, must be to ascertain whether it was the intention of the parties, to be gathered from the whole lease, to grant to the lessee any estate in the land. Now what is the principal thing granted, demised, and for the enjoyment of which the defendant has covenanted to pay rent? The language of the lease is, "the room on the corner of North First Street, etc., and located in the one-story building now erecting on lot 8 in block 15," etc. It is clear that it is not the whole building, or house, but only a certain room located in that building, which is the principal thing demised or rented, and for which a description was necessary to identify it and distinguish it from other rooms in the build-

ing not intended to be demised to the defendant. A lease of lot 8 in block 15 would carry the land and buildings upon it, and so, too, would a lease of the house, or building, carry, at least, the subjacent soil, for "by a grant of a house, the ground whereon it doth stand doth pass:" Sheppard's Touchstone, 90. But the lease is not of the house or building, but of a particular room in the building, viz., "the room on the corner," etc.

There is a distinction between a house and the rooms within it. In Kerr v. Merchants' Exchange, *supra*, the vice-chancellor said: "So in the present case, the leases are not to be considered leases of land, but of apartments in the building, distinct from the land on which it was erected. Leases must be construed according to the intention of the parties, and with reference to the subject-matter, which, in this instance, were rooms or apartments in the building designated by certain numbers. I think it follows, that, with the destruction of the premises which were demised, namely, the apartments in the building, the lease itself, and the rights and interests under it, terminated." So, too, in Stockwell v. Hunter, *supra*, the court say: "The proper construction of such a lease as the present, as seems to us, is, that the lessee's right of occupation of the land is an interest, for the time being, defeasible by the destruction of the building by fire.

So, also, in McMillan v. Solomon, *supra*, it was decided that, by the lease of apartments in a building, in a town, for the purposes of trade, the lessee takes only such interest in the subjacent land as is dependent upon the enjoyment of the apartment needed and necessary thereto; and if they are totally destroyed by fire, this interest ceases. By the lease in question, the defendant took no interest in the subjacent soil, or lot 8, beyond that connected with the enjoyment of the particular room demised or rented. It, "the room on the corner," etc., was the thing leased; and when the principal thing leased was destroyed, the lessee's interest therein necessarily terminated.

The fire dissolved the relation of landlord and tenant, for there was nothing left to hold in tenancy. The thing rented was gone, destroyed by the fire, and, as a consequence, the lease terminated. A few days after the destruction of the building by fire, the defendant, upon the assumption that his lease included a demise of the land and had not terminated, moved another building on the same and on the place occupied by the building destroyed by fire. Upon this state of facts, the plaintiff served upon the defendant a written notice to quit, and a demand of the possession of the premises, which the defendant refused to surrender; whereupon the plaintiff brought an action of forcible entry and detainer. Can it be maintained? It was found as a fact by the court below that the entry of the defendant, in moving the building on the lot, was made "in the daytime and in a peaceable and quiet manner;" and whatever views we may entertain upon such an entry, the argument treated us as precluded from the examination of this subject, and upon that hypothesis we shall consider it. The argument was that the refusal to surrender the premises on the written notice was a holding of the possession by force, or a forcible detainer. Now this is not the case of a defendant unlawfully holding over after the expiration of his lease, for, in that case, he only continues to hold the possession of the identical premises, or some part thereof, originally leased, but it is the case of a defendant entering—peaceably, we must take it—upon the land of the plaintiff, under what

he believed to be a claim of right, and refusing to deliver the possession upon a written notice and demand of the premises.

To maintain his action, then, the plaintiff must bring his case within the principle, "where the possession shall be held by force," as declared in our statute, and Taylor v. Scott, 10 Or. 485, is decisive that he can not recover under this provision unless he proves that the defendant forcibly detains the premises from him. It needs no argument to prove that the refusal of the defendant, under the facts of this case, indicates no purpose or determination, upon his part, to resist the entry of the plaintiff by force. Without some such purpose, Taylor v. Scott, *supra*, is decisive that this action can not be maintained. We do not mean to assert that plaintiff was bound to regain the possession of the premises by the use of force, for that would lead to a breach of the peace, which it was the the object of the statute to prevent and punish; but that there must be something, at least, in the facts or circumstances, to indicate that the possession will "be held by force." In Steinlein v. Halstead, 42 Wis. 424, which was an action of forcible entry and detainer, it appeared that the defendant entered upon the premises by tearing down the fence and moving a building on to the lot.

In regard to the detainer, the testimony of the plaintiff was as follows: "I went into the building and found the defendant to be the owner of the building, and occupied. I told him he had taken unlawful possession here, and I wanted him to remove without delay. He said he would not remove, unless he was forced to do so by law; that nobody could get him away, unless he was forced to go by law; he had two or three men working in the shop." And the court say, "that this language fairly imported that the defendant would resist, by force, all attempts, except through legal process, to remove him from the possession." Now here the language of the defendant and the circumstances of the case manifest a determined purpose to retain the possession and to resist, with force, any attempt of the plaintiff to regain the possession otherwise than by legal process. There is certainly nothing in the facts of the case at bar which indicate any purpose or determination of the defendant to resist the entry of the plaintiff by force. We hold, therefore, upon the facts of this record, that the action can not be maintained. The judgment of the court, including the judgment for one thousand eight hundred and twenty dollars for use and occupation, is reversed and the action dismissed.

SUPREME COURT OF UTAH.

HARRINGTON ET AL. *v.* CHAMBERS ET AL.

Filed February 6, 1882.

NEW TRIAL, WHEN NOT GRANTED WHERE EVIDENCE IS CONFLICTING. — Where the evidence is conflicting, an appellate court will not grant a new trial upon the ground that the findings are contrary to the evidence, unless the preponderance is so apparent and marked that the court can have no hesitancy in declaring that the particular finding under review is against the evidence.

ADVERSE CLAIMANT, IN A SUIT BROUGHT AGAINST AN APPLICANT FOR A PATENT, MAY SHOW that the location of the claim applied for is invalid, for the reason that the ground contained therein is embraced by a third claim, in which neither party has or claims any interest.

DECLARATIONS OF A PARTY IN POSSESSION AND CLAIMING TITLE to a mining claim, made before parting with his interest, against the validity of the location of such claim, are admissible in evidence against the grantee of the declarant.

MINING CLAIM, WORK UPON, WHAT CONSTITUTES.—Work done outside of a mining claim, if done for the purpose and as a means of developing the same, is as available for holding the claim as if done within the boundaries of the claim itself. One general system of work may be devised, well adapted and intended to develop several contiguous claims, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it.

DEFINITION OF LODE AND VEIN.—The terms "lode" and "vein," as used in the acts of congress in reference to the location of mining claims, are such "lodes" and "veins" as are so called by miners.

EXPERT TESTIMONY IS ADMISSIBLE TO SHOW THAT A CLAIM CONTAINED SUCH A VEIN as a miner discovering it would be likely to follow, with the reasonable expectation of finding paying ore.

VALID LOCATION OF A MINING CLAIM MAY BE MADE, whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following them, in the expectation of finding ore.

MINERAL VEIN, WHERE MAY BE SHOWN TO EXIST.—Where the validity of a claim depends upon whether a lode has been discovered and located, evidence that such claim contains a vein within its boundaries, at places other than at the discovery point, is admissible.

ERROR IN ADMITTING AS EVIDENCE IN REBUTTAL TESTIMONY WHICH IS NOT TECHNICALLY SO ADMISSIBLE, is not sufficient to reverse the judgment, as such evidence might have been received in the sound discretion of the court.

APPEAL from the third district court. The opinion states the facts.

Bennett & Harkness, for the appellants.

Sutherland & McBride, for the respondents.

EMERSON, J. The appellants having made application for the government title to certain mining ground known as the Switzerland claim, the respondents filed an adverse claim to a portion of the premises, under a mining claim known as the Parley's Park, and thereupon commenced this action to determine the right of possession of the ground in controversy.

The case was tried by P. L. Williams, Esq., referee, and upon his report of findings of fact and conclusions of law, a decree was rendered in favor of the respondents. A motion for a new trial was made, which was overruled. Thereupon this appeal was taken from the order overruling the motion for a new trial and from the judgment. The record contains the following:

"It is stipulated by the counsel that the testimony taken be considered as taken in all the cases; that will be so as to all the testimony;

that being taken in one case is to be used in all the others as far as applicable."

Besides the above-entitled case, there were referred to the same referee a cross-suit between the same parties involving the same questions and subject-matter, the parties therein being merely reversed; also an action by defendants against the plaintiffs involving the same mining ground, the plaintiffs therein representing the Como tunnel and the defendants therein the Parley's Park mining claim; also an action by the defendants representing the Parley's Park claim against Harry Rickard et al., applicants for and representing the Ontario No. 1 Extension East mining claim, which suit involved the right to the same mining ground in dispute in the principal case, and the foregoing stipulation refers to all of said actions, the attorneys of record being the same in all."

The referee reported the following findings of fact and conclusions of law:

FINDINGS OF FACTS.

1. That the locators of the Parley's Park mining claim, mentioned in the complaint, at the time of the location of said claim, viz., on the nineteenth day of July, 1872, at the "discovery point" of said claim, discovered a mineral-bearing vein, or lode, and the claim was duly recorded August 9, 1872.

2. That soon after said location, to wit, in the month of August, 1872, the locators of said Parley's Park mining claim marked on the ground the boundaries of said claim by setting stakes at the corners thereof.

3. That prior to the twenty-fourth day of July, 1874, and within a year preceding that time, the owners of said claim performed labor and made improvements thereon of one hundred dollars in value.

4. That each year thereafter, up to July 19, 1878, work of the value of one hundred dollars was done on said claim by the owners thereof.

5. That during the year beginning on the nineteenth of July, 1878, the owners of the Parley's Park claim were also the owners of two certain claims, called respectively the "Central" and "Lady of the Lake," the Central adjoining the Parley's Park, and Lady of the Lake adjoining the Central mining claim, and that with a view to the future working and development of all three of said claims, the owners thereof located what is called the "main shaft" in the Lady of the Lake surface ground; that said shaft is in such proximity to said Parley's Park mining claim, that work in it has a tendency to develop said claim, and said shaft was located and intended for the purpose of developing all of said claims.

I find that during said last-named year work was prosecuted in said shaft, and by improvements made thereat, exceeding in value three hundred dollars, and of not less than two thousand dollars in value. No work was done in said year after July 19, 1878, and prior to the fifteenth day of September, 1879, in the Parley's Park surface ground, or within its limits, by the owners thereof. I also find that to the Lady of the Lake mining claim an application for patent was entered and paid for at the United States land office at Salt Lake City, Utah, no protest having been made prior to July, 1878, but no patent for said claim has yet been issued.

6. That at the time this action was commenced the plaintiffs were in possession of said Parley's Park mining claim; that by the admission of the defendants on the trial, the plaintiffs at the commencement of this action had the title to said mining claim by regular conveyances from the locators; that the Parley's Park Silver Mining Company was organized as

a corporation on the nineteenth day of March, 1879, and on or about the first day of June, 1879, received a conveyance from said plaintiffs of said mining claim, and possession thereof, and this suit is prosecuted in the interest and for the benefit of said corporation.

7. Before and at the commencement of this action the defendants claimed an interest in only a part of the premises embraced in said Parley's Park mining claim, and claimed said interest adverse to said plaintiffs; that said adverse claim consists of, and was based solely on, an alleged mineral location, made in October, 1874, called the Switzerland, which embraced a part of the said Parley's Park claim described in the complaint.

8. On the third day of October, 1874, James Cain, Mike Heffron, and John Cammerman entered upon the ground described in the pleadings as the Switzerland mining claim, and marked the boundaries as set forth in the answer and posted at the discovery point on a vein of mineral-bearing rock in place, by them opened and discovered, a notice of said claim, which notice described the said claim set forth in the answer, and afterwards, on the fifth day of October, filed a copy of said notice as posted for record with the recorder of the district, which notice was recorded as follows:

NOTICE OF SWITZERLAND LODE.

We, the undersigned, claim fifteen hundred feet on this lead, lode, or ledge, or deposit of mineral-bearing rock or metal therein.

We claim one hundred and forty feet north-westerly to the Ontario line, and we claim one thousand three hundred and sixty feet south-easterly from this notice and monument, with one hundred feet on each side of the vein for working purposes; we claim all the rights and privileges guaranteed to us by the mining laws of the United States and the local laws of this district. This location is situated one hundred and forty feet south-west of the south-west boundary line of the Ontario patent line stakes, in Uintah mining district. Located October 3, 1874.

JAMES CAIN,	300 feet.
MIKE HEFFRON,	500 feet.
JOHN CAMMERMAN,	200 feet.

That afterward, and on or about the fifteenth of April, 1876, the attention of the persons who had recorded the notice was called to the discrepancy between the record and the notice filed for record, said person having in the mean time ceased to be recorder of the district, and thereupon said person changed said record to correspond to the notice filed.

9. That the locators of said Switzerland claim and their grantees claiming under said location have in each year since done work and made improvements thereon of the value of more than one hundred dollars, and have been in the continuous possession of said improvements.

10. That the defendants by conveyances from the locators and their immediate grantees, at the time of the commencement of this action, had acquired and still have the record title to said claim, and own all the title and interest therein which could be acquired from said locators, and by subsequent compliance with mining laws and customs.

11. The discovery point of the Switzerland claim, and the point where the location notice was posted, is within the bounds of the Parley's Park mining claim.

12. That on the thirteenth day of September, 1879, Thomas Cassidy, claiming the Parley's Park mining claim was forfeited for want of work and improvements, located a mining claim called the "Accidental," em-

bracing the premises in dispute in this action, and all that part of the Parley's Park mining claim lying easterly of the easterly end line of the Ontario mining claim.

13. Said Cassidy, on said day, posted a written notice of location on a lode of rock bearing silver, found within said claim, and at the discovery point. Said notice described the claim by reference to natural objects and permanent monuments, so it could be identified, and described it by metes and bounds, and also contained the name of the locator and date of location.

14. Said Cassidy, on the fifteenth day of September, 1879, filed a copy of said notice of location in the office of the recorder of said Uintah mining district, for record, where the same was duly recorded.

15. Said Cassidy and his grantee of said claim have in each year since said location done work and made improvements thereon of the value of more than one hundred dollars.

16. On the nineteenth day of September, 1879, the said Cassidy conveyed said Accidental claim to the defendant, Robert C. Chambers, who has ever since owned the same.

And the following are my

CONCLUSIONS OF LAW:

1. That the plaintiffs, at the commencement of this action, were the owners and in possession of the mining claim called the Parley's Park, which was then, and still is, a valid mining claim, embracing the premises described in the complaint, subject only to the paramount title of the United States; that the same is now owned and held by the Parley's Park Silver Mining Company by like valid title derived from the plaintiffs during the pendency of this action.

2. That the defendants have no title or interest in said premises, and had none at the time this action was commenced.

3. That said plaintiffs, or their grantees, are entitled to judgment or decree declaring and confirming their title to said Parley's Park mining claim, and the premises embraced therein, and that the defendants have no right, title, or interest in said premises, or any part thereof, and also for costs of this suit. P. L. WILLIAMS, Referee.

In reviewing the case, I shall follow the order adopted by the appellants in their brief.

The first point made by them is, that the first and second findings of fact are against evidence.

The statement on the motion for a new trial, which by the stipulation of the parties is made the statement on this appeal, consists of a transcript of all the testimony taken on the trial of the case. As it was nearly all directed to these points, it could not well be summarized, on the argument; neither can it in this opinion. Since the submission of the case I have gone over all the testimony with these objections in view. This review clearly discloses the fact, that there is a substantial conflict in the testimony as to these points. As these were among the main contested points in the case, it would have been strange indeed if it had been otherwise than conflicting.

It is usually an unpleasant and often a difficult task for an appellate court to determine the truth where there is a conflict of testimony. It is much more difficult than for a trial court in determining upon its findings, or in arriving at a conclusion upon a motion for a new trial, because so much depends upon circumstances which can not be presented

by or preserved in a transcript. The same considerations will apply, with equal force, to the mind of the lower court when the testimony is taken, and findings presented by a referee. It is mainly for this reason that it has become the settled doctrine of the courts, that the findings of the trial court will not be disturbed unless the preponderance is so apparent and marked that the appellate court has no hesitancy in declaring that the particular finding under review is against the evidence. This is the settled doctrine of this court: Walker v. Popper, 2 Utah, 281; Dewey v. Snyder, Id. 344. For this reason we ought not to disturb these findings.

The second point urged upon our attention relates to that portion of the fifth finding of fact which states that the main shaft of the "Lady of the Lake is in such proximity to said Parley's Park mining claim, that work in it has a tendency to develop said claim." It is claimed by the appellants that there is no evidence to support this part of the finding. The testimony, uncontradicted, established as a fact, as stated in the finding, that "the owners of the Parley's Park claim were also the owners of two certain claims called respectively the Central and Lady of the Lake, the Central adjoining the Parley's Park, and the Lady of the Lake adjoining the Central mining claim; and with a view to the future working and developement of all three of said claims, the owners thereof located what is called the main shaft in the Lady of the Lake surface ground." The testimony was also uncontradicted as to the object for which the shaft was located, and its relative location, which was further shown upon the maps put in evidence. It is true, no witness testified in the exact words of the finding objected to, nor was this necessary in order to support the finding. The portion of the finding objected to is a statement of the ultimate facts found by the referee, from this uncontradicted testimony, and is warranted by the facts and circumstances in proof.

The first error of law urged by the appellants relates to the reception of the testimony of one Kennelly over this objection. The testimony and objection were as follows:

"The Switzerland was first claimed in 1874, I think; I don't know whether work was done on the Parley's Park in 1874 or not; that year Dutch John and Caine were working at the Switzerland discovery eighty or one hundred feet south-east of the Parley's Park discovery, and very close to where the shaft is put down; there was very little work done when I first saw it—might have been twenty-five dollars' worth, more or less; the claimants were then at work; I was at work on the Ontario Extension No. 1, east, for Harry Rickard; this claim covered nearly the same ground as the Switzerland, and the north line of it was north of and included the Switzerland discovery point, and I had a conversation with Caine and others working on the Switzerland in regard to these two claims.

"Q. What did they say about the conflict between the ground you were on and their ground? Objected to by defendants' counsel as incompetent and immaterial to show what was claimed between the Rickard ground (the Ontario No. 1), and the Switzerland. Objection overruled. Defendants except.

"A. The owners of the Switzerland stated the title of the Ontario No. 1, east, was the best title of the two—that the title of the Switzerland was no good; Jim Caine said so; he located both claims as I understood."

It is claimed on the part of the appellants that "it was incompetent to attack the title of the Switzerland by showing that some claim, not in controversy nor owned by either party, had a better title. If such attack in any case would be proper, it could not be made by proof of the declarations of a third person."

The Ontario No. 1 claim was not involved in this controversy. The appellants were claiming title, by location and work, to the Switzerland, and it was because they had applied for a patent for the latter that this suit was brought. The basis of the appellants' right to a judgment in their favor was a valid location of the Switzerland. For that to be valid, the ground must have been unoccupied and subject to location under the mining laws.

The object of this testimony, and the only effect it could have, was its tendency, more or less cogent, to show that the location of the Switzerland was invalid. The validity of the location of the Ontario No. 1, had nothing to do with the cost, and was of no matter of consequence only so far as it was given as a reason by the declarant why the location of the Switzerland, upon which the appellants based their right, was invalid, and this effect would follow because they sought by the latter location to appropriate ground already occupied by the Ontario No. 1.

The respondents had the same right to controvert the validity of the Switzerland location on this account as for any other reason which would render it invalid. The question and testimony, taken together, is as if the witness had been asked, What was said about the validity of the Switzerland location? A question which probably, under the circumstances, would not have been objected to, and to which the answer must necessarily have been the same as that given.

The question is not, therefore, obnoxious to this portion of the objection.

Neither is it subject to the objection usually applicable to the declarations of third persons. It was the declaration of an owner, made before he had parted with his interest, and while in possession of and at work upon the ground which was the subject of the conversation. It fairly comes within the rule allowing the admission of declarations. That the declarant was not a party to the then pending suit, and had, since making the declaration, parted with his interest, does not affect the right.

But even if this were not so, as the referee found the fact of the Switzerland location, and all the other facts of the recording, working, and labor necessary to make it good, but held it bad because it was subsequent, in point of time, to the location of the respondent's claim, the Parley's Park, it is absolutely certain that the reception of this evidence did no injury to the appellants' case, even if its reception could by any possibility be held to have been error. The findings show that the referee entirely disregarded this evidence, for so far as they relate to the Switzerland claim they are against it.

The contrary clearly appearing, no injury will be presumed, even if the appellants' objection had been well taken, and the exception of the testimony erroneous. When the record discloses the fact that an error of the court in admitting evidence has not prejudiced the party objecting, the error will not justify a reversal of the judgment: Snell v. Crow, decided at this term.

The second and thirteenth assignments of error at law will be considered together. They are as follows:

2. Also in overruling defendants' objections to the testimony of the witness, Benjamin W. Morgan, and permitting him to testify concerning the location of the Lady of the Lake main shaft, its object, and to doing work thereon as and for work on the Parley's Park claim, and in overruling defendants' motion to strike out all evidence admitted concerning said shaft and work done thereon..

13. The referee erred in not finding as matter of law, that the Parley's Park claim was forfeited for want of work and improvements from July 19, 1878, to September 15, 1879, and the Accidental location therefore valid.

At the trial it was admitted that the Parley's Park Mining Company had succeeded to the interest of the plaintiffs.

According to the fifth finding of fact no work had been done after July 19, 1878, and prior to the fifteenth day of September, 1879, on the Parley's Park surface ground or within its limits by the owners thereof. And that the "main shaft" was located within the surface boundaries of the Lady of the Lake, for the purpose of developing the three claims mentioned, and several thousand dollars' worth of work done thereon during the year beginning on the nineteenth day of July, 1878. The findings further show that during the pendency of the suit, and under the claim that the Parley's Park was forfeited for want of work, the Accidental claim was located embracing the premises in dispute. The fact of this location and a conveyance to one of the defendants was set up in a supplemental answer. From the findings of fact it further appears, that the last-named claim was held and worked in compliance with the mining laws. To obviate this, and to prove that the Parley's Park claim had not been forfeited, the respondents showed the location of the main shaft above referred to, its object, and the work done upon it. The findings in favor of the respondent is based upon this work.

The testimony referred to in the second assignment of error of law is as follows:

B. W. Morgan, sworn for plaintiffs, says: The Parley's Park Mining Company, an incorporation, is in possession of the Parley's Park, Central, and Lady of the Lake claims. The property was deeded to them in May, 1879. I am one of the directors, and have represented the company here, and have had something to do with the purchase of the property. * * * *

Q. In the season of 1879, state what the company referred to did with reference to the working of their three claims?

Objected to by defendants as immaterial and irrelevant to prove what was done upon the Parley's Park—it is immaterial to prove what they did to the three claims.

Objection overruled; defendants except.

A. I went there in company with Mr. Frank Eastman, surveyor, and Mr. Dahlgleish, to locate the shaft. Mr. Eastman had an instrument with him, and we got the corner post of the Lady of the Lake first. This was in June, 1879. We measured from that point and got the boundaries of the Lady of the Lake, the Central, and the Parley's Park. Then located the shaft-house about half-way between the east end of the Ontario claim and the east end of the Lady of the Lake claim. I think Mr. Coullard was there and helped us measure it, and pointed out the points. We located the hoisting-works and the shaft.

Q. What was the object of the shaft?

Defendants objected on the ground before stated.

Objection overruled; defendants except.

A. The object of the shaft was to develop all the property of the Parley's Park Mining Company—the Parley's Park, Central, and Lady of the Lake claims. The object was expressed; measurements were made for that purpose. We located the shaft as near to the north side of the Lady of the Lake ground as possible, for the purpose of catching the vein on the dip. We projected a shaft six hundred feet deep, double compartment—one compartment four and a half by five feet, and the other five by six feet. It was to be timbered by timbers and wall plates, about twelve inches square, and cross-timbered twelve by fourteen inches, and three-inch lagging of the timbers five feet apart from center to center.

Q. You say the contract was let?

Same objection, ruling, and exception.

A. Yes; to J. J. Dahlgleish, in June or the early part of July. Work was commenced the next day after the measurements, and the work continued from that time.

Q. What amount was expended prior to the nineteenth of July?

Objected as above, and same ruling and exception.

A. I could not exactly answer, but I should say several thousand dollars. In pursuance of this plan of sinking the shaft, machinery had been purchased, boilers and engines, and everything else. Work was done on the ground to the amount of a good many hundreds of dollars, over three times three hundred dollars, on the nineteenth of July. Work was kept up all the time, and has been continued since pretty near all the time.

All the foregoing testimony of the witness B. W. Morgan in regard to the location of and work done on the shaft on the Lady of the Lake ground was taken under defendants' objection, and defendants' counsel now moved to strike the same out on the ground first stated in the objections.

The court overruled the motion, and defendants' counsel excepted.

Cross-examined.—No public notice was put up or recorded touching the purpose of sinking that shaft. The Lady of the Lake was not a patented claim. The entry had been made and it was passed. The patent had not come from the department. The shaft and work were entirely within the limits of the Lady of the Lake claim.

The testimony and the facts found bring the case within the spirit and meaning of the amendment to section 2324 of the United States revised statutes.

There is nowhere in the whole case the least intimation that the work done or that proposed was located in bad faith, or that it was in any way a subterfuge, or that there had ever been any contrary statement or claim than the one now set forth and relied upon. On the contrary, there is uncontradicted testimony that it was all done in the utmost good faith, as is evidenced, among other things, by the character and permanency of the work, and the large amount of money expended.

There was no more reason for a public notice being given or recorded of the purpose of sinking the shaft, or of running any tunnel in connection therewith, than there is of any other manner in which claimants propose to develop their claims. Neither the laws of congress nor the rules and customs of miners require it. The case is different where a tunnel is located and run for the discovery of "blind lodes."

True, there was no testimony that what is technically called a tunnel

was yet run or commenced, as, under the circumstances detailed, that would not be done until they should, as the witness states, "catch the vein on its dip." This work was necessarily the preliminary work to starting the tunnel, and was, in good faith, done for the development of all the claims.

The language of the court in Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, is applicable to the facts in this case. In that case the court say: "Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claim intended to be developed by it."

"A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by plaintiff, and we think all work done was a part of that general system, and, as such, applicable to all the claims, which had by purchase been concentrated in a single party, the plaintiff."

The testimony in the case before us leaves no room for doubt, and such is the express finding of the referee, that the work in question was done for the express purpose of developing the three claims owned by the respondents, one of which is the Parley's Park, and, under the decision above quoted, is as available for holding that claim as if done on the claim itself. This holding is also in harmony with the principle enunciated in English v. Johnson, 17 Cal. 107.

The third assignment of error in law is on the admission of the opinions of certain witnesses, "that at the Parley's Park discovery shaft there was such a vein or indication as a miner would be likely to follow with reasonable expectation of finding ore; and in permitting witnesses to testify there was such a vein as a miner would locate, and in permitting witnesses to answer questions in various forms that the vein there was one a miner would locate and follow."

It is claimed by the appellant, that "one of the disputed questions of fact was the claimed discovery of a lode in the Parley's Park claim. Nine witnesses were permitted to say that there was such a vein or such an indication of a vein as a miner would locate or follow with the expectation of getting ore." And further, that "if as experts the witnesses could give opinions, they could only give their own opinions, and it was not competent for them to state what would be the opinions of miners."

The question put to the first witness interrogated upon this point, together with the testimony upon this point, is taken as a sample of that of all the others, all being the same in substance, and is as follows:

"It is brecciated matter at the top—quartzose matter with iron stain. I should say it was a very good indication for ore. I should call it a mineral vein, that is, in the miner's acceptation of the term. It is marked so as to be distinguishable from the inclosing rock by color and texture, and it is distinct in the walls, and well marked. The vein is a little narrower on the west side than on the east side of the shaft, and its course is easterly and westerly.

"Q. State whether or not that was such a vein as a miner discovering it would be likely to follow with the reasonable expectation of finding paying ore.

"Objected to as incompetent, and not the subject of an opinion for an expert. Objection overruled, defendants except.

"A. I would consider it a good indication to follow."

It will be noticed that by this question the witness was not asked to give his opinion or "to state what would be the opinion of miners," but state what, in his opinion, others conversant with the business of mining and locating mines would have understood the indications described by him to mean, and how they would have acted upon this understanding.

Each of the witnesses had been shown to have had superior knowledge and practical experience, as a miner, and was undoubtedly qualified to speak upon the subject. Each had given a detailed statement and description of the indications in question, and had given his opinion, or rather how he would have acted in reference thereto. The right to go thus far was not questioned by the appellants. They claim, however, that the question following this testimony, and as above quoted, is within the prohibition as laid down, and referred to by them, in Greenleaf's Evidence, volume 1, section 441, that a witness should not be allowed to state his views "on the manner in which other persons would probably be influenced, if the parties acted in one way rather than in another."

So far as my examination has extended, this principle has been mainly discussed in connection with cases arising out of policies of insurance, and relating to the misrepresentation of, or the withholding of information by, the insured. In those cases the principal question discussed has been the right to call persons acquainted with the business of insurance to give their opinions as to the materiality of a misrepresentation or concealment. Upon this question there is a conflict of authority, both in this country and in England. It is now thought, however, that the arguments in favor of the admission of such evidence outweigh those urged against it.

The language of the court in deciding the case of Chapman v. Walton, 10 Bing. 57, is peculiarly applicable to the case at bar.

That case was a suit against an insurance broker for negligence in not having procured proper alterations to be made in a policy of insurance, on information conveyed to him by letter, in which he was told that the voyage was altered, and it was "left with him to do the needful with it."

The defendants' counsel, for the purpose of proving that his client had acted prudently in the matter upon the information he had received, and was therefore guilty of no negligence, called several policy brokers, and putting into their hands the policies, the bills of lading, and invoices of the goods and the letter, asked: "What alterations of the policies a skillful insurance broker ought, *in their judgment*, to have procured, having these documents in his possession, and being instructed to do the needful?"

The answers were, "that they thought he would do ample justice by procuring the alterations as made." The jury found for the defendant, and a rule for a new trial was moved on the ground that this evidence had been improperly admitted. The rule was discharged, Lord Chief Justice Tindal, in deciding the case, among other things, saying: "But it is not a simple abstract question, as supposed by the plaintiffs, what the words of the letter mean; it is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same circumstances; * * * and this conclusion, it appears to us, neither judge nor jury could arrive at from

the simple perusal of the letter, unassisted by evidence, because they would not have the experience upon which a judgment could be formed."

It appears, in the case at bar, that the locators of the Parley's Park claim had interpreted the indications which nature had placed upon the surface of this claim to mean that there was a deposit of valuable ore beneath, and with these indications before them, the witnesses were asked if they, and others of their class skilled in their business, would construe them to mean the same.

In neither of the cases, Higbee, Executor, etc. v. Guardian Life Insurance Co., 53 N. Y. 603, and Steinbach v. Lafayette Fire Insurance Co., 54 Id. 90, referred to by the appellants, is the principle decided in the case above quoted from, or involved in the case at bar, either decided or discussed. In the first of the two above-named cases, a physician, called by the defendant, after describing certain symptoms he saw in a casual acquaintance, indicative that the assured had severe headaches, was asked whether he knew enough from what he saw and the information received from the deceased to determine as to the character of these headaches. He answered, in substance, that he got an impression sufficient to satisfy his own mind, but not enough to base a medical opinion upon. He was then asked to state the impression made on his own mind, which question was, upon objection, excluded. *Held*, no error, as it called for an opinion based upon conjecture simply; that the opinion, to be proper evidence, must be based upon facts; that the witness could not speak from mere impressions.

In the second case, the question put to the witness was whether, in his opinion, certain articles, or articles of a certain class which were specially hazardous, formed a part of the line of business of certain traders. The evidence was excluded. In deciding the case the court says: "The defendant's question involved the element of opinion on the part of the witness, as to the propriety of considering fireworks as forming part of the line of business of German jobbers and importers. That was of no sort of consequence, the material point being whether, in fact, the persons known in trade under the designation mentioned did usually and generally, as matter of fact, keep fireworks. Accordingly, the judge at the trial ruled that the opinions of witnesses could not be substituted for facts, and while excluding the question under consideration, instructed the defendant's counsel that he was at liberty to ask if the persons whom the witness knew in Baltimore carrying on the kind of business that the plaintiff did, usually kept fireworks. * * * The question what things were in the line of business the plaintiff was carrying on, was not one to be answered by opinions of experts, but by an investigation of facts, and the judge was, therefore, correct in excluding evidence of opinions on that point, on the part of the witness." No one will question the soundness of these decisions. They are not, however, applicable to the principles involved in the questions under consideration, nor to the facts in this case. These questions did not aim at the substitution of the opinions of the witnesses for the facts. The facts, as they existed, had all been described, and the conclusions to be drawn from them, involving, as it did, special knowledge and skill, were a proper subject for expert testimony: Kohn v. Old Telegraph Co., 2 Utah, 174.

The element involved in the answers to the questions under consideration is very much the same as that in answer to questions requiring the opinion of witnesses touching the market value of property. In cases

where market value is not ascertained by precise facts, but rests on opinion, that is not always an opinion of what others would give for it, that is, consider it worth, or what it would bring in the market.

Both on principle and on the authority of the decided cases, the evidence was properly admitted. And this will be the more apparent if we consider what was the real meaning of the question. As stated above, it did not require the witnesses to state what the opinion of other miners would be, but if the indications which they saw, and had described, were such as miners would follow expecting to find ore, or in other words, was it, in your opinion, a mineral vein.

But, say the appellants, the law requires the discovery of a lode, not of something which the miner may call a lode.

The discussion of this portion of the objection will dispose of the fourth and fifth assignments of error at law.

The mining law of congress provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

In the well considered and reasoned opinion of Judge Field, in the Eureka-Richmond case, 4 Sawyer, it is decided that the miner's definition or understanding of a lode is what is meant by the mining acts of congress of 1866 and 1872, and that a lode is "whatever the miners could follow and find ore."

This interpretation of the law will commend itself to the good sense of every one at all familiar with the subject, and has practically received this interpretation by the miners throughout all the mining region.

By the questions referred to, the witnesses were asked if, in their judgment as experienced miners, the facts and appearances which they had seen and described formed what Judge Field says constitutes a vein or lode within the meaning of the act of congress above referred to.

I have long thought, and still think, that, under the requirement above quoted, a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following, in the expectation of finding ore, and that a valid location may be made of a ledge deep in the ground and appearing at the surface not in the shape of ore, but in vein matter only. This is a fair, reasonable, and, I believe, correct construction of the mining law upon this subject.

Objection is made that testimony was received tending to show that there were indications of ore or vein matter at other points on the surface of the Parley's Park claim than at what was called the discovery.

A sufficient answer to this objection is found in the statement of the referee, that he would receive the testimony "for the purpose of showing a continuity of the vein testified to at the discovery point."

Without this limitation upon the effect which the court declared he should give to the testimony, it was proper and admissible.

The ore, or the indications which determine the prospector to make the location, are seldom confined to one spot. Neither is there any requirement of the law which compels him to name as the discovery point the precise spot where he first finds the ore or the indications which, to his mind, form the lead or lode. In fact, before the location is made, an examination or tracing is often required to determine its course, and in doing this, the croppings may be found in numerous places. Which will finally be marked as discovery may depend upon considerations of con-

venience for work, description, monuments, etc. It was competent for the plaintiffs to show that ore, or mineralized rock, or whatever the "miner could follow and find ore," was not only at the place marked discovery, but cropped out at other points within the "limits of the claim located," and thus strengthen the testimony, already in, in reference to the indications at the point called discovery.

The sixth assignment of error at law relates to the exclusion of the testimony of one McBride, offered to prove the value of certain work. The work upon which he was called to pass an opinion was done some years before he came into that camp or knew anything about it. He did not pretend to know the value of it at the time it was done, and that was the material thing to know, or rather what he was offered to disprove. He was allowed to state the length of time, in his judgment as a miner, it would take to accomplish it. What had been done was there for his inspection. With that as a basis, if he had known what were at that time the usual or going wages, the value of the work would not have been a matter of opinion, but simply a mathematical computation. This he did not pretend to know; in fact, stated that he did not know, and his opinion was rightfully excluded.

The last assignment of error at law relates to the admission, on the part of the plaintiff, of certain testimony, chiefly certificates of assay, after the defendants had closed their case. It was claimed that the testimony offered and received was not rebutting.

The reception of testimony at that stage of the case, if not strictly or at all rebutting, was within the sound discretion of the court. It does not appear that this discretion was abused, but was wisely exercised in the admission of the testimony, in view of what the record discloses as to the cases then on trial, and the situation of the parties.

The judgment of the district court is affirmed.

HUNTER, C. J., concurred.

TWISS, J., dissented.

BOOK REVIEWS.

THE LAW OF THE FEDERAL JUDICIARY: A TREATISE ON THE PROVISIONS OF THE CONSTITUTION, THE LAWS OF CONGRESS, AND THE JUDICIAL DECISIONS RELATING TO THE JURISDICTION OF, AND PRACTICE AND PLEADING IN, THE FEDERAL COURTS. By SAMUEL T. SPEAR, Author of "The Law of Extradition," "The Constitutionality of the Legal Tender Acts," etc. New York: Baker, Voorhis & Co., 1883.

This bulky volume of 872 pages is one of those compendious and convenient hand-books which are becoming so common, in which all the matters externally related to some one general subject, although perhaps widely differing in their essential natures, are collected from their various sources, and arranged under appropriate heads in the form of a single treatise. In the present instance the judiciary and judicial powers of the United States form the general subject; and the special matters treated of include, among others, the jurisdiction of the federal courts, and the rules of pleading, practice, and evidence in common-law, equity, and admiralty suits, which prevail in these tribunals. The entire work is separated into seven parts. Part I is a general discussion of the clause of the constitution, "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." Part II deals with the extent of the judicial power, and examines in separate chapters each of the "cases" as enumerated by the constitution in which the jurisdiction exists. Part III is devoted to the courts themselves, their organization, their jurisdiction, original and appellate, and their modes of procedure and rules of evidence. The eight chapters of this part treat of the "district," "circuit," and "supreme" courts, the "court of claims," "commissioners of circuit courts," "officers of federal courts," "the federal jury," and "the federal law of evidence." Part IV deals with the removal of causes from the state to the federal courts, and under this title discusses the two entirely different matters of the removal of causes to the circuit courts, and the removal of causes by writ of error or by appeal to the United States supreme court. Part V treats of the relations of the federal with the state jurisdiction, including the questions concerning the concurrent and the exclusive jurisdictions, the federal and the state jurisdiction over *habeas corpus*, and the federal jurisdiction over questions arising under state laws. Part VI deals with the relations of the common law with the jurisdiction of the federal courts; and Part VII, of their equity jurisdiction and practice, including the equity rules established by the federal courts themselves.

It is plain from the foregoing brief analysis, that this book embraces some of the most profound and momentous questions of constitutional law, questions which determine the authority of the federal government, and the relations between that government and the several states. These questions require for their full solution, a construction of the entire constitution, and their full discussion belongs to exhaustive treatises upon constitutional law. As most of the important topics treated of in this volume may be found in other works, it must be regarded, we think, as a hand-book, written for the convenience rather than for the instruction of the profession. Viewed in this light, it will undoubtedly be a very useful compendium for those lawyers who practice in the federal courts. The most useful chapters, and those which furnish the largest scope for originality of treatment, are those which deal with the removal of causes from the state to the federal courts. This subject has become one of great practical importance. The full scope and meaning of the congressional legislation upon it, can only be settled by judicial interpretation, and among the decisions attempting such an interpretation, there is, to say the least, not a complete harmony.

Upon the typographical appearance of the volume we are compelled to make one criticism. There are no foot-notes, but all the cases cited are inserted in parentheses into the body of the text. This mode is undoubtedly common (but not universal) in our American reports; but in a text-book, the reader ought not to be compelled to wade through a mass of cited cases, printed in italics, before he can reach the following sentence. A page so printed has not, at least, the neat appearance which should be found in a legal treatise.

RESTRAINTS ON THE ALIENATION OF PROPERTY. By JOHN CHIPMAN GRAY, Story Professor of Law in Harvard University. Boston: Soule & Bugbee. 1883.

The surprise which the author confesses to have felt at the opinion of the supreme court of the United States in the case of Nichols v. Eaton, 91 U. S. 716, containing much that was contrary to what, both as a teacher and a practitioner, he had supposed to be settled law, was the occasion of this work, which is modestly designated as an essay.

The subject of restraints on the transfer of real and personal property, both voluntary and involuntary, may well be considered one of the subtlest branches of the law. Its development, as the author states, is in danger of being marred and confused by too exclusive an attention to particular aspects of the subject. The unquestionable effect of the present work will be to clear away much of the confusion and conflict of authority which surrounds the matters of which it treats. In the discussion of his subject the learned author has displayed great critical acumen, and strong powers of logical analysis, besides giving evidence of deep and varied research into the ancient and modern author-

ities. For convenience and clearness of treatment, the book is divided into two parts. Part first discusses the subject of forfeiture for alienation; that is, where at the creation of an estate no attempt is made to attach any character of inalienability to it, but it is given, either on condition that it shall not be alienated or until it is alienated. Part second treats of restraints on alienation; that is, where the holder of the estate is obliged to keep it in spite of his own wishes, or those of his creditors, and it is sought not to punish but to prevent alienation. Each part is subdivided into several heads, corresponding to the different kinds of estates which it is possible to hold in either real or personal property, and the whole subject is then discussed with reference to its special application to estates in fee simple, estates tail, estates for life, and estates for years. Following this discussion is a summary of conclusions reached by the author. These conclusions must necessarily be of great assistance to the legal student and to the practicing lawyer, not only because they are marked by great clearness of thought and brevity of expression, but because they are contained in so few pages. An appendix is added to the book proper, in which the statutory regulations of New York affecting the subject of restraints on alienation, and the decisions thereunder, are considered. This legislation is designated as crude and reckless, and deservedly unsuccessful in practice. What the author has to say on this subject in the appendix, and the conclusions he there reaches, are of advantage to lawyers practicing in states such as California, where the legislation of New York has been adopted substantially without alteration. In conclusion, it may be remarked that the mechanical execution of the book is faultless, and reflects credit on the publishers.

WARVELLE ON ABSTRACTS. A Practical Treatise on Abstracts and Examinations of Title to Real Property. By GEORGE W. WARVELLE, of the Chicago Bar. Chicago: Callaghan & Co. 1883.

In writing this book on the preparation of abstracts and the examination of title to real property Mr. Warvelle has accomplished a work which had heretofore escaped the attention of American legal authors, although in England several treatises on the same subject, notably that of Mr. Preston, have long been in general use. The author has, therefore, the rare good fortune of supplying a want which has really long been felt, not only by that class of persons commonly known as searchers of records, who are so rapidly increasing in our larger cities, but also by the practicing lawyer, whenever his professional duties require him to give his opinion upon a title to real estate. As indicated by its title, Mr. Warvelle's treatise is essentially practical. It does not profess to exhaustively discuss the law applicable to real estate, although many of the general legal doctrines, a knowledge of which is indispensable either

for the preparation or examination of a title, are considered with fullness. It is, on the contrary, mainly devoted to a consideration of the best methods of compiling an abstract, how and whence the matters to be there stated are obtained, what should appear therein, and the necessary steps to be taken and things to be observed in its examination. These are matters of detail of which the average lawyer has little accurate knowledge, or if he has learned them, it has been through actual experience. As illustrative of the methods which he recommends, and as guides in practice, the author has embodied in his work a large number of forms and diagrams. Lawyers and conveyancers will find the use of these of great assistance to them in what may be called the mechanical portion of the preparation and examination of abstracts. The book is full of other practical suggestions, and is indispensable to that large portion of the profession who are frequently, or even occasionally, called upon for their opinion on matters connected with the title to real estate.

DONOVAN ON TRIAL PRACTICE—TRIAL PRACTICE AND TRIAL LAWYERS. A Treatise on Trials of Fact before Juries. By J. W. DONOVAN. St. Louis: William H. Stevenson. 1883.

The object of the above work is to disclose to the practitioner the secret by which causes are won before juries. It deals with the manner of putting, saying, and doing things in a way to carry conviction to a jury, and thus to secure a favorable verdict. The author enforces the general rules which he lays down for the preparation, management, and presentation of a case, by a wealth of illustration, most of which are derived from the experiences of members of the bar who still occupy a prominent rank in the profession. This feature of the book, aside from the practical advantages which it affords, makes it especially interesting and readable to those who delight in legal anecdote.

NOTES.

In presenting the first number of the WEST COAST REPORTER to the profession, it was the desire of the publishers and editors to report one or more cases from each of the courts included within its scope. In this expectation they have been disappointed; in some instances because the material sent on was not received in time for publication, and in others because that which was sent was not full enough to enable us to give our ideal of a reported case. It will also be observed that cases from some of the courts have been reported, in which the decisions have been rendered for several months. This has been done advisedly, and for the purpose of including in the REPORTER all cases that have been decided in such courts since the issuance of the last volume of their regular reports. We expect soon to catch up with these courts, and also with those omitted from this number, and ask a suspension of criticism on this point until we are able so to do. We feel fully justified in stating that we propose, and very soon will be able, to keep all our promises.

THE case of Tenney v. Bergen, decided by the New York court of appeals on October 23, 1883, is of interest to the legal profession, as it involves the question, when an attorney is justified in withdrawing from a case which he has contracted to carry on, by reason of the misconduct of his client. In this case the plaintiff was employed by the defendant to conduct certain proceedings in the surrogate's court. During the continuance of this employment the defendant, without the knowledge or consent of the plaintiff, retained as counsel in the matter a person who was personally and professionally objectionable to the plaintiff. For such reason the plaintiff withdrew from the case, against the wishes and under the protests of the defendant. In an action by the plaintiff to recover the value of his services, the court held, that the employment of new counsel, without the knowledge or consent of the plaintiff, furnished him with reasonable cause for withdrawing from the case. And further, that the rule that an attorney is bound to an entire contract, should not be very rigidly enforced while the client is left with the right arbitrarily to discharge his attorney at any time.

THE English papers mention a novel case, where the defendant, under an agreement with a mortgagor, erected a large street advertisement on the wall of a house, and the tenant brought ejectment to recover possession of the part of the wall thus occupied, and for mesne profits. The action was sustained, although the defendants contended for the contrary, claiming that they had only an easement or license.

THE necessity for the enactment of some measure for the relief of the supreme court of the United States is apparent to all. For the accomplishment of this purpose two bills have already been introduced in the house of representatives. One of these bills, commonly known as the "Davis" bill, is the same as that which was presented to congress during its last session, but which failed of passage. It provides for the creation of intermediate courts of appeal in each of the present circuits. The other bill restricts the jurisdiction of the district courts, in the expectation that by such means the amount of business of the supreme court will be decreased.

WEST COAST REPORTER.

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RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

HAVING thus stated, by way of preface, the fundamental doctrines of the common law concerning the use of running streams and small inland lakes, and the rights of riparian owners, as established by the general consensus of English and American decisions, I shall proceed to examine, with more of detail, the variations from these doctrines which have been made by the courts or recognized by the legislation of the Pacific commonwealths. In this division of the subject it will be expedient to notice, in the first place, certain matters, connected with various conditions of fact, which may be regarded as settled, and subsequently to discuss those questions which are still open, and which admit of conflicting opinions, or involve, perhaps, a conflict of decision.

I. Prior appropriation of waters on the public lands of the United States.

From the time of the discovery of gold in California the mining interests became, and for many years continued to be in that state, and still are in other Pacific states and territories, of paramount importance, to which agriculture, manufacturing, and all other industries were subordinated. The lands containing the minerals belonged almost entirely to the public domain of the United States. Vast numbers of immigrants poured over these mineral regions, settled down in every direction, appropriated parcels of the territory to their own use, and were prospecting and mining in every mode rendered possible by their own resources, under no municipal law, and with no restraint except that of superior physical force. "The world has probably never seen a similar spectacle—that of extensive gold fields suddenly peopled by masses of men from all states and countries, restrained by no law, and not agreed as to whence the laws ought to emanate by which they would consent to be bound."

In this condition of affairs, the miners themselves adopted certain

"mining customs" to which they yielded a voluntary obedience, and which were afterwards recognized and sanctioned by the legislation of the state and of congress. Scattered over the territory at "camps," "bars," and "diggings," the miners held meetings in each district or locality, and enacted regulations by which they agreed to be governed. The rules once adopted were enforced with rigor upon all settlers in the particular camp. The legislature of California, at the session of 1851, gave to these voluntary regulations a legal and compulsive efficacy by the following brief but admirably comprehensive statute: "In actions concerning mining claims, proof shall be admitted of the customs, usages, or regulations established or in force at the bar or diggings embracing said claims, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action." These "mining customs" or rules were simple, and related to the acquisition of "claims" to mineral lands and to water for the purposes of mining, and prescribed the acts necessary to constitute such an appropriation of a parcel of mineral land or portion of a stream as should give the claimant a prior right against all others, the amount of work which would entitle him to a continued possession and enjoyment, what would constitute an abandonment, and similar matters. In this proceeding we find the origin of the peculiar doctrines concerning water rights as settled in the Pacific communities. Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land. The streams and lakes were all on the public domain; for their advantageous employment it was often necessary to divert water from its natural bed, and to carry it through artificial channels—"ditches" or "flumes"—sometimes of great length and constructed at an enormous cost; there were no riparian owners or occupants except the miners, and the streams could be put to no beneficial use except for purposes of mining. From all these circumstances, and from the very necessities of the situation, it universally became one of the mining customs or regulations that the right to use a definite quantity of water, and to divert it if necessary from these streams and lakes, could be acquired by prior appropriation.

The custom thus originating was soon approved by the courts, and the doctrine became and still is settled in California and other Pacific states and territories, in opposition to the common law, that a permanent right of property in the water of streams or inland lakes which wholly ran through or were situate upon the public lands of

the United States, may be acquired for mining purposes by mere prior appropriation; that a prior appropriator may thus acquire the right to divert, use, and consume a quantity of water from the natural flow or condition of such streams or lakes, which may be necessary for the purposes of his mining operations; and that he becomes, so far as he has thus made an actual prior appropriation, the owner of the water as against all the world, except the United States government. This doctrine, applied at first to the operations of mining, has been extended to all other beneficial purposes for which water may be essential—to milling, manufacturing, agricultural, irrigating, and municipal purposes.[1]

The right of property thus settled by state courts availed against all persons except the United States government. This limitation was soon removed. The United States government recognized the right to water on the public domain thus acquired by prior appropriation, as a substantial and valid right which the government was bound to acknowledge and protect; and it repeatedly approved and adopted the doctrine which had sprung from the mining customs and been settled by the state and territorial decisions.[2] This view was expressly confirmed by a statute of congress passed July 26, 1866.[3] "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and respected in the same; and the right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed." This statute, it is held by the United States supreme court, does not create the right; but it is "rather a voluntary recognition of a pre-existing

[1] *California.*—Parks Canal etc. Co. v. Hoyt, 57 Cal. 44; Hill v. Smith, 27 Id. 480; Wixon v. Bear River etc. Co., 24 Id. 367; Phœnix W. Co. v. Fletcher, 23 Id. 481; Kidd v. Laird, 15 Id. 161; Ortman v. Dixon, 13 Id. 33; McDonald v. Bear River etc. Co., Id. 220; Bear River etc. Co. v. N. Y. Min. Co., 8 Id. 327; Crandall v. Woods, Id. 136; Hill v. King, Id. 336; Hoffman v. Stone, 7 Id. 46; Kelly v. Natoma W. Co., 6 Id. 107; Hill v. Newman, 5 Id. 445; Irwin v. Phillips, Id. 140; and see also Maeris v. Bicknell, 7 Id. 261, 262; Nevada etc. Co. v. Kidd, 37 Id. 282, 312; Farley v. Spring Valley W. Co., 58 Id. 142; Himes v. Johnson, 61 Id. 259. *Nevada.*—Strait v. Brown, 16 Nev. 317; Barnes v. Sabron, 10 Id. 217; Ophir Silver M. Co. v. Carpenter, 4 Id. 534; Lobdell v. Simpson, 2 Id. 274. *Colorado.*—Schilling v. Rominger, 4 Col. 100. *Utah.*—Crane v. Winsor, 2 Utah, 248. *Montana.*—Atchison v. Peterson, 1 Mont. 561. *For Purposes of Irrigation, etc.*—Barnes v. Sabron, 10 Nev. 217; Lobdell v. Simpson, 2 Id. 274. *Of Manufacturing or Milling.*—McDonald v. Bear River etc. Co., 13 Cal. 220; Ortman v. Dixon, Id. 33; and see note in 43 Am. Dec. 279, 280.

[2] Broder v. Natoma W. Co., 101 U. S. (11 Otto), 274; Basey v. Gallagher, 20 Wall. 670; Atchison v. Peterson, Id. 507.

[3] U. S. R. S., sec. 2339.

right of possession, constituting a valid claim to its continued use, than the establishment of a new one."[4]

It will aid in the subsequent examination of the open questions, to fix the exact extent and limits of the doctrine thus formulated, and to ascertain the grounds upon which it was rested by the courts. A very few of the earliest cases enter into no discussion, and seem to speak as though the rule were universal, applicable to all waters under all circumstances.[5] But most of these early decisions state the reasons for the doctrine in the most express manner, and thus indicate its grounds, extent, and limits. One or two illustrations will suffice. In Hoffman v. Stone,[6] Murray, C. J., said: "The former decisions of this court, in cases involving the right of parties to appropriate waters for mining and other purposes, have been based upon the *wants of the community and the peculiar condition of things in this state* (for which there is no precedent), rather than any absolute rule of law governing such cases. The absence of legislation on this subject, has devolved on the courts the necessity of framing rules for the protection of this great interest, and in determining these questions we have conformed, as nearly as possible, to the analogies of the common law. The fact early manifested itself, that the mines could not be successfully worked without a proprietorship in waters, and it was recognized and maintained. To protect those who, by their energy, industry, and capital, had constructed canals and races carrying water for miles into parts of the country which must have otherwise remained unfruitful and undeveloped, it was held that the first appropriator acquired a special property in the waters thus appropriated, and as a necessary consequence of such property, might invoke all legal remedies for its enjoyment or defense. A party appropriating water has the sole and exclusive right to use the same for the purposes for which it was appropriated, and so long as he is not obstructed in the use thereof, he has no ground of action."

It should be observed that the waters referred to in this opinion were all upon public lands. In the case of the Bear River Mining Co. v. The New York Mining Co.[7] the reasons for the doctrine were stated by Mr. Justice Burnett more fully: "It may be said with truth that the judiciary of this state has had thrown upon it responsibilities not incurred by the courts of any other state in the Union. We have had a large class of cases unknown in the jurisprudence of our sister states.

[4] Broder v. Natoma W. Co., 11 Otto, 274.
[5] See, for example, Hill v. Newman, 5 Cal. 445; Kelly v. Natoma W. Co., 6 Id. 107.
[6] 7 Cal. 46, 48 (1857).
[7] 8 Cal. 327, 332 (1857).

The mining interest of the state has grown up under the force of new and extraordinary circumstances, and in the absence of any specific and certain legislation to guide us. Left without any direct precedent, as well as without specific legislation, we have been compelled to apply to this anomalous state of things the analogies of the common law and the more expanded principles of equitable justice. There being no known system existing at the beginning, parties were left without any certain guide, and for that reason have placed themselves in such conflicting positions that it is impossible to render any decision which will not produce great injury, not only to the parties immediately connected with the suit, but to large bodies of men, who, though not formal parties to the record, must be deeply affected by the decision. No class of cases can arise more difficult of a just solution, or more distressing in practical result. The business of gold mining was not only new to our people, and the cases arising from it new to our courts, and without judicial or legislative precedent, either in our own country or in that from which we have borrowed our jurisprudence, but there are intrinsic difficulties in the subject itself which it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice. Yet we are compelled to decide these cases, because they must be settled in some way, whether we can say, after it is done, that we have given a just decision or not.

"The uses of water for domestic purposes, and for the watering of stock, are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases the element is almost entirely consumed. Under a proper system of irrigation, only so much water is taken from the stream as may be needed, and the whole is absorbed or evaporated. Entire absorption is the contemplated result of irrigation. Where properly used as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Considering the different uses to which water is applied in countries governed by the common law, it is not so difficult to understand the principles which regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary, and after doing this he was bound to let the remaining portion flow, without material interruption or deterioration, in the natural channel of the stream to others below him. If the volume of water was not

sufficient for all, then those highest up the stream were supplied in preference to those below. [The correctness of the proposition contained in this sentence, as a common-law rule, may be questioned.] So far as the preferred uses were concerned, no one was allowed to deteriorate the quality of the water. And for the purposes of a motive power, there was no use of the element which could impair its quality. But in our mineral region we have a novel use of water, that can not be classed with the preferred uses, but still a use which deteriorates the quality of the element itself, when wanted a second time for the same purposes. In cases heretofore known, either the element was entirely consumed, or else its use did not impair its quality when wanted again for the same purpose.

"This fact constitutes the great difficulty in this and other like cases. If the use of water for mining purposes did not deteriorate the quality of the element itself, then the only injury that could be complained of would be the diminution in the quantity, and the interruption in the flow. In repeated decisions of this court, it has been uniformly held that the miners were in the possession of the mineral lands under a license from both the state and the federal governments. This being conceded, the superior proprietor must have had some leading object in view when granting this license; and that object must have been the working of these mineral lands to the best advantage. The intention was to distribute the bounty of the government among the greatest number of persons, so as most rapidly to develop the hidden resources of this region; while at the same time the prior substantial rights of individuals should be preserved. In the working of these mines water is an essential element; therefore that system which will make the most of its use, without violating the rights of individuals, will be most in harmony with the end contemplated by the superior proprietor."

The conclusion was reached in this and other cases, that the right of the first appropriator of water from a stream on the public domain is equally protected, so far as the *quantity* is concerned, from damage occasioned by subsequent locators above him, as well as below him. But as to the deterioration in the *quality* alone of the water, by reason of its being used by others for mining purposes before it reaches the ditch of the prior appropriator, this must be deemed *damnum absque injuria*. Any other rule, it was said, would involve an absolute prohibition of the use of *all* the water of a stream above any prior appropriator, in order to preserve the quality of a small portion taken by him from the stream. *J. N. P.*

(TO BE CONTINUED.)

CIRCUIT COURT, DISTRICT OF NEVADA.

PRATT *v.* CALIFORNIA MINING COMPANY.

Filed November 17, 1883.

ASSOCIATION, MEMBERS OF, AND INTEREST THEREIN.—Where W., by deed, conveyed certain real estate to "an association of persons," without naming all of the persons who composed that association at the date of the deed, the court will, upon issues raised thereon, inquire into and determine who composed the association at the time of the conveyance to it, and the interest which each member of the association took in the property conveyed to the association.

PRESUMPTIONS ARISING FROM A DEED MAY BE OVERCOME by evidence, clear and convincing, contradicting such presumptions.

PARTIES, CONDUCT AND ACTION OF.—The contemporaneous and subsequent action of parties in disposing of property in which they are jointly interested, may be considered as illustrating and evincing their understanding of their rights and interests in that property at the time such interests were acquired therein.

LACHES—STATUTE OF LIMITATIONS.—The defense of laches, neglect, or acquiescence is peculiar to equity courts and will be enforced in proper cases. No formal plea of the statute of limitations is necessary to raise this defense in a court of equity. It may arise upon the bill as presented to the court, or upon the case as made by the complainant.

DILIGENCE IN PROSECUTING DEMAND—CHARACTER OF PROPERTY INVOLVED.—Where property is of a speculative, fluctuating value, parties are held to a stricter diligence in the assertion of alleged rights therein than where the property involved is of a value fixed, permanent, and little changeable.

BEFORE Sawyer, circuit judge, and Sabin, district judge. The opinion states the facts.

W. E. F. Deal and *J. F. Lewis*, for the complainant.

R. S. Mesick, for the defendant.

SABIN, J. The complainant in this suit alleges that he is the owner of thirteen feet and one and one half inches of mining ground, undivided, described in his bill, situated on the Comstock lode, in Virginia City, Storey County, Nevada, the same being a portion of that certain mining ground and claim known as and called the California claim. That he has been such owner thereof since December 22, 1859. That defendant owns the remainder of said mining claim, or ground, and holds the same, as tenant in common, with complainant. That defendant has removed from said mining ground ores to the value of thirty million dollars, and upwards, which it has converted to its own use. Complainant prays to be adjudged to be the owner of said thirteen feet and one and one half inches of said mining ground or claim, for partition thereof, for an accounting, and for general relief.

The answer denies all right, title, or interest of complainant in and to said ground, or any part thereof. It is full and responsive to the bill, and contains substantive averments, by way of defense, which need not be here recited. The answer admits that defendant has removed ores from said mining claim, of the value of twenty million dollars, which admission is accepted by complainant, and no evidence was taken thereon.

It also admits that complainant has received no part of the proceeds of said ores, and denies all right in him thereto.

It is admitted, and so stipulated, that whatever interest or estate complainant ever had or now has in said mining ground was acquired by

him through and by virtue of a certain deed executed by James Walsh, dated December 22, 1859, submitted in evidence as complainant's exhibit number four.

This deed, so far as material to this case, reads as follows: "For and in consideration of six thousand dollars paid to me by an association of persons now owning and running a water-mill for the purpose of crushing quartz on Carson river, about one and a half miles above China Town, on said river, in the territory of Utah, and county of Carson, said association originally consisting of Joseph Woodworth, Mr. Hastings, Mr. Pratt, Mr. Wilson, and myself, I have this day sold and quitclaimed to said association my one fourth, undivided, of," etc. (describing the property).

This deed was duly executed and recorded December 22, 1859. Both parties to this suit derive title to the ground in controversy through this deed. The defendant, in its answer, avers that one William Stuart was a member of that association on the date of said deed, and that he took an interest in the property conveyed of one twentieth of all the ground so conveyed to the association; and it further avers that complainant's interest in said ground was never one fifth thereof, but only one twentieth thereof. And upon these averments of the answer arise the real issues decisive of this case.

It is necessary for us, then, to determine these two questions of fact, upon the evidence submitted:

1. Who composed that association on the twenty-second of December, 1859?

2. What interest or estate did each member thereof respectively take in the property conveyed by this deed?

It is conceded by both parties that Walsh and the four persons named in the deed were members of the association at the date of the deed and took under it. It will be observed that the deed runs, not to the persons named, but to "said association." A presumption might arise that the persons named as the original members of the association were the only members thereof at the date of said deed, though the peculiar phraseology of the deed would suggest the contrary.

But when an issue of fact is raised on this very point, the presumption would yield to the truth and fact, as established by the evidence. The evidence on this issue ought to be clear, strong, and convincing.

Complainant's case, as made, rests almost wholly upon his own deposition. That of the defendant has a wider range. It is supported by the depositions of James Walsh, the grantor in said deed, C. H. Fish, and various deeds vesting the title to this mining ground in defendant.

We do not deem an extended review of the evidence necessary in this opinion, as it is all of record. Walsh, in his deposition, tells us very clearly and plainly when, where, and how this association was formed; who composed it, and the interest which was allotted to and taken by each member thereof under his deed, in the property conveyed. He tells us distinctly that it was composed of Woodworth, Wilson, Hastings, Pratt, Stuart, and himself; that he wrote the deed, but can not tell how it happened that Stuart's name was omitted therefrom, as a member of the association, but that he was such, and took his allotted interest under his deed. Strongly corroborative of this statement is the fact that, within six months from the date of that deed, Walsh pays Stuart three thousand

five hundred dollars for the very interest which Stuart acquired in this property, by this deed of Walsh to this association.

The deeds submitted in evidence by defendant, conveying the various alleged interests of all of these parties in this ground, strengthen and confirm the deposition of Walsh in all material points. Walsh was virtually the "head and front," of this association. He owned this property, had purchased it from Comstock, in the month of August, 1859.

It is manifest, from all of the evidence, that he and Woodworth were the managers and the controlling spirits of the association. If Walsh did not know who composed this association on the twenty-second of December, 1859, we have no knowledge from the evidence, aside from the deeds, who did compose it on that date. Pratt is wholly silent on this point, as we shall hereafter see. The deposition of Walsh is in harmony with his action subsequent to his conveyance to this association; in harmony with the action of every member of the association in disposing of his interest in this property; in harmony with the declarations made by Woodworth in March, 1860, and in 1865, to Pratt, as to the extent of Pratt's interest in this property; and it is in harmony with all of the deeds made by all of these parties, submitted in evidence, conveying their interests in this property. These deeds were executed in 1860, when all, or nearly all, of these men were on the ground—when this matter was fresh and clear in their minds. They were not executed with a view of serving as evidence in this case, but they were intended to be, and doubtless were, absolute verities at the time they were executed, and they are the perpetual record of how all of these six persons then understood this whole matter, both as to who composed the association and the respective interest of each in this property. And we are compelled, in view of all of the evidence, to give this deposition of Walsh full credence on all material points.

We can not say this of the deposition of Pratt. He confessedly knew but little of the association or of its affairs at any time, and the lapse of more than twenty years, when he gave his deposition, had not strengthened or brightened a knowledge originally limited, uncertain, and vague.

It is remarkable that in his deposition, covering sixty-four pages, he nowhere tells us who did compose this association. He testifies that he did not know whether it was formed by any written articles of association or otherwise; whether or not it had or kept any records; who were its officers; what funds it had or what became of them; how much he or any member contributed to it; or what became of its property after he left Gold Hill, Nevada, in April, 1860.

He says they shipped and worked about one hundred tons of ore, worth about two hundred and fifty dollars per ton. His counsel, in his argument, states that this ore ought to have netted the association at least seventeen thousand five hundred dollars, yet Pratt does not know what was done with this large sum of money—seems never to have inquired about it, though entitled, as he claimed, to one fifth of it. We can not but think that he stated both the source and extent of his knowledge of this matter, when, in reply to a question as to who was present when the association was formed, he says: "I don't know where they met, and I don't know who were present. All I know, Joe Woodworth told me we had formed a company of five. I was down at Carson river when he told me."

It may serve no useful end to review his evidence at length. Walsh

contradicts Pratt on many—nearly every material point, and we can not but think that Walsh was much the best informed in regard to this association, and all of its affairs, at the dates of which he speaks, and that his testimony is far the most credible. Walsh has no interest in this suit, and his deposition is consistent throughout: See deposition of Walsh, pp. 6–8, 20–23.

On the other hand, Pratt's testimony is very unsatisfactory and sometimes confused and contradictory: See deposition of Pratt, pp. 17–34.

In order fully to understand the strength or weakness of these depositions they must be carefully studied, compared the one with the other, and both with the documentary evidence in the case, and the subsequent conduct of all of the parties composing the association, not omitting that of complainant himself. And it is permissible for the court to take into consideration the contemporaneous and subsequent action of these various parties, in reference to this property, as evincing their construction and understanding of their respective rights and interests under this deed executed by Walsh to this association: Mulford v. Le Franc, 26 Cal. 88; Steinbach v. Stewart, 11 Wall. 576; Ham v. City of San Francisco, 9 Saw. ——.

After careful examination of all of the evidence, we are convinced, and so find and hold, that on the twenty-second of December, 1859, the association to which Walsh conveyed this property, by his deed of that date, was composed of Joseph Woodworth, James Walsh, J. W. Hastings, Metcalf Pratt, complainant, George Wilson, and William Stuart, and that they each took an interest in the property conveyed.

We pass to the second question, What interest did each take in this property?

The presumption arising from the deed, unexplained, would be that they took in equal shares or proportions. This, however, is but a presumption, and may be overcome by evidence not necessarily inconsistent with the deed, in the same manner that a deed, absolute on its face, may be shown to be only a mortgage, or that a legal title may be shown to be held by the grantee, in trust, or that property, apparently community property, may be shown to be the individual property of either spouse. In either case, the extent of the interest or estate may be inquired into and determined.

Much that we have said, in our review of the evidence, as to who composed this association, applies as to the interest which each member thereof took in this property. Walsh tells us, in his deposition, that when he and Woodworth decided what property they would give these men an interest in, they allotted to each his share or interest in the property. That Woodworth and himself reserved each a three-eighths interest. Hastings was given a one-tenth interest, and Pratt, Stuart, and Wilson, a one-twentieth each. And that Woodworth informed the men of their respective interests, and had the deed recorded. Now the deeds in evidence show that this was true, and that each member of that association then so understood the matter, and each one thereafter conveyed just his allotted share, or interest, and never claimed any other than his allotted interest in this property, except complainant.

Is it possible that all of these five men were mistaken as to their interests, not one of them correct, when they were all at work together, knew the property, and were on the ground, and that Pratt, who con-

fessedly knew but little of the association or of its affairs, is alone correct?

These deeds, executed in 1860, seem much more convincing than the confused statement of an interested witness made long subsequent thereto. Walsh conveyed this property to this association December 22, 1859. On March 23, 1860, Pratt, complainant, conveyed to Woodworth one twentieth of this property, his allotted interest. July 23, 1860, Hastings conveys to Woodworth one tenth of this property, his allotted interest. August 16, 1860, George Wilson conveys to King and Othel his one twentieth interest in this property.

There was a mistake evidently in the first deed executed by Wilson, and another deed was executed by Wilson and wife, August 27, 1860, to King and Othel, corrective of the first deed.

September 15, 1860, Stuart conveys to Walsh his one twentieth of this property. Walsh, by two deeds to Sparrow, of date September 9, 1860, and October 9, 1860, and by one deed to Barron, conveys his original three eighths interest in this property and the twentieth interest purchased from Stuart.

In the deed of Walsh to Sparrow of September 9, 1860, after mentioning this association, is this recital: "My interest in the property of said association being originally three eighths of the whole."

Woodworth joins with others in conveying all of their interests in this ground to the grantors of defendant, and hence no particular description appears in this deed of the specific interest conveyed by Woodworth.

These deeds confirm the deposition of Fish as to the sources whence defendant derived title to this property, and the interest conveyed by each member of that association. It is more than probable that, could we have the testimony of Woodworth on this point, it would confirm the testimony of Walsh and these deeds. Pratt testifies repeatedly that Woodworth told him that he, Pratt, owned only a twentieth interest in this property. He told him this when he purchased his interest in 1860, and repeated it in 1865. There is no support for the suggestion that this association was a purchaser of this property for value.

The interest conveyed to each was evidently a gratuity, and was so understood by them all, as is shown from the fact that each disposed of his allotted interest, and never claimed any other or greater interest therein, excepting complainant.

Pratt testifies that he contributed his labor and expenses to the association. Walsh testifies that he understood that all of the men were paid; and thinks they were, and it is undisputed that Walsh sent two hundred dollars to Woodworth, by Pratt, with which to pay Pratt for his labor just before he left, in November, 1859, to return to his home at Grass Valley, California. We think the evidence settles as clearly what the interest of each of these persons was in this property as it does the fact who composed the association. And from it we find and hold that Woodworth and Walsh each took and held, under this deed to the association, a three-eighths interest in the property conveyed; that Hastings took and held a one-tenth interest therein; that Wilson Pratt, complainant, and Stuart each took and held a one-twentieth interest therein, and no more.

It is conceded that Pratt conveyed to Woodworth one twentieth of this mining ground, by his deed of March 23, 1860. It follows, therefore,

from our decision on the last question, that he then conveyed away all of the interest or estate which he ever had in this association property.

And we can not resist the belief that he well knew at the time of the sale of his interest, that he was parting with his entire interest in the property. Woodworth assured him then that he was so doing; and he had a right to believe Woodworth, for he tells us virtually that Woodworth had told him all he ever knew of the association. If, however, there could be any doubt on this point, the conduct of Pratt, for more than twenty-one years after this conveyance, in reference to this property, would seem to place that doubt at rest. In August, 1860, he was at Gold Hill, and received from Woodworth five hundred dollars, the balance due on the purchase money of his interest in this property. He goes away; abandons this and all other interests which he then had at Gold Hill; keeps watch of this property; knows its great value; talks about it; knows that defendant is in possession of it, and working it; and yet, for fifteen years, he never even demands his interest in it. At the end of that time he makes demand, is denied, and again goes away and is silent for more than six years longer before attempting to assert his alleged rights. This is not the usual conduct of men where great interests are at stake, who are strong in the belief of their rights, and diligent in the assertion of them. His conduct, during all of this time, was just such as we might expect of a man who knew that he had parted with his entire interest in the property, and regretted that he had done so.

Another matter of defense is urged upon our attention, to wit, the staleness of plaintiff's claim. And we consider it, since if we are wholly wrong in our determination of the questions of fact involved in this case, we still think that, in view of complainant's laches, neglect, acquiescence, and delay in the assertion of his alleged rights, he has no standing in a court of equity to demand the relief sought, or any relief.

Upon this point, complainant's counsel insist, "that the statute of limitations of Nevada must control the court in the determination of this question." We do not view the subject in this light; but if counsel's position be true, it seems to us that it is absolutely fatal to complainant's standing. The statute of limitations has little if anything to do with this defense—that of complainant's laches—unless by way of analogy. This defense arises independently of the statute, and may arise either upon the bill of complaint as presented to the court, or upon the whole case as disclosed by the evidence.

We will, for a moment, consider the statute of limitations of Nevada. By this statute, the limitation for the recovery of a mining claim, or the possession thereof, is fixed at two years; that of other realty at five years. The statute also declares what shall be considered adverse possession of a mining claim. We presume it will hardly be contended, under this statute at least, but that defendant and its grantors have been in the adverse possession of this ground since 1860, when it acquired title thereto and went into possession thereof: See Abernathie v. Con. Va. M. Co., 16 Nev. 260, and cases there cited. But if this be denied, it certainly must be conceded that defendant has been in adverse possession of this ground since April, 1875, the time when Pratt made his demand, whatever that demand was, and was denied any interest in this property. The bill of complaint virtually alleges an ouster of complainant, but does not fix the date thereof; but this is supplied by the evidence. The answer virtually avers the same thing. The bill alleges a demand by complain-

ant upon defendant for his interest and estate in this property, and for an accounting; that defendant has refused the same, and denies "that plaintiff has, holds, owns, or is entitled to any interest whatever in or to said premises, or any part thereof." This denial by defendant, of all participation by complainant in the rents and issues of the property, coupled with a denial of all right or interest of complainant in the property itself, is, as between co-tenants, equivalent to actual ouster; and such ouster would he found from the date of such denial: Freeman, Cot. & Part. secs. 235, 242; 16 Nev. 260, *supra*.

This denial is fixed by the evidence, as early, at least, as April, 1875—even if it is not fixed as early as March 23, 1860—when Pratt's further interest in the property was denied by Woodworth, and all possession thereof by Pratt ceased.

If, then, this court is controlled, in the matter of this defense, by this statute, what possible standing has plaintiff in court? In limiting the recovery of mining claims to two years, and extending it to five years as to other realty, the state has declared its fixed policy—has said that it would not tolerate unreasonable delay, and it charges upon all persons, at their peril, that they be diligent in the prosecution of all mining rights and interests. There is wisdom in this policy and law of the state, and we see no reason why it should not be enforced in this or any proper case.

In the case before the court, the bar of the statute is not invoked by formal plea. Defendant, being a foreign corporation, could not, under the rulings of the supreme court of Nevada, plead the statute in this action, had it desired to do so. This, however, is of slight significance.

As we have observed, this defense arises independently of the statute of limitations. The doctrine of laches, in equity courts, is much older than any statute of limitations. The jurisdiction of equity courts was established by act of parliament in 1349, though these courts had existed long prior thereto, with a somewhat uncertain jurisdiction. The statute of limitations of James I. was enacted in 1624, nearly three hundred years after the establishment of equity courts by act of parliament.

In Clay v. Smith, Amb. 645, decided in 1767, Lord Camden says: "Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

On this subject, however, it will be amply sufficient to call attention to rulings of the supreme court of the United States, upon the defense here urged.

In Badger v. Badger, 2 Wall. 87, a case strongly analogous to the case at bar, the court says: "Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitations which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitations at law. But there is a defense peculiar to courts of equity, founded on lapse of time and staleness of claim, where no statute of limitations governs the case. In such cases, courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. . Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and can not be excused but by showing some actual hindrance, or impediment

caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In that case the bill was dismissed in the lower court, on the ground of complainant's neglect and delay in the prosecution of the demand. And in affirming that decree, the court further says: "If a further reason were required for affirming this decree, it might be found in the statute of Massachusetts [the statute of limitations]. * * * But we prefer to affirm the decree for the reasons given, without passing any opinion on the effect of this statute."

In Sullivan v. Portland etc. R. R. Co., 94 U. S. 811, this subject is further discussed. In this case the bar of the statute of limitations was not pleaded. The court says: "To let in the defense that the claim is stale, and that the bill can not therefore be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will upon that ground be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly. A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands, wherever a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

In Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, the court adverts to the character of the property involved, and the relative obligation of diligence resting upon those claiming rights or interests therein. The court says: "The fluctuating character and value of this class of property [oil mining property] is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars, as its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much daily. The injustice therefore is obvious, of permitting one holding the right to assert the ownership in such property to voluntarily await the event and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real

estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The delay in this case was less than four years, and in affirming the decree of dismissal, of the lower court, the court further says: "We think, both on authority and principle—a principle necessary to protect those who invest their capital and labor in enterprises useful but hazardous—that we should hold that plaintiff has waited too long." See also Hayward v. National Bank, 96 U. S. 611, and cases there cited; Story's Eq. Jur., vol. 2, sec. 1520, and note 4; Story's Eq. Pl., sec. 813, and note; Pomeroy's Eq., vol. 1, secs. 420, 421; Gottschall et al. v. Mesling et al., 2 Nev. 185; United States v. Flint et al., 4 Saw. 80; Manning v. San Jacinto Tin Co., 7 Id. 418; Dannmeyer v. Coleman et al., 8 Id. 51; United States v. Tichenor et al., Id. 142; Hart v. Clarke, 19 Beav. 349; S. C., 6 H. L. Cas. 655; Clements v. Hall, 24 Beav. 333; 6 De G. M. & G. 232; Norway v. Rowe, 19 Ves. 143.

Now what was complainant's conduct in regard to this property, from the time he sold this interest, in March, 1860, to the time of the commencement of this suit, a period of nearly twenty-one years and a half? There can be no dispute on this point, for we take his own statement thereon. Immediately after selling this interest, March 23, 1860, he returned to his home at Grass Valley, California, to look after his mines there; returned to Gold Hill, Nevada, in August of the same year, and collected five hundred dollars due him from Woodworth. Returned then to Grass Valley; remained there until 1870, when he went to Mineral Hill, Eureka county, Nevada, where he remained, at work for wages, until 1881, when he went to Idaho territory, returning from there to testify in this case. In April, 1875, he visited Virginia City, called at the office of defendant and demanded his interest in this property, and was refused. He returns to Mineral Hill, waits six years and a half longer, and then brings this action. When asked by defendant's solicitor, why he had not looked after this property, his answer is, "Because I neglected it." And when asked how he came to neglect it, he says, "It was through my carelessness, that's all." When questioned further by his own solicitor on this point, he tells us that he never had the necessary means from April, 1860, to the time he gave his deposition, with which he could assert his rights to this property. And then, as if in travesty of his last statement, he tells us that he did commence this action without advancing a dollar, and that the only expense he had been to was in coming from Idaho territory to testify upon the hearing before the commissioner. For twenty-one years and a half he was so poor that he could not do anything toward asserting his rights, but at the end of that time he could bring suit and press it to judgment, without expense or liability.

Now this excuse is without merit, if not untrue. It is a fair inference from the testimony that Woodworth paid Pratt one thousand dollars at the time he purchased his interest, March 23, 1860. In August following, Pratt tells us that Woodworth paid him five hundred dollars, balance due for purchase money. He could certainly then have commenced suit for this property, and this was the very time when he should have done so, when the witnesses were all there, and before the property had passed to innocent purchasers in good faith. He tells us he owned valuable

mines at Grass Valley, California; worked for wages when he wished to do so, and during his ten or eleven years at Mineral Hill he had accumulated between fifteen and sixteen hundred dollars. We do not believe that during these many years, with all of these means, and money, and health to labor when he wished to do so, he was still too poor to bring suit to assert his rights. But if he was poor and embarrassed, of which there is no evidence, it was no excuse for his neglect and carelessness. In Hayward v. National Bank, *supra*, complainant sought to excuse his delay by reason of his poverty. He said "he felt too cast-away to speak to anybody; could not help himself, nor pay the loan; cared very little about anything." Of this the court says: "No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

In view of the authorities cited and the facts in this case, can it be contended that complainant has shown any excuse for his delay in bringing this action?

Diligence is a relative term, and the law justly charges all persons claiming rights or interests in property of a speculative or fluctuating value with a far higher diligence in the assertion of those rights than where the property involved is of a value fixed, permanent, and little changing.

The changes in values occurring in a mining town or locality, in five or ten years, are often far greater than those which occur in an agricultural community in half a century.

Complainant is a miner. He knew the fluctuating, changing, speculative value of mining property. He knew this mining ground was valuable, and advancing in value. He kept watch of it through the papers, talked and corresponded about it with his friends, and knew all this time what was being done with the property, and yet for fifteen years he never says a word in assertion of his rights, and then, after demand and refusal, he waits six and a half years longer before doing anything to enforce his alleged rights.

There is no suggestion of any fraud on the part of the defendant in this whole matter. It has lawfully done all that it has done about this property. It came into the possession of it in 1873, from grantors whose possession runs back to 1860. From that time to the present its possession has been peaceable, exclusive, and adverse to all, unless as to complainant, and certainly adverse to him since April, 1875. By its energy, enterprise, and means it has developed a great mine, at great expense and toil and risk. It has taken this vast sum of twenty millions of dollars from this mining ground, which has been distributed in a thousand different channels.

During all this time complainant had stood quietly by, saying nothing, doing nothing, contributing nothing, incurring no expense, risk, or liability, and now demands his alleged distributive portion of this vast sum taken from this property. The demand is without merit, unconscionable, and stale. We have not been cited to, nor have we found, a single case in any way analogous to this, where any relief has been granted by a court of equity.

Let decree be entered dismissing complainant's bill, with costs.

CIRCUIT COURT, DISTRICT OF OREGON.

NORTHERN PACIFIC TERMINAL COMPANY *v.* LOWENBERG ET AL.

Filed November 16, 1883.

PETITION FOR REMOVAL.—When it appears upon a petition for removal of a cause that the same is removable upon the application of the petitioners, under the second clause of section 2 of the act of 1875, it will not limit or restrain the effect or operation of such petition if the petitioners only ask the court therein to proceed no further "as to them."

PROCEEDING TO APPROPRIATE PROPERTY.—A judicial proceeding to appropriate private property to the use of a railway corporation is subject to the usual incidents of a civil action or suit, including the liability to removal into the circuit court.

SEPARABLE CONTROVERSY.—In an action against two or more persons to appropriate property held by them as tenants in common, to the use of a railway corporation, there is a separable controversy between such corporation and each of said tenants, which can be fully determined as between them, and if either of such tenants is a citizen of a different state from such corporation, he may remove the whole case into the circuit court, under the second clause of section 2 of the act of 1875.

IRREGULARITIES IN REMOVAL.—Although there are irregularities in the removal of a cause, still, if it appears from the record that it involves a controversy cognizable by the circuit court, a motion to remand to the state court will not be allowed.

AMENDMENT.—*Quære:* Can the petition for removal be amended in the circuit court?

ACTION to appropriate property. The opinion states the facts.

Joseph Simon, for the plaintiff.

M. W. Fechheimer, for the defendants.

DEADY, J. On April 17, 1883, the plaintiff commenced an action in the state circuit court for the county of Multnomah against the defendants, as the owners and possessors of a triangular-shaped piece of land, lying in the north-east corner of block 28, in Watson's addition to Portland, containing about five hundred and ninety square feet, to appropriate the same to its use for railway purposes, under the provisions of the corporation act of Oregon: See Or. Laws, 533.

The complainant alleges that the plaintiff is a corporation formed and existing under the laws of Oregon, for the purpose, among other things, of constructing lines of railway from the depots, warehouses, and other terminal buildings of the Northern Pacific and other railway and navigation companies, in the northern part of Portland, to the east bank of the Wallamet river, southerly to East Portland, and northerly to the dry-dock, wharves, elevators, and coal bunkers of the Oregon Railway and Navigation Company, north of Albina; that the plaintiff is authorized by the act aforesaid to appropraite lands for this purpose, and that the use of said premises is necessary for the convenient construction and operation of its proposed lines of railway; that it is unable to agree with the defendants as to the value of said premises; and that on April 17, 1883, it tendered the defendants five hundred dollars in payment of the same.

On April 27, 1883, the defendants, P. Goldsmith and Tillie Goldsmith, his wife, filed a verified petition in the state court for the removal of the cause to this court, accompanied with a bond in the penal sum of one thousand dollars, executed with good and sufficient sureties, and conditioned as required by law.

It appears from the petition that the matter and amount in dispute in the action, so far as the petitioners are concerned, exceeds in value the sum of five hundred dollars exclusive of costs; that the petitioners are

citizens of the state of New York, while their co-defendants are citizens of Oregon; and that the land in question is owned by them in common.

The petitioners allege that in said action there is a controversy which is wholly between citizens of different states, to wit, the plaintiff and the petitioners; and which can be fully determined as between them; and "they pray this honorable court, that as to your petitioners, to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into" this court.

Accompanying this petition there was filed an affidavit of one of the attorneys of the petitioners, to the effect "that from prejudice and local influence" the petitioners "will not be able to obtain justice in said court."

On July 19, 1883, it appearing to this court, from the petition of the attorney for the defendants, that said state court "refuses to order the removal of said cause and the record thereof to this court, and is now wrongfully proceeding therein," an order was made allowing a writ of *certiorari* to be issued, directed to said court, requiring it to forthwith send said record to this court, which was done on the day following.

On October 22, 1883, the plaintiff filed a motion to "dismiss" the cause from this court, for substantially the following reasons:

1. That it does not involve a controversy within the jurisdiction of this court; 2. That it is not one in which there can be a final determination of the controversy, so far as it concerns the petitioners, without the presence of the other defendants, because it "is an action for the condemnation of land for railroad purposes and an exercise of the right of eminent domain, and is incapable of severing without prejudice to other parties defendant; 3. That it is not one between citizens of different states, and could not be removed unless all of the defendants could and did join in the application therefor; 4. That it is not one in which there is a controversy between citizens of different states, within the meaning of the constitution and acts of congress, so as to enable a part of the defendants to remove the same; and, 5. That it can not be removed as to the defendants petitioning therefor and left in the state court as to the remaining defendants, as asked for by the petitioners in their application for removal.

This motion is in form a mistake. It should have been "to remand" and not "to dismiss." If an action is improperly brought here by removal from a state court, the proper remedy is a motion to remand. The words "dismiss" and "remand" are not used interchangeably or indiscriminately in section 5 of the act of 1875 (18 Stat. 472). The former has reference only to a suit brought in the circuit court, and the latter to one removed there from a state court. In the one case, if it appears that the suit is not cognizable in the circuit court, it is dismissed; and in the other, it is remanded to the state court.

Counsel for the plaintiff insists that the motion to dismiss is proper, and in support of his position refers the court to Removal Cases, 10 Otto, 467, where I find that the reporter in the statement of the case speaks of a motion "to dismiss" having been made in the court below and "overruled." This is probably an inadvertence of the reporter. But however that may be, it is certainly no authority that a motion "to dismiss" will lie in such a case. But counsel has leave to amend, and the motion will

be considered as one "to remand" the cause "to the court from which it was removed."

On the argument of the motion it was admitted by counsel for the defendants that the petition for removal was drawn without reference to the *ruling* in Hyde v. Rubble, 104 U. S. 407, and King v. Cornell, 106 U. S. 395, to the effect that the act of March 3, 1875 (18 Stat. 470), repealed by implication the second subdivision of section 639 of the revised statutes, on the subject of removal of causes.

The petition seems to have been drawn under said subdivision, and the affidavit of local prejudice under the third one.

But this latter may be dismissed from further consideration. It is not a petition for removal at all, and if it was the petition of the Goldsmiths, the cause could not be removed upon it, because all the defendants or the persons interested on that side of the controversy therein are not citizens of another state than this when the action is brought.

But if the facts stated in the petition are sufficient to authorize or cause the removal of the cause under the act of 1875, the motion can not be allowed, unless the effect of the petition is to be limited in this respect by the fact that the petitioners only asked the court therein to proceed no further "as to them."

But I do not think that this expression ought to have the effect to control or limit the legal effect of the facts stated in the petition, particularly when taken in connection with the general prayer, that the court would "make the order of removal required by law."

The petitioners were seeking to have their controversy with the plaintiff removed to this court, and if they ignorantly or inadvertently only asked that so much of the action might be sent here, I do not think that is sufficient to prevent the removal of the whole of it, if such was the legal effect and operation of the facts stated. But while the petitioners did ask the court to proceed no further "as to them," they also, in effect, asked that such order of removal be made in the cause as the law applied to the facts stated would authorize and require, and this was plainly for the removal of the whole of the cause or none: See Clark v. Chicago, M. & St. P. R'y Co., 11 Fed. Rep. 355.

There is nothing in the nature or purpose of this action to prevent its removal to this court.

It is an action brought against the owners of private property for the purpose of obtaining the right to use it in the construction and operation of a railway, and at the same time ascertaining the value of such right or the amount that ought to be paid therefor. The statute under which it is brought provides, in effect, that it shall be commenced and proceeded in to final determination, in the same manner as an ordinary action at law.

The plaintiff's right to appropriate private property to its use and the money value of such use are in their nature proper subjects of judicial inquiry. And so it has been wisely provided that whenever a controversy arises between a corporation, like the plaintiff, and any one concerning such right or use, it may be determined in the usual way of disposing of like controversies—by an action at law. And the mere fact that the plaintiff derives its right to appropriate private property to its use from the state, in virtue of its right of eminent domain, is altogether immaterial. In granting this right to the plaintiff, the state has seen proper to impose the condition that, in case of a controversy between it and the

owner of private property, as to the right of appropriation or the value thereof, resort must be had to a judicial proceeding to determine it. And, of course, such proceeding, when instituted, is subject to the usual incidents of an ordinary action or suit, including the liability to removal. In this respect it stands in exactly the same category as an action of ejectment to recover the possession of the same premises. And so it has been expressly ruled by the supreme court in Boom Co. v. Patterson, 98 U. S. 404.

This is also a case in which there is a separable controversy between citizens of different states.

The defendants are tenants in common of the property in question, and the interest therein of each is distinct from that of any other, and may be separately sold, conveyed, recovered, or appropriated. This being so, the case falls exactly within the second clause of section 2 of the act of 1875, providing for the removal of causes to the circuit courts. There is a controversy in it which is wholly between citizens of different states—the plaintiff and the Goldsmiths—which can be wholly determined as between them; and therefore, the whole case can be removed here by either of the parties interested in such controversy: Field v. Lownsdale, 1 Deady, 293.

Besides, the case having been brought here, the question upon the motion to remand is not whether there are any irregularities in the proceedings for removal, but whether on the face of the record it satisfactorily appears that the action does not involve a controversy within the jurisdiction of this court: Osgood v. Chicago D. & V. R'y Co., 6 Biss. 335. That there is such a controversy in this case, is too plain for argument; and therefore the right of the petitioners to have this cause remain within the jurisdiction of this tribunal for trial is clear beyond cavil or doubt.

The petitioners also filed a motion to amend the petition for removal, so as to omit the words "as to your petitioners." According to the view I have taken of the case, these words are not material and do not limit or control the legal effect of the petition. But the petitioners are entitled to make their application for removal as nearly correct as they can, so long as they do not thereby prejudice the right of the adverse party. Without, therefore, determining, only *pro forma*, the right to make the amendment or the effect of it, it is allowed.

The motion to remand is denied.

UNITED STATES *v.* WILLIAMS ET ALS. SAME *v.* SAME.

Filed November 23, 1883.

CUTTING TIMBER ON THE PUBLIC LANDS.—Section 4 of the act of June 3, 1878 (20 Stat. 89), prohibits the cutting of any timber on the public lands with intent to dispose of the same; but the proviso thereto permits a settler under the pre-emption and homestead acts to clear his claim as fast as the same is put under cultivation, and the timber cut in the course of such clearing may be disposed of by the settler to the best advantage.

ID.—But if such settler cuts timber on his claim with the intent to dispose of the same, and not merely as a means of preparing the land for tillage, he is a willful trespasser and is liable accordingly.

MEASURE OF DAMAGES IN AN ACTION FOR CUTTING TIMBER on the public lands, in case the trespass is inadvertent and not willful, is the value of the timber in the tree;

but where the trespass is willful, the value of the labor put upon it by the trespasser must be added to the value in the tree, with interest thereon, in either case.

TRESPASS BY MISTAKE.—The defendant claimed to have taken up a homestead on the north-west quarter of section 22, of township 19, and while intending to cut saw-logs thereon with intent to dispose of the same, did by mistake cut said logs on the north-east quarter of said section: *Held*, that if the defendant had cut the logs on the north-west quarter, as he intended, it would have been a willful trespass, and therefore his mistake was immaterial, and he was liable to the United States for the value of said logs as a willful trespasser.

ACTION for damages for cutting timber on the public land. The opinion states the facts.

James F. Watson, for the plaintiff.

Rufus Mallory, for the defendant.

DEADY, J. These actions are brought by the United States against the defendants to recover the value of certain timber unlawfully cut and removed from the public lands to a certain sawmill in Springfield, Lane county, Oregon, and there sawed into boards and converted to the use of the defendants, to the damage of the plaintiff in the first case in the sum of nine thousand dollars, and in the second one of six thousand dollars.

In No. 932, it is alleged in the complaint that between April 1 and July 13, 1883, there was cut and removed by the defendants therein, from what would be, if surveyed, the nort-east quarter of section 22, in township 19 south, of range 1 west of the Wallamet meridian, nine hundred thousand feet of timber of the value of one thousand eight hundred dollars; and in No. 933, between April 1, 1882, and July 13, 1883, there was cut and removed from the same tract six hundred thousand feet of timber of the value of two thousand dollars.

The defendants, Charles and William Williams, in case 932, answered jointly, admitting the cutting and removing by them to said sawmill, as alleged, of two hundred thousand feet of timber; and said Charles, in case 933, answered, admitting the cutting and removing of six hundred thousand feet by him; and alleging in both cases that such cutting and removing was done by mistake, as to the locality of said timber; that it was only worth twenty-five cents a thousand feet in the tree; and they bring into court in satisfaction of the damages thereby sustained by the plaintiff the sum of fifty dollars in the one case, and one hundred and fifty dollars in the other.

The defendant Pengra answered separately, denying the allegations of the complaint, and the actions were dismissed as to him.

The cases were afterwards submitted to the court for trial without a jury, upon an agreed statement of the facts or evidence in the case.

From this statement it appears that section 23 of said township is unsurveyed, but it has not been public land since prior to 1881, and that at the time the defendants cut the timber on section 22 of said township, they had authority to cut and remove timber from said section 23; that said section 22 is public land, the west half of which was surveyed before this timber was cut thereon, and the line on the north side thereof was run between it and section 15 and sections 23 and 14; that on May 1, 1882, Charles Williams was, and still is, the owner of a tract of land —the quantity of which is not stated—adjoining the north-west quarter of said section 22, and that in said month of May, said Charles "took up a homestead claim" thereon, as he supposed, but which was, in fact,

on the north-west quarter of said section; that said north-west quarter section and the land so taken for a homestead were fit for tillage when the timber was removed, and said Charles took the latter "for the purpose of preparing the same for tillage, and for that purpose removed therefrom, in the spring and summer of 1882, six hundred thousand feet of timber, in good faith, for the purpose of preparing said land for tillage," and in neither case was said timber cut with any intention of trespassing on the public lands or taking timber therefrom unlawfully; and that all of said timber was cut into logs on the land, and was worth twenty-five cents a thousand in the tree, and seventy-five cents a thousand in the log, and no more.

Under the timber act of March 2, 1831 (4 Stat. 472; R. S., sec. 2461), the cutting or removal of any timber from the public lands, other than for the use of the United States, was absolutely prohibited, under a penalty of not less than three times the value of the timber and imprisonment not exceeding twelve months.

But the courts treated the pre-emption, homestead, and mining acts, subsequently passed, as laws upon the same subject, by which the timber act was modified, so as to permit the occupants of the public lands, under these several acts, to cut and remove timber therefrom for the purposes for which they were thus occupied, but not otherwise. And the timber so cut might be disposed of rather than destroyed: United States v. Nelson, 5 Saw. 68.

On June 3, 1878, congress passed a special timber act (20 Stat. 89) for the Pacific States. The first three sections of this act provide for the sale of the unsurveyed public lands, valuable chiefly for timber, but unfit for cultivation. Section 4 provides "that after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy any timber growing on any land of the United States," in said states, "or remove or cause to be removed any timber from such public lands with intent to export or dispose of the same," under pain of punishment as therein provided—with a proviso that nothing therein contained "shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements."

This proviso does not apply to any but lawful settlers on the public lands under the pre-emption, homestead, or mining acts with the intention of acquiring the title thereto. By this proviso, congress in effect declared, as the courts had held, that notwithstanding the general prohibition against cutting timber on the public lands, such settlers might cut timber thereon in the ordinary course of working a mine or preparing a farm for tillage. But in either case the cutting of the timber must be subordinate, if not merely incidental to the mining or cultivation. The latter must not be used as a cloak or pretext for the former: United States v. Smith, 8 Saw. 107.

The proviso does not license the cutting of timber for the purpose or with the intention of disposing of the same. The section expressly forbids this, and the proviso does not allow it. A mere settler on the public lands has no right, as such, to cut timber thereon for the purpose of disposing of it by sale or otherwise. And yet I think the act of 1878 ought to be construed as authorizing a settler to dispose of timber which he cuts in good faith for the purpose of clearing his land for present cultivation. Whatever timber it is necessary to cut to prepare the land for tillage, the

settler ought to be allowed to dispose of to the most advantage to himself—to sell it rather than destroy it.

But this is a privilege easily abused, and the temptation to do so is very strong. Therefore it ought not to be allowed except upon clear proof that the tillage or cultivation has kept pace, acre by acre, or field by field, with the cutting and removal. Otherwise the public lands will soon be pillaged of their valuable timber by the contractors and employees of mill-men, working under the guise of pre-emptors and homesteaders, preparing their so-called "farms for tillage." But "tillage" means husbandry—the cultivation of the land, particularly by the plow.

In Woodenware Co. v. United States, 106 U. S. 432, it was held by the supreme court that in an action to recover damages for cutting and carrying away timber from the public lands, the rule for assessing them is as follows: 1. When the defendant is a willful trespasser, the full value of the property at the time of bringing the action, with no deduction for his labor and expense; 2. When the defendant is an unintentional or mistaken trespasser, the value at the time of the conversion, less the amount which such trespasser has added to its value.

It is admitted that the timber in question was cut and removed from the public lands unlawfully. But it is claimed that the trespass was not willful but the result of a mistake, and therefore the damage ought to be confined to the value of the timber in the tree.

On the argument it was practically admitted by the counsel for the plaintiff that the timber cut by the defendants in the summer of 1881 was cut by mistake. But it is not apparent how the mistake was made; nor is it shown that any pains or care was taken to prevent or avoid the mistake. If the mistake was the result of carelessness or indifference, I do not think it is such a mistake as ought to excuse the defendants from paying damages as willful trespassers: Winchester v. Craig, 33 Mich. 207.

But the claiming that this two hundred thousand feet of timber was cut by mistake is not contested by the counsel for the plaintiff, and the finding of the court will be that the plaintiff is entitled to recover fifty dollars damages on that account, with interest from December 31, 1881.

The six hundred thousand feet cut upon the same tract in the summer of 1882 by the defendant, George Williams, was also cut by mistake; that is, it was cut upon the north-east quarter of section 22 instead of the north-west one, where it is stated that he intended to "take up" a homestead in May of that year.

Leaving out of consideration the fact that more or less of this timber was cut probably a month before this homestead is alleged to have been taken, the district attorney insists that there is no such mistake or inadvertence in the case as will excuse the defendant from the consequences of a willful trespass.

There is no fact or circumstance in the case tending to show that the defendant ever attempted in good faith to make a farm on either the north-east or west quarter-section. Incidentally, it is mentioned in the statement of facts that he built a house on the north-east quarter, but for aught that appears it was a mere loggers' hut. There is no evidence of residence or cultivation, or even intent to do so. The land was surveyed, but the defendant does not appear to have made any application or filed any statement in the land office, evidencing his intention to make a homestead thereon. In short, nothing was done on either quarter-section but what is consistent with the idea that the defendant was upon

the land simply as a logger, engaged in getting out logs for the Springfield sawmill.

But admitting that the defendant was actually on the north-west quarter for the purpose of claiming it as a homestead, that fact did not entitle him to cut the timber from it with intent to dispose of the same, or otherwise, only so fast and far as he put the land in cultivation. It is not practicable to lay down any absolute rule as to how near the cultivation shall keep to the clearing—how close the plow shall follow the ax; but it it is clear that whoever cuts timber on the public lands and removes it therefrom, or disposes of it, must be prepared to show that he is a lawful settler thereon, and that the timber was cut for the purpose of clearing and cultivating the land, and not otherwise. And in case the timber is sold or otherwise disposed of for gain, the farther the clearing is ahead of the cultivation, the stronger is the presumption that it was cut with such intent, and not to prepare the land for tillage.

If the defendant then had cut this timber upon his alleged homestead, it would under the circumstances have been a willful trespass. His mistake is immaterial. It only amounts to this, that whereas, he intended to trespass upon the north-west quarter, he inadvertently got over the line and trespassed upon the north-east quarter.

But it is claimed that the defendant acted in good faith; and it is so admitted in the statement. This is relied upon by counsel to repel the inference from the circumstances, that the defendant was a willful trespasser. But this general statement of good faith is necessarily qualified by the admitted facts of the case. Judged by these, it may be admitted that the defendant so far acted in good faith, that when he was cutting on one quarter he thought he was cutting on the other. And this is probably as far as it was intended to go. But the facts of the case prevent the conclusion that he could have honestly believed that he was entitled to cut timber for sale on either quarter. The timber on these lands probably constitutes their chief value. Ample provision is made for their sale to those who want to purchase them, and also for the use of the timber by the miner and agriculturist who settle upon them for these purposes. But the liberality of the government in this respect ought not to be used to screen those lawless depredators who go upon the public land in the guise of settlers, and then cut and remove the timber therefrom upon the pretense of preparing it for "tillage:" Woodenware Co. v. U. S., 106 U. S. 437.

The finding in this case will be, that the plaintiff is entitled to recover the value of the timber after it was cut into logs—four hundred and fifty dollars, with interest from December 31, 1882—and if the case stated had gone as far as it might and probably ought, the measure of damages would have been the value of the logs when delivered at the sawmill in Springfield.

CHAPMAN v. FERRY ET AL.

Filed December 3, 1883.

PRINTED COPY OF TITLE OF BOOK, ETC.—The "printed" copy of the title of a book or other article, required by section 4956 of the revised statutes, to be delivered or mailed to the librarian of congress, may be "printed" with a pen as well as type, with or without the aid of tracing-paper.

DEPOSIT OF COPIES OF WORK WITH LIBRARIAN.—The copies of a copyright work required by section 4959 of the revised statutes to be deposited with the librarian of congress within ten days after publication, may be so deposited after the printing of the work and before its formal publication.

COPYRIGHT OF MAP, INFRINGEMENT OF.—It is difficult to say, in some cases, what constitutes an infringement of the copyright of a map, but where the subsequent map appears to have been substantially copied from the prior one, without alteration or revision, except in scale and color, there is clearly an infringement, which authorizes a court of equity to enjoin the sale of such infringing map and to require the publisher to account for the profits arising from the sale thereof.

SUIT in equity for an injunction and an account. The opinion states the facts.

H. Y. Thompson, for the plaintiff.

Frederick V. Holman, for the defendants.

DEADY, J. This suit is brought against the defendants to obtain an injunction and an account, because of an alleged infringement by them of the plaintiff's copyright of a "map of the cities of Portland, East Portland, and the town of Albina," obtained by him in 1874.

The suit was commenced on May 13, 1881. A demurrer to the original bill was sustained, on the ground that the title of the map could not be copyrighted, and because it did not appear that the plaintiff had performed the several acts necessary to obtain a copyright: Parkinson v. Lasselle, 3 Saw. 330.

On March 18, 1882, an amended bill was filed, to which a demurrer was sustained, so far as it prayed for a discovery of the number of copies of the defendants' map that had been disposed of and were still on hand, and for a surrender of the latter and the plates on which they were printed: 8 Saw. 191.

It appears from the amended bill that, at and before the commencement of this suit, the plaintiff was the author and proprietor of a map of the cities and towns aforesaid, entitled as aforesaid, drawn upon a scale of about eight hundred feet to the inch, for which he duly obtained a copyright in the year 1874; that on May 10, 1881, the defendants published five hundred copies of a certain map with the same title as the plaintiff's, and then and thereafter sold three hundred copies of the same at five dollars a copy; and that in the preparation of said map the defendants copied the map of the plaintiff without alteration, except to enlarge the scale to five hundred feet to the inch, and change the colors of the lines of the land claims upon which these towns are located, and thereby wrongfully appropriated the skill and labor of the plaintiff.

On September 15, 1882, the defendants answered so much of the amended bill as was not included in the demurrer thereto, by which they deny any knowledge or information as to the plaintiff's alleged copyright, and admit the publication and sale of a map by them, as stated in the bill, but allege that their map includes many additions, improvements, and changes not in the plaintiff's, and deny that in the prepara-

tion of their map they copied the whole of the plaintiff's map, but admit that they made use of said map for comparison and in small part for compiling their map, and allege that by reason of the imperfections in the same and the changes and additions to the towns aforesaid since the publication thereof and prior to the publication of the defendants' the former had "become of little value and unsalable."

It satisfactorily appears that the plaintiff duly complied with the law in obtaining his copyright.

The plaintiff testifies that he filed a tracing of the printed title of his map with the librarian of congress, but it is contended that this is not a "printed" copy of such title as is required by section 4956 of the revised statutes.

The "copy" of such title furnished the plaintiff by said librarian, in pursuance of section 4957 of the revised statutes, does not indicate what was the character, in this respect, of the title deposited with him. It is described in the certificate of the librarian simply as "the title of a map."

A tracing is a mechanical copy or fac-simile of an original, produced by following its lines, with a pen or pencil, through a transparent medium, called tracing-paper. The map, together with the title in Roman letters, was engraved on stone and then printed, and a copy of this printed title, thus made, was filed with the librarian.

This, I think, was a substantial compliance with the statute. A "printed" copy can only be required for convenience of reading as compared with ordinary script or writing. But a copy of the title which has the form and appearance of a printed one, whether made by an impression upon type or with a pen, with or without the aid of tracing-paper, is so far a printed copy. The result and not the means by which the printing is accomplished is the thing to be considered. As legible a copy of the title may be printed or produced with a pen as with type.

The defendants also object that it does not appear from the evidence that the plaintiff deposited two copies of his map in the mail addressed to the librarian within ten days *after* its publication, as provided in section 4959 of the revised statutes; but as they contend, it appears such copies were deposited in the mail some time after the map was printed but *before* it was published or offered for sale.

It appears that the copies of the map were deposited in the library of congress on January 23d—just one month after the copy of the title was. At that time the mail from here to Washington was from twelve to fourteen days in transit, so that it is quite certain that the copies were mailed here near about January 10, 1874. The map was then printed, of course, but how long before is not clear or material. Probably it had not then been formally published or offered for sale to the public. The plaintiff says in his testimony, "I sent them [the maps] on before I offered any copies for sale."

The objection then comes to this, that it is not sufficient to mail the copies after printing and before formal publication, but that the same must be sent to the librarian after publication. The purpose of the statute is to secure a collection in the library of congress of all the works copyrighted under the laws of the United States, and so two copies of each are required to be delivered or mailed to the librarian at an early period after publication—not less than ten days. But if the proprietor of the work will take the pains to send the copies on the very day of publication, I see no reason why he may not. And if a day or

two or ten should intervene between the printing and formal publication of a work, what purpose of the statute is not as well served if the proprietor should be diligent enough to mail or deliver the copies before such publication? None that I can conceive of.

The statute must have a reasonable construction in this respect, having in view the purpose for which it was made. And this is, that the copies can not be delivered or mailed later than ten days after publication, but may be before.

From the evidence it appears that the defendants employed a civil engineer and draftsman to compile or prepare the original of their map, and that in so doing he used the map of the plaintiff and three other older uncopyrighted maps, one of which was in manuscript, together with the public records and common observation, but no actual surveys. The city of Portland and its suburbs, which are the subject of these maps, having been improved and increased in population during the seven years that elapsed between their publication, that of the defendants' contains some matter that is not found on the plaintiff's.

Questions of infringement of copyright are often very difficult to decide. The distinctions between the lawful and unlawful use of a prior publication are sometimes very fine and almost inappreciable. They have been called the metaphysics of the law: Folsom v. Marsh, 2 Story, 105. A person who bestows his skill and time in the surveys, research, and observation necessary to the making of a correct map of any place or locality, does not thereby prevent any other person from using the same means to accomplish the same end. The natural objects, public records, and surveys from which a map is made are open to the examination of any one. But it is clear that no person has a right to sit down and copy the map of another, and thereby defraud the latter of the profit of his labor and skill: Gray v. Russel, 1 Story, 18; Blunt v. Patten, 1 Paine, 397; Cary v. Longman, 1 East, 358; High on Inj., sec. 647.

At the same time, it is not every use of a prior publication that is considered an unlawful infringement. *Bona fide* quotations from a book do not constitute such an infringement. But as absolute originality is not possible in the case of a map, a person may take material from prior publications, provided he bestows on it such skill and labor, in revision or otherwise, as to produce an original result. But the appropriations must not be denied, and the alterations must not be merely colorable, nor the result a servile imitation of the original: Copinger's Law of Copyright, 181, 183; High on Inj., sec. 647.

It is not very clear from the evidence what use was made of the plaintiff's map in the compilation of the defendants', unless it was substantially copied. It is admitted by the defendants, and their draftsman so testifies, that it was used for comparison and correction. But this may mean more or less. The defendants' map may have been so far compared with and corrected by the plaintiff's as to make the former not only like the latter, but practically a copy of it. So far as the defendants' map was corrected by the plaintiff's, it was in effect a copy of it.

Save the additions on the defendants' map, indicating the changes and improvements that had taken place since the publication of the plaintiff's map, there is no difference between them, except that the former is on a larger scale than the other, and has some lines printed in colors. And yet it is possible, although they are both so far alike, that one was not copied from the other, but only compiled from the same sources. But

the probabilities are otherwise. There is a singular coincidence in the two maps, that tends strongly to prove that one was copied from the other. On the plaintiff's map, block 106 in Caruther's addition to Caruther's addition appears with a square piece out of the north-west corner, caused by a re-entering angle. This is the first time that said block appears in that form on any map. The plaintiff testifies that he entered it on his map in that form, as the result of a survey made by himself, that he has since demonstrated to be incorrect. The defendants must have copied it from the plaintiff's map, and the fact that they copied such a singular error, which appears on no other map, indicates strongly that they copied the plaintiff's map indiscriminately and generally. Another coincidence is quite as convincing in the same direction.

The plaintiff's map shows that South First street, in Caruther's addition to Caruthers' addition, does not conform in line and width to the same street in Caruthers' addition to Portland, and it is the only one except the defendants' on which that fact appears; while from the testimony of the plaintiff it is shown they do conform on the county records, and that he ascertained the want of conformity from actual survey. Now as the defendants' map is not made from actual surveys, but from other maps and public records, they must have copied this feature of their work from the plaintiff's. And if the plaintiff was mistaken, either as to the error in the form of block 106 or the conformity of South First street on the county records, the defendants might easily have shown it. But they have not attempted to do so, and the facts thereabout must be taken as stated by the witness.

Add to this the admission made in the testimony of the defendants' draftsman, to the effect that he got all he could out of the plaintiff's map, and "never thought of its being copyrighted," and the only reasonable inference from the premises is, that in the compilation of the defendants' map they substantially copied the plaintiff's, and are, therefore, so far guilty of an infringement upon his copyright.

The plaintiff is entitled to a perpetual injunction against the defendants, as prayed for in his bill, and to an account of the profits realized by them on the sale of the infringing map, for which purpose the cause will be referred to the master.

DISTRICT COURT, DISTRICT OF OREGON.

THE QUEEN OF THE PACIFIC. PACIFIC COAST STEAMSHIP COMPANY, Claimant.

Filed December 18, 1883.

ADMIRALTY RULE 38—"PROCEEDS OF PROPERTY" THEREUNDER.—Where a ship and cargo are saved from a common peril, after a considerable jettison of the latter, and allowed by the salvors to proceed to their destination, where the saved cargo was delivered by the master or agent to the consignees without contribution for salvage or jettison, but on the deposit by each consignee of a sum of money equal to twenty per cent. of the value of the cargo delivered to him "to cover general average," and the execution of a bond for the payment of his proportion of the "losses and expenses" consequent upon such peril, the salvage service being for the benefit of both ship and cargo, the expense thereof constituted a general average; and in a suit against the ship and cargo for salvage, the libelants may elect to treat such deposit as so far a substitute for the cargo delivered, and require the agent of the vessel, under admiralty rule 38, to bring the same into court to answer the exigency of such suit.

IN admiralty. The opinion states the facts.

M. W. Fechheimer, for the libelants.

Cyrus A. Dolph, for the claimant.

DEADY, J. On October 13, 1883, the steamship Queen of the Pacific and cargo were libeled in this court upon a claim of salvage by George H. Flavel and others, the owners, managers, and employees of and on the steam-tugs C. J. Brenham, Astoria, Columbia, and Pioneer. On the same day, the vessel was arrested and claimed by C. H. Prescott, managing agent, for the owner, the Pacific Coast Steamship Company.

On October 15th, the libelants filed a petition herein under the admiralty rule 38, asking that the managing agent aforesaid be required to show cause why certain moneys deposited with him by the consignees of the Queen's cargo should not be brought into court, to answer the exigency of this suit; and on November 3d said agent filed an answer to the petition, and the matter was argued and submitted on November 10th.

From the statements in the petition and the libel to which it refers, and the answer thereto, and accepting the latter when they differ from the former, it appears that on September 4, 1883, the steamship Queen of the Pacific, then being of the value of five hundred and fifty thousand dollars, while on a voyage from San Francisco to Portland with a cargo of not less value than two hundred thousand dollars, and three hundred passengers, grounded about noon, in a dense fog, on Clatsop spit, at the mouth of the Columbia river, and on the following day, at or near high tide, in the afternoon, was pulled off by the steam-tugs aforesaid, under the direction and management of the libelants, after throwing overboard about one fourth in value of her cargo, and allowed by the salvors to proceed on her voyage to Portland, where the remainder of her cargo was delivered to the respective consignees; said agent first demanding and receiving from each of said consignees a deposit in money equal to twenty per centum of the value of such consignment, "to cover general average and other charges;" and also a bond or agreement for the payment of his proportionate share of the "losses and expenses" caused by the stranding and saving of said vessel and cargo, as aforesaid, to be

ascertained by certain named "average adjusters in accordance with the established usage and laws."

Since the argument of the application and on December 1st, the claimant answered the libel, by which it admits that "said tugs rendered valuable aid and assistance to said steamship in enabling her to get off from said spit," and alleges that the value of the vessel is of no greater sum than four hundred and eighty-five thousand dollars, and that at the time of said stranding she had on board one thousand eight hundred and sixty measured tons of assorted cargo, of the value of three hundred and fifteen thousand dollars, of which six hundred and thirty-two measured tons were jettisoned, of the value of about ninety-five thousand dollars.

Where a ship and cargo are saved from a common peril, each must bear its proportion, according to its value, of the compensation decreed to the salvors, but neither is liable for the salvage due from the other: 2 Par. S. & A. 263, 304; The Leathers & Cargo, New Ad. Rep. 427.

The libelants therefore have no claim against the Queen for saving the cargo, and unless they are entitled to have this money brought into court as a substitute for the cargo, they can not in this respect obtain any relief in this suit.

It may be admitted, that this deposit is not the "proceeds" of the cargo within the letter of rule 38, because it was not actually derived from the sale of it. But it was obtained by the claimant from the consignees of the cargo, as a condition precedent to its delivery to them, to stand for and in the place of the cargo, in certain contingencies. Now if this claim for salvage is one of such contingencies, then I think the money is so far the "proceeds" of the cargo, within the spirit and equity of the rule, and ought therefore to be brought into court to answer such claim accordingly.

The contingency upon which this deposit was to stand for the cargo delivered was the liability of the latter to a general-average contribution, consequent upon the stranding of the vessel upon which it was then being carried. So far as appears, there are only two items that can enter into this account in this case. They are salvage and the value of the property jettisoned. There is no doubt about the second one in any case, but the first one depends on circumstances.

An expense incurred for salvage for the benefit of a ship or cargo is a particular average charge upon either the ship or cargo, as the case may be, but where such expense is incurred for the benefit of both, it constitutes a general average.

In Peters & Co. v. Warren Ins. Co., 1 Story, 468, Mr. Justice Story says: "General average is commonly understood to arise from some voluntary act done, or sacrifice or expense incurred, for the benefit of all concerned in the voyage or adventure; and then it is apportioned upon all the interests which partake of the benefit. But the mere fact that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done or sacrifice or expense voluntarily incurred for the common benefit, does not make it necessarily a case of general average by our law. Salvage is properly a charge, apportionable upon all the interests and property at risk in the voyage, which derive any benefit therefrom. But although it is often in the nature of general average, it is far from being universally true, that, in the sense of our law, all salvage charges are to be deemed a general average. On the contrary, these charges are sometimes a simple average

or partial loss. We must, therefore, look to the particular circumstances of the case to ascertain whether it be the one or the other." In Job v. Langton, 6 El. & B. 779, the court says: "All expenses incurred from the misadventure, till all the cargo has been discharged, confessedly constitute a general average." And in 1 Par. S. & A. 362, it is said that "salvage, * * * being for the benefit of all persons concerned in ship, cargo, and freight, falls within the rule of general average:" See also Id. 436. The expense of salvage in this case, whatever it may be, was consequent on the misadventure of stranding the vessel, and the service was certainly for the benefit of both ship and cargo. Consequently it is a general average—one of the items which the deposit was made to meet.

The bond which was taken to meet the "losses and expenses" incurred by the stranding, as might be ascertained by the "average adjusters," must be considered a further security for the payment of the contribution that may be found due from the consignees for the loss occasioned by the jettison, in case the deposit should be found insufficient to satisfy it and the expense of salvage.

The claimant was allowed by the salvors, in the interest of commerce and for the convenience of all concerned, to bring the saved property into port, where the master or agent assumed the responsibility of delivering the saved cargo to the consignees, without payment of salvage or contribution for the jettison, but taking at the same time a deposit and bond from each of them as a substitute and security therefor.

In so doing, he acted as the agent of all the persons concerned: 1 Par. S. & A. 473. And I think that so far as this deposit is concerned, it ought to be regarded for this purpose, as a substitute for the cargo, and that the libelants may ratify the substitution and claim the benefit of it in this suit.

The contribution for the jettison is a matter between the ship and cargo, but the contribution for salvage is one for which they are both bound to the libelants in proportion to their value.

While this conclusion is only just to the libelants, it is not prejudicial to the rights of any one. It reaches the manifest equity of the case, and is, I think, fairly within the spirit and purpose of the admiralty rule 38.

The prayer of the petition is granted, and it appearing that the agent has in his hands not less than thirty thousand dollars of such deposit, he is required to bring the same into court to answer the exigency of this suit, and particularly the claim of the libelants against said saved cargo for salvage.

SUPREME COURT OF CALIFORNIA.

PEOPLE *v.* SHEM AH FOOK ET AL.

In Bank. Filed December 24, 1883.

REFUSAL TO ALLOW DEFENDANTS TO WITHDRAW THEIR PLEA OF NOT GUILTY, and to interpose instead a demurrer and a motion to set aside the information, is not an abuse of discretion.

DENIAL OF A MOTION TO SET ASIDE AN INFORMATION which was subscribed by the district attorney of the county, is not error, where it does not affirmatively appear from the transcript that before the filing thereof the defendants had not been legally committed by a magistrate.

EVIDENCE OF THE DEFENDANT'S MANNER AND CONDUCT WHEN ARRESTED, and comments upon the same, made by a third person at the time, in the presence and hearing of the defendants, is admissible.

WHETHER LEADING QUESTIONS SHALL BE ALLOWED TO BE PUT by the prosecution to its own witnesses, is a matter of judicial discretion.

REFUSAL TO STRIKE OUT THE TESTIMONY AS TO CERTAIN ADMISSIONS by the defendants, made after their arrest, while in the sheriff's office and in the jail, is not error, where there is nothing to show that such admissions were not voluntary.

ADMISSIONS MADE BY ONE DEFENDANT IN A CONVERSATION with a third person are competent evidence against him on a trial of two defendants jointly for murder.

EXCEPTIONS TO STATEMENTS OF COUNSEL.—Mere objections or "exceptions" made by defendants on the trial to statements by the counsel for the prosecution in his argument before the court and jury, can not be considered by the appellate court, where no action by the trial court in the matter was demanded, and no exception was taken to any ruling or action of the court.

INSTRUCTIONS BY THE COURT—CIRCUMSTANTIAL EVIDENCE.—Where defendants' counsel made attacks upon circumstantial evidence as a ground for conviction, and called the attention of the jury to certain cases found in books, where it was claimed innocent persons had been convicted upon circumstantial evidence, an instruction of the court cautioning the jury against attaching too much importance to such cases, in connection with other and proper instructions concerning circumstantial evidence, is not error.

APPEAL from a judgment of the superior court for the county of Fresno, entered upon a verdict convicting the defendants of murder. At the trial, the counsel of the defendants asked leave of the court to withdraw the plea of not guilty, and for permission to demur and move to set aside the information. This the court refused. Certain admissions of the defendants, made in conversation between themselves, and overheard by the witnesses for the prosecution, who had been so placed that they could overhear what was being said, were admitted in evidence, against the defendants' objections, and a motion to strike out such testimony was overruled. In his instructions to the jury, the court charged them against attaching too much importance to certain cases which were called to their attention by the counsel for the defendants, the effect of which cases was to show in how many instances innocent persons had been convicted upon circumstantial evidence. The further facts appear in the opinion.

Thomas D. Riordan and *W. Barry*, for the appellants.

Hart, attorney general, for the respondent.

The COURT. 1. We can not say the court below abused its discretion in refusing to allow defendants to withdraw the plea of not guilty, and to interpose a demurrer and motion to set aside the information.

2. Nor did the court err in denying defendants' motion to dismiss the information. On motion of defendant an information may be set aside

if it be not signed by the district attorney, or if, before the filing thereof, the defendant was not legally committed by a magistrate: Penal Code, 995. In the case at bar, the information was subscribed by the district attorney of the county, and the transcript does not show but that the defendants were legally committed by a magistrate.

3. The court properly disallowed defendants' challenge to the panel of jurors. There was no material departure from the forms prescribed for drawing and return of juries: Penal Code, 1059.

4, 5, 6, 7. We think the testimony of the witness Witt, as to the manner and conduct of defendant Ah Fook, and the witness's statement that another person spoke of the peculiarity of defendant's manner at the time, was admissible. Nor was the testimony of the constable, Meade, as to defendants' manner and conduct when he arrested them, inadmissible—taken in connection with the declarations of Shem Ah Fook.

8, 9, 10. The eighth, ninth, and tenth points of appellants are based on objections to questions of the prosecution, on the ground that they were leading questions. It was for the court below, in its wise discretion, to permit questions leading in form.

11, 12. There was no material error in denying defendants' motion to strike out the testimony of the witness Millard, nor in overruling the objection to Hubner testifying. As to the statements said by the witness to have been made by defendants, in the evening, in the sheriff's office, and in the interval between the first and second days' proceedings before the committing magistrate, however liable to abuse such mode of securing evidence may be, we can not say the statements of defendants, as alleged, were not voluntarily made. There is nothing in the transcript to indicate that the statements made by defendants to each other in their cells in the jail were not voluntary.

13. The objection to the testimony of the witness Hubner as to admissions of Ah Tie, in conversation with Ah Ping, was properly overruled. Such admissions were proper evidence against defendant Ah Tie.

14, 15, 16. The "exceptions," or objections to statements of counsel for the people in argument, and in the presence of the jury, can not be considered. No action of the court with reference to such statements was demanded or requested, nor was there any exception to the ruling or action of the court.

17. The court gave the instructions which were given as a charge to the jury.

18. The court did not err in instructing as to counsel reading from cases where convictions have been had upon circumstantial evidence: People v. Cronin, 34 Cal. 191.

Judgment and order affirmed.

SMITH *v.* TAYLOR ET ALS.

In Bank. Filed December 26, 1883.

ATTACHING CREDITOR MAY VOLUNTARILY RELEASE PROPERTY OF THE DEBTOR taken on attachment, without an order of court, and a direction by the attorney of the creditor to the sheriff to release the property attached will have such effect.

APPEAL by the defendant Taylor from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order refusing him a new trial. This was an action on a

promissory note against John A. Robinson, as maker, and J. A. Ledden and S. P. Taylor, as indorsers. The defendant Taylor answered separately, alleging that he was merely a surety, and set up in defense that the plaintiff had attached sufficient property of Robinson to satisfy the note, and had subsequently released the attachment without his knowledge or consent. The court found against him on this last issue, and ordered judgment accordingly. The further facts appear in the opinion.

C. H. Parker, for the appellant.

Craig & Meredith, for the respondent.

SHARPSTEIN, J. The finding, "that the plaintiff did not, at any time, release or cause to be released from attachment property of the defendant Robinson," is not justified by the evidence, which shows "that real property sufficient in value of the defendant Robinson had been duly attached to satisfy any judgment which might be obtained in said action against said Robinson and Taylor;" and that the sheriff was directed by the attorneys of the plaintiff to release said property of said defendant Robinson from said attachment.

The claim of respondent's counsel, that real property attached as this was can only be released by order of the court, is not, in our opinion, tenable. The code provides for a discharge of a writ of attachment, by order of the court, on motion of the defendant, on the ground that the same was improperly or irregularly issued. But there is nothing to indicate an intention to preclude an attaching creditor from voluntarily releasing property attached, or that such a release would not be valid until it received the sanction of the court. And we know of no way in which the plaintiff could have made a release more effectual than by directing the sheriff to release the property described from the attachment. The cases which hold that the sheriff could not do this without the order of the court, or the consent or direction of the plaintiff, have no application to this case.

Judgment and order reversed.

MORRISON, C. J., and MCKINSTRY, THORNTON, MYRICK, and MCKEE, JJ., concurred.

MORROW *v.* SUPERIOR COURT, ETC.

In Bank. Filed December 26, 1883.

JUSTICE'S COURT HAD JURISDICTION PRIOR TO THE ADOPTION OF THE PRESENT CONSTITUTION to entertain an action by one having a claim against a life insurance company, incorporated under the act of April 22, 1866, against a stockholder in such company, to recover his proportionate share of such liability, when the same is less than three hundred dollars.

LIABILITY OF A STOCKHOLDER FOR THE DEBTS OF SUCH COMPANY IS PRIMARY, and not contingent upon the fact that the creditor has exhausted his remedies, or any part of them, against the corporation.

CERTIORARI to the superior court of the city and county of San Francisco, to review the proceedings of said court in the case of Barron v. Morrow, appealed to it from the justice's court. The further facts appear in the opinion.

E. W. McGraw and *James T. Boyd*, for the petitioner.

Vincent Neale, for the respondent.

SHARPSTEIN, J. The principal question in this case is, whether, before the adoption of the present constitution, one having a claim against a life insurance company, incorporated under the act of April 22, 1866 (Stats. 1865–6, p. 752), could bring and maintain in a justice's court an action against a stockholder in such incorporation, whose proportionate share of such liability would be less than three hundred dollars.

Whether he could or not, depends very much on the construction to be given to section 17 of said act, which is as follows: "Each stockholder of the company shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of the capital stock."

In the brief of counsel for petitioner it is said, that "in any action to enforce this liability it is necessary that there should be ascertained and determined:

"1. The amount of capital stock of the corporation.

"2. The amount of this capital stock owned by each stockholder.

"3. The total amount of debts and liabilities of the corporation.

"4. The proportion of such debts and liabilities for which each stockholder is liable."

And it is further said, that "this can not be done in a common-law action."

But if an individual creditor can maintain an action against an individual stockholder for such proportion of the indebtedness of the company to such creditor, as the stock of such stockholder bears to the whole of the capital stock of such company, it would only be necessary in such action to ascertain the whole amount of the capital stock of such company, the amount owned by the stockholder sued, and the amount of the indebtedness of the company to the creditor suing such stockholder. This could be done quite as well at law as in equity.

The first clause of section 16 of the act of April 14, 1853, as amended by the act of April 27, 1863, read as follows: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be prosecuted."

In Larrabee v. Baldwin, 35 Cal. 155, it was said it would not be a strained construction of that clause, standing alone, to hold that a creditor of the company might maintain an action against an individual stockholder on his personal liability, although it "might be open to some doubt, whether it was contemplated that each creditor should be compelled to pursue each stockholder for his individual share of his debt, or whether he might make his money out of the first one he could find, whose liability is sufficient to cover the indebtedness." But after throwing out this intimation, the court decided the case before it, mainly, if not wholly, on other provisions of the same section.

In the clause last above quoted it is expressly provided that "joint or several actions may be prosecuted" on the stockholder's liability. That provision is not contained in the clause under which the petitioner was sued. But it is expressly provided that each stockholder shall be *individually* and *personally* liable for a proportion of all the debts, and he is necessarily liable for the same proportion of each debt. *All* the debts means *every* debt of the company; and it does seem to us that any creditor is entitled to sue any stockholder for such proportion of the indebtedness

of the company to such creditor as the stock of such stockholder bears to the whole capital stock of said company. The stockholder is made *individually*, not *jointly*, liable. And if it should be the misfortune of any stockholder to be sued by each creditor of the company, the aggregate of their several recoveries could not exceed the sum which all might recover in a joint action.

As to the primary liability of the stockholders of the company, for its debts, we entertain no doubt. There is a provision for a guaranty fund, to which recourse may be had after the assets from premiums, and other sources, exclusive of capital stock, have been exhausted. But as we construe it, there is nothing in the act which postpones a creditor's right of action against a stockholder, until after he has exhausted his remedies, or any part of them, against the company for the recovery of his debt. The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation as it would be if the act had made no provision for any other liability than that of stockholders for the debts of the company.

Judgment affirmed.

MORRISON, C. J., and THORNTON and MYRICK, JJ., concurred.

BARSTOW *v.* SAVAGE MINING CO. ET AL., KUTZ, Intervenor.

In Bank. Filed December 26, 1883.

BONA FIDE PURCHASER FROM A THIEF OF CERTIFICATES OF STOCK, standing on the books of the company in the name of one person, although owned by another, acquires no title as against the real owner, notwithstanding such certificates were regularly indorsed by the person in whose name they stood, if they were stolen without the fault or negligence of the owner.

CERTIFICATE OF STOCK IN AN INCORPORATED COMPANY is not a negotiable instrument according to the definition of the civil code.

BONA FIDE PURCHASER OF CERTIFICATES OF STOCK FROM ONE who has not the title and has no authority to sell, who relies upon the negligence of the owner for his protection, must show that such negligence was the proximate cause of his deceit.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the intervenor. The opinion states the facts.

Bartlett & Smith, for the appellant.

Gordon, Waymire, and *Lloyd, Newlands & Wood*, for the respondents.

MYRICK, J. The facts of this case, as presented in the findings, are substantially as follow:

Prior to February 5, 1879, the defendant, the Savage Mining Company, duly issued its three certificates of stock, No. 24,843, certifying that C. A. Schmitt, trustee, is entitled to thirty shares of the capital stock of the said company, transferable on the books of the company by indorsement on and surrender of the certificate; No. 25,537, in the name of Randolph, Mackintosh & Co., trustees, for ten shares; and No. 25,704, in the name of Greenbaum, Helbing & Co., trustees, for ten shares, in like tenor as the first. On the fifth of February, 1879, the plaintiff purchased from the owners thereof, for value paid, the said fifty shares, and received the said certificates, properly indorsed. Thereafter, on or about May 1, 1879, the said certificates were, without any fault or negligence of the

plaintiff, stolen from him, and were, on the sixth of May, 1879, sold and delivered by the thief to the defendant Rogers, he, Rogers, purchasing the same in the usual course of business, for value, without notice of any defect in his vendor's title.

The plaintiff never sold the certificates or the stock which they represent, or authorized or acquiesced in or ratified such sale. On the thirtieth of May, 1879, plaintiff demanded of the defendant Rogers the return of the certificates, and Rogers refused to deliver them. The intervenor, Kutz, purchased the certificate for thirty shares (subsequently to the theft) in the ordinary course of business, for value, without notice of any defect in his vendor's title, and whatever title he (Kutz) has, he derived from Rogers. None of said fifty shares have been transferred on the books of the company from the names of the parties set forth in said certificates, except the ten shares represented by certificate No. 25,537, which have been sold for assessments. After the theft the plaintiff duly demanded of the company a transfer of said fifty shares from the names in which they stand, as aforesaid, to his own name, and the issuance to him of a certificate therefor, and such transfer and issuance were refused. On the eleventh of August, 1879, the intervenor presented certificate No. 24,843 to the company, offered to pay any assessment levied on the stock represented thereby, and demanded a transfer to himself of the thirty shares and the issuance to him of a new certificate, which transfer and issuance were refused on the ground that the company had already been notified by plaintiff of his ownership of the stock and of the theft, and been directed to stop transfer thereof, and had been, in connection with Rogers, sued by plaintiff concerning the ownership of the stock. The court then found as to the value of the stock at different times involved in the transactions. From these facts the court below concluded as law that the intervenor, Kutz, was entitled to judgment against the plaintiff and the company for his costs, and against the company for four hundred and sixty dollars damages, and that the defendant Rogers was entitled to judgment against the plaintiff for his costs, and rendered judgment accordingly. From this judgment the plaintiff appealed.

It will be seen from the foregoing that the question for consideration is, if shares of stock of a corporation standing in the name of A. on the books of the corporation be owned by B., the certificate being properly indorsed, and if the certificate be stolen without the fault or negligence of B., does the purchaser from the thief take title so as to prevent B. from claiming the property?

1. It is well known to be the general rule, that a thief acquires no title to the stolen property, and that he can pass none. "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell, from the true owner, will not enable the possessor to give a good title:" Covill v. Hill, 4 Denio, 323. To the general rule above stated there are exceptions as to money and negotiable securities.

2. A negotiable instrument is defined to be "a written promise or request for the payment of a certain sum of money to order or bearer:" Section 3087, Civil Code. There are six classes of negotiable instruments, namely: 1. Bills of exchange; 2. Promissory notes; 3. Bank notes; 4. Checks; 5. Bonds; 6. Certificates of deposit: Section 3095, Civil Code.

A certificate of stock, namely, that A. is the owner of shares of stock

in an incorporated company, is not a promise or request for the payment of money, nor does it contain any of the elements of such promise or request. "A negotiable instrument *must not contain* any other contract than such as is specified in this article:" Section 3093, Civil Code.

"The distinction between all these [notes, bills, corporation bonds] and corporate stocks is marked and striking. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation:" Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 627; Sherwood v. Meadow Valley Mining Co., 50 Cal. 412.

The case last above cited, Sherwood v. Meadow Valley Mining Company, was an action based on the following facts: One Schmeidell was the owner of twenty shares of the stock of the defendant, and held a certificate therefor issued to himself, as trustee, and he sold the shares and delivered the certificate, properly indorsed, to Levy, who lost the same, not having had the stock transferred on the books of the corporation. The plaintiff purchased (as he supposed) the stock, and received delivery of the certificate, for value, in the usual course of his business as a stock broker. It was held that the plaintiff acquired no right to the stock.

In the subsequent case of Winter v. Belmont Mining Company, 53 Cal. 428, the facts were, that Winter was the owner of certain shares of stock, and had them transferred on the books of the company to the name of "M., trustee," who indorsed the certificates in blank, and delivered them to Winter. Subsequently M. stole the certificates from Winter, and sold them in the market in the ordinary course of business. The court, in commenting on the statute providing that shares of stock may be transferred by indorsement and delivery of the certificate, but that the transfer is not valid except as between the parties until entered on the books of the corporation, and on certain prior cases holding that until such entry the stock may be sold on execution against the person in whose name the stock stood, applied that principle to the case before it of stolen certificates, and held that the purchaser from M., the thief, took a good title.

We are not prepared to follow that case (Winter v. Belmont Mining Company) in what is said in the opinion regarding the negotiability of certificates of stock; but, on the contrary, are of opinion that the principle that the thief of the stolen property (it not being money or negotiable securities) can pass no title, should be maintained, unless the facts presented by a case should bring it within the law as stated in McNeil v. The Tenth National Bank, 46 N. Y. 325: "When the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claims of the true owner." Upon referring to the transcript in Winter v. Belmont Mining Company, we observe the findings of the court state that Winter delivered his certificates to M. with permission that the latter have the shares of stock transferred on the books and certificates issued to him (M.) for the purpose of enabling the said M. to vote at the then coming election as the owner of said stock. Here was an element upon which, perhaps, it might properly be held that Winter was estopped from saying, as to an innocent purchaser, the title

did not pass; because, for one purpose at least, viz., to vote, he had authorized M. to appear to be and act as the owner.

But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit.

In the case at bar, the owner, Barstow, did not clothe the thief with any apparent power to pass title. The certificates (though properly indorsed) remained in the names of the former owners, and when Rogers purchased he was not dealing with any one who had apparent authority from the owner to make a disposition of the stock; he dealt with one having nothing beyond bare possession, which, as said above, does not clothe the possessor with the power of selling.

In conclusion, then, we are of opinion, and decide, that where stock of an incorporation stands on the books in the name of A., and the stock is owned by B., and the certificate (though properly indorsed) is stolen from B. without his fault, the thief can pass no title, and B. may pursue his property.

The judgment is reversed and the cause is remanded, with instructions to render judgment in favor of plaintiff, but it is not manifest that the plaintiff can have judgment against Rogers for the value of the stock, and also that the incorporation issue new certificates to him; he may have one or the other, as he elects, but not both. It is stated in the findings that the shares represented by certificate number 25,537 have been sold for assessments. Plaintiff being the owner of those shares, he should have paid the assessments, and neither Rogers nor the incorporation should be held responsible for his omission to do so.

MORRISON, C. J., and SHARPSTEIN, MCKINSTRY, and THORNTON, JJ., concurred.

ROSS, J., concurred in the judgment.

HOME LOAN ASSOCIATION v. WILKINS ET AL., KING, Petitioner.

In Bank. Filed December 24, 1883.

SALE OF MORTGAGED PREMISES WILL NOT BE STAYED, PENDING AN APPEAL from the judgment against a subsequent purchaser from the mortgagor in possession, unless an undertaking be filed for the payment of the deficiency, if any shall arise on said sale. The rule is otherwise if the judgment is against such a purchaser not in possession.

PETITION for an order staying the execution of a judgment for the sale of certain mortgaged premises. The petition was made in behalf of a subsequent purchaser from the mortgagor. The further facts appear in the opinion.

E. A. Lawrence, for the appellants and petitioner.

J. R. Brandon, for the respondent.

THE COURT. On the former hearing in department two (11 Pac. C. L. J. 252), it was held, that where an appeal is taken from a judgment for the sale of mortgaged premises, by one not in possession thereof, the sale might be stayed without filing an undertaking for the payment of a deficiency arising upon such sale; and that the petitioner, not being in pos-

session of the mortgaged premises, was entitled to have such sale stayed without filing such undertaking. It now transpires that the petitioner was in possession of said premises, and as he has not filed an undertaking for the payment of the deficiency if any shall arise on said sale, it is not stayed by the appeal. It follows that the order made in department must be vacated, and the application for a stay be denied.

Application denied.

BRANGON *v.* HIS CREDITORS.

In Bank. Filed December 27, 1883.

EVERY CREDITOR OF AN INSOLVENT DEBTOR MAY FILE HIS OPPOSITION to the debtor's discharge, and may control the same to the extent of withdrawing it, whether other creditors consent thereto or not.

APPEAL from a judgment of the superior court of the city and county of San Francisco, discharging an insolvent debtor. The facts are stated in the dissenting opinion of Ross, J.

Hutchinson & Lyon, for the appellant.

J. R. Brandon, for the respondent.

MYRICK, J. We are of opinion that each creditor may file his opposition to the discharge of the debtor, and may control the same to the extent of withdrawing, whether other creditors consent thereto or not.

Judgment affirmed.

MORRISON, C. J., and THORNTON and SHARPSTEIN, JJ., concurred.

ROSS, J., dissenting. This was a proceeding in insolvency under the insolvent act of 1852. Within statutory time, under the provisions of section 20 of the act, Henry Cowell, a dissenting creditor of the insolvent, who had proved up his claim, filed a written opposition to the discharge of the insolvent, grounded on fraud. The accusation was answered by the insolvent, but before any trial was had of the issues raised by the answer, the attorneys for the insolvent and the opposing creditor stipulated to withdraw the opposition and answer, and to allow the proceedings in insolvency to go on as if no opposition had been filed. To that, however, the appellant, who was also a schedule creditor of the insolvent and had proved and filed his claim, objected, upon the ground, as stated in his affidavit, "that the stipulation was fraudulently, collusively, and corruptly entered into by and between said Cowell and said Brangon, whereby, in consideration of the sum of two thousand five hundred dollars, then paid or secured to be paid by said Brangon, and at the request of said Brangon the said Cowell agreed and promised to withdraw and dismiss the said opposition theretofore filed by him in the matter above entitled." Upon this affidavit the appellant asked leave to intervene and prosecute the opposition proceeding, offering, at the same time, to substantiate by proof the charges which he had made in the affidavit as to the collusion and fraud by which the stipulation had been made, and the offer was met by the insolvent's attorney, who stated "his readiness to prove, by witnesses then present, that such charges of collusion and fraud, on the part of Cowell and the insolvent, were utterly false and untrue." But the court refused to hear the affirmations and denials of fraud in procuring the stipulation, denied the application of

the appellant to intervene, dismissed the opposition, and afterward discharged the insolvent debtor from his debts and liabilities.

By section 20 of the act of 1852 provision is made by which any one or more of the creditors may, within ten days next following the appointment of an assignee, contest the proceedings on the ground of fraud, by filing a written opposition stating specifically the acts of fraud charged, whereupon, and upon receiving the insolvent's answer thereto, a jury is required to be summoned to try the issue, which, if established, forever deprives the insolvent of the benefit of the act. But because each and every creditor is by the act entitled to file a written opposition to the proceedings within ten days next following the appointment of an assignee, I do not think each and every one is necessarily bound to do so in order to protect his right. "A creditor intending to oppose the discharge," as said in *In re* Houghton, 10 N. B. 239, "may find that this duty has been assumed by another creditor; he examines the specifications and considers them sufficient; perhaps he consults with that creditor, and finds him determined to prosecute the case. Suddenly he learns that the opposition is to be waived"—and this pursuant to an alleged fraudulent and collusive arrangement between the insolvent debtor and the opposing creditor, and after the statutory time for the filing of another opposition has passed. Can such a practice be tolerated? Is the court powerless to prevent itself from being made the instrument for carrying into effect the arrangement of such a nature? I think not. Good faith upon the part of the insolvent in making the assignment is by the statute made prerequisite to his right to a discharge. When written charges of fraud in making the assignment are duly filed, the insolvent debtor is required to answer them, and if he denies them, they are to be disposed of in accordance with law. The statute provides that the court must thereupon summon a jury to try them. No doubt the charges may, by the consent of all parties in interest, and by the permission of the court, be withdrawn. But of course the court ought not and would not permit such withdrawal if there was reason to believe the charges were true. But who are the parties in interest? Are they the insolvent debtor and the opposing creditor only? I think not. When the petitioner is adjudged insolvent, all his creditors become parties in the proceedings and interested therein. The petitioner can not retrace his steps and cause his petition to be dismissed unless by the consent of all of his creditors; and this because each and every creditor is directly interested: Cerf v. Oaks, 59 Cal. 135; Bump's Bank. Law, 20. So, too, when one creditor files an opposition to the proceedings, charging fraud on the part of the insolvent, every other creditor is interested in the charge, for its disposition is bound to affect his rights. Every creditor has a right to rely upon the charge being prosecuted in good faith, and if the creditor who files it fails so to prosecute it, I think any other creditor entitled to assume the burden.

The judgment should be reversed.

McKee, J., concurred.

California Farmers' etc. Ins. Co. *v.* Schindler et al.

In Bank. Filed December 27, 1883.

Finding to the Effect that a Subsequent Undertaking was Given in the place of a former one which was required upon the issuance of a preliminary restraining order, is erroneous, when the complaint alleges, and the undertaking recites, that the same was given "as a condition to the further continuance of the said injunction."

Sureties on an Undertaking Given on Condition of the further continuance of a restraining order, or in place of a former undertaking given when such order was made, only bind themselves prospectively from the date of the execution of their undertaking, and upon a breach thereof are not liable for damages sustained by the obligee before such date.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Fox and Kellogg, for the appellants.

Pilsbury and Titus and *A. W. Thompson*, for the respondent.

McKee, J. The action in hand was brought against defendants as sureties to an undertaking in the sum of two thousand five hundred dollars, to recover damages which the corporation, plaintiff in the action, claims to have sustained by reason of, and during the continuance of, a restraining order, and the costs and expenses incurred in procuring its dissolution.

The restraining order was made on March 15, 1879, in an action commenced on that day by George W. Carter against the said corporation to perpetually enjoin it from collecting an assessment which had been levied upon its outstanding policies of insurance. At the time of filing the complaint in the action Carter obtained an order to show cause why a temporary injunction should not be issued, and also an order *ad interim* restraining the corporation from doing any act or thing in the way of collecting the assessment. On obtaining this last order he gave bond, as required by the court, in the sum of one thousand dollars, conditioned according to section 525 of the code of civil procedure. That bond was filed and approved by the court on March 15, 1879.

The order to show cause came on to be heard April 11, 1879. On that day counsel for both parties argued and submitted Carter's application for a temporary injunction. The court took the application under advisement, and, at the same time, required Carter to give and file a further undertaking in the sum of two thousand five hundred dollars, with the like conditions and provisions contained in the one thousand dollar bond, "as a condition to the further continuance of the injunction." This additional bond was given, approved, and filed on the day of the entry of the order which required it. Three days thereafter, namely, on April 14, 1879, the court dismissed the order to show cause, denied the application for a writ of injunction on the ground that the plaintiff in the action was not entitled to the writ, and discharged the restraining order on the ground that it had been improperly made. From that order no appeal has been taken; the order has not been in any respect modified or reversed: it stands in full force, although the injunction suit is yet pending.

At the trial of the action upon the breach of the two thousand five hundred dollar undertaking, the court found as follows, namely:

"1. That the district court ordered that the undertaking for two thousand five hundred dollars be given and filed in the place and stead of the bond already filed; to wit, the aforesaid bond of one thousand dollars; and that in pursuance of the order thus made, the undertaking was given, approved, and filed in the place and stead of the bond for one thousand dollars."

"2. That, in order to procure the dissolution and discharge of the restraining order, the corporation employed and paid to counsel for professional services in that matter the sum of five hundred dollars; and that it has also sustained damages in the sum of six hundred and sixty-five dollars, in consequence of being prevented and hindered by the restraining order from carrying on business for thirty days, during which time it had to pay that sum of money for office rent, salaries of officers and employees, and office expenses and the like."

The first finding is directly opposed to the averment in the complaint upon the subject to which it relates, and to the recitals in the undertaking upon which the action is founded.

The averments of the complaint are, that the court made an order that the undertaking be given "as a condition to the further continuance of the said injunction," and that "the undertaking was given under and in pursuance of said order." And the recitals in the undertaking are:

"Whereas the above-named plaintiff has commenced an action in the district court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, against the above-mentioned defendant, and is about to apply for an injunction in said action against the said defendant, enjoining and restraining the said defendant, its officers, directors, and servants, from the commission of certain acts, as in the complaint filed in said action is more particularly set forth and described;

"Now, therefore, we, the undersigned, David Schindler and N. Wyckoff, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of two thousand five hundred dollars, gold coin of the United States, and promise to the effect that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of two thousand five hundred dollars, gold coin of the United States, as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto.

"Dated this eleventh day April, A. D. 1879."

In the presence of the fact admitted by the complaint and recited in the undertaking (which is also made part of the complaint), that the undertaking was given as a condition to the further continuance of the injunction, there is no place for presumption or proof that it was given in the place or stead of a former undertaking in the case; and the finding, being contrary to the averments of the complaint, is outside the case made by the plaintiff, and renders the decision of the court erroneous for defective findings: Murdock v. Clark, 9 Pac. C. L. J. 207; Silvey v. Neary, 59 Cal. 97; Tracy v. Craig, 55 Id. 91; Hill v. Den, 54 Id. 20.

The second finding is also outside the limits of the cause of action arising out of a breach of the undertaking. It includes damages for which defendants as sureties to the undertaking are not legally bound. For whether the undertaking was given as a condition for further continuing the restraining order, as is alleged in plaintiff's statement of its

cause of action, or in the place or stead of the first bond for one thousand dollars, given when the restraining order was made, as it has been found by the court, the sureties to the undertaking bound themselves only prospectively from the day of the execution of their undertaking, and not retrospectively; they were, therefore, not liable on a breach of their undertaking for damages which the obligee may have sustained before the date of their obligation. It is too well settled to need reference to authority that the obligation of sureties arises out of the terms of their contract, and can never arise from implication or inference. To the extent and in the manner and under the circumstances expressed by those terms, they are bound, but no further.

Now, by the express terms of the undertaking in suit defendants promised to pay such damages as might be sustained by reason of the injunction, if the court shall finally decide plaintiff was not finally entitled thereto. Undoubtedly, the "injunction" in the minds of the contracting parties was the *ad interim* order, by which the corporation was enjoined from doing the acts and things complained of, until the application for a temporary injunction was heard and decided. That order was made and had been operative, upon the one-thousand-dollar bond, from March 15, 1879, until April 11, 1879. On that day the defendants contracted for its further continuance.

Then, and not until then, the obligation arising out of their contract commenced; and it continued from that time onward until the happening of the contingency which caused a breach of the obligation, upon which they became liable for any damages which may have been sustained during the existence of their obligation, but not for damages suffered anterior to its date. For such damages a bond had been already given, upon which other persons were liable. It may be that those who were sureties to that first bond had become insolvent, or that its penalty was insufficient, and that on these grounds the court required the giving of the additional undertaking as a condition "to a further continuance of the restraining order;" but in either case, the sureties to the first bond would be bound for the damages caused by the order before the giving of the second bond; and, at all events, the sureties to the second could not be made liable therefor until the remedy on the first bond has been exhausted: Lane v. The State, 24 Ind. 421; Bates v. The State, 15 Id. 322.

Whence it results that the court below erred in deciding upon the findings that the defendants were liable upon their undertaking for damages suffered by the plaintiff, by reason of the restraining order, before the date of their obligation.

Judgment reversed and cause remanded for further proceedings.

McKinstry, J., concurred.

Morrison, C. J., and Sharpstein and Thornton, JJ., concurred in the reversal of the judgment on the ground that the action was prematurely brought: Clark v. Clayton, 10 Pac. C. L. J. 944; Dougherty v. Dore, 11 Id. 76.

BAYLEY v. MUEHE.

Filed December 27, 1883.

HEIRS OF A DECEASED MORTGAGOR NEED NOT BE MADE PARTIES in an action against his executor or administrator to foreclose the mortgage.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The facts of this case are stated in the opinion delivered in Department One, and reported in 11 Pac. C. L. J. 408.

F. J. Castlehun, for the appellant.

Stetson & Houghton, for the respondent.

THE COURT. For the reasons given in the opinion delivered when this case was before Department One of this court (11 Pac. C. L. J. 408), the judgment is reversed and cause remanded.

MYRICK, J., concurred, except so far as approval of Cunningham v. Ashley, 45 Cal. 485, may be implied.

MCKEE and THORNTON, JJ., dissented.

SCHULER v. SAVINGS AND LOAN SOCIETY ET AL.

In Bank. Filed December 27, 1883.

PROPERTY OF A HUSBAND IS PRESUMED TO BE COMMUNITY PROPERTY in the absence of evidence to the contrary; and upon a declaration of homestead being made and recorded thereon by the wife, becomes, by operation of law, the estate in joint tenancy of the husband and wife, of which they are jointly seised in equal shares.

HUSBAND AND WIFE MAY CONTRACT TOGETHER IN RELATION TO PROPERTY in which they are joint owners, and it would seem that the wife is entitled to the fruits of such contract as her separate property.

POSSESSION OF THE WIFE AS TO THE COMMUNITY PROPERTY IS THE POSSESSION OF THE HUSBAND, and he can not, except in cases of conversion, sue her for the possession of such property or for his interest therein.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

George W. Tyler, for the appellants.

M. C. Hassett, for the respondent.

MCKEE, J. The appellant, Henry Schuler, was the owner of a brewery in Sonora, in this state, and he and his wife, the respondent herein, resided in two of the rooms of the brewery building. On or about September 1, 1874, the husband contracted to sell the property for three thousand dollars; one thousand dollars payable "in hand," another thousand on or before the first of October next thereafter, and the remaining thousand on or before the first of November following. The wife, having heard of the sale, made and recorded a declaration of homestead upon the property on the eighteenth of September, 1874; and when the time came for the husband to perform his contract, she refused to join in the execution of the deed, unless he would secure her for her interest in the homestead claim. There was no evidence whether the property, before the making and filing of the declaration of homestead, was the separate property of the husband or community property. In

the absence of such evidence, the presumption is that it was community property: Althof v. Conheim, 38 Cal. 230; and when the declaration of homestead was made and recorded by the wife, the property became, by operation of law, the estate in joint tenancy of the husband and wife (section 1265 of the civil code of 1874), of which they were jointly seised in equal shares. It was, therefore, not part of their community property.

Recognizing the existence of the legal relation between himself and wife in respect to the property, the husband consented to secure her for her interest or estate in the homestead premises; and for that purpose he executed to her a transfer of a bank-book which he had with the Savings and Loan Society of San Francisco, which showed on deposit in the bank a balance in his favor of about two thousand seven hundred dollars. The transfer was in the following words:

"SONORA, October 22, 1874.

"Savings and Loan Society, 619 Clay street.

"Transfer to Rose C. Schuler, the bal. of my account.

"Witness: D. REDMOND." "HENRY SCHULER.

This transfer the husband delivered with the bank-book to his wife, upon the receipt of which she abandoned the homestead by joining in the execution and delivery of the deed of the property to the purchaser.

It is admitted by counsel for appellant that the transfer and delivery of the bank-book were made to the wife in consideration of her joining in the execution of the deed. The transfer was therefore valid and effectual to vest title in the wife, if she had the legal capacity to contract with her husband concerning her joint real property. Section 158 of the civil code has provided that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried," etc.

Under this law, husband and wife are not one in respect to the separate, joint, or common property which may have been acquired by either; they are coequals, and each is allowed to contract with the other in regard to such property, as either might contract with a stranger. The rights of either in respect to such property are substantially equivalent, differing chiefly in the single circumstance that the husband, being still considered the head of the family, is entitled to manage and control the property of the wife for the benefit of both, and to dispose of the common property, except for the purpose of defrauding the wife of her rights therein. The transaction between the husband and wife, relating as it did to real property of which they were joint owners, was, therefore, one in which they could engage with each other.

But it is urged that while the wife, by the transfer, acquired the right to the money, she acquired it "as common property, and not absolutely and for her sole and separate use." Yet the transaction was made between the parties as if they were unmarried: Secs. 158, 159, *supra*. The husband dealt with his wife as a *feme sole*, and in that capacity she dealt with him, and as such the transfer was made and the bank-book delivered to her. Having received them as a *feme sole*, she would seem to be entitled to the fruits of the transaction as her separate property.

But whether the money be regarded the separate property of the wife, or the common property of the husband and wife, we see no error in the record or judgment in the case prejudicial to the appellant. For, as shaped by the pleadings, the case involves an action to obtain the posses-

sion of money deposited in a bank by one whose title to it is admitted. If it was the separate property of the wife, her property and remedial rights to it are unquestionable. If it was common property, neither her property right nor her capacity to sue has been questioned. By his answer, the husband, while admitting the transaction between himself and wife, affirmatively averred that they intended thereby to vest it in her as common property; and that he had notified the bank not to pay the money to her because it was common property of himself and wife; while the bank by its answer averred its readiness to pay the money to whoever was lawfully entitled to it. The verdict was for the plaintiff, and judgment was entered in her favor, from which the bank has now appealed.

Even if the money be common property, the judgment does not affect the right of the husband. Nor would possession of the money by the wife affect his rights. Her possession of common property is his possession; and he can not, any more than any other tenant in common, sue his co-tenant for the possession of the common property or his interest therein, except in case of a conversion. That, according to the issues raised by his answer, is not this case.

There is no error in the instructions of the court to the jury, and there are no errors in the record prejudicial to the appellant.

Judgment and order affirmed.

MYRICK and SHARPSTEIN, JJ., concurred.

MCKINSTRY, J., concurring. We concur in the judgment. The point urged by the appellant is that the court below erred in giving the following instruction: "If you believe from the evidence that the defendant, Henry Schuler, had agreed to convey certain real estate in Sonora, on which plaintiff and said defendant resided at the time, to said Bacigalupi, that plaintiff filed a declaration of homestead, declaring the same a homestead, and that in consideration that plaintiff would execute with said defendant a deed of said real estate to said Bacigalupi the said defendant made and delivered the instrument, Exhibit A, then you will find for the plaintiff."

Exhibit A speaks for itself, and, in our opinion, operated a transfer to plaintiff of the balance of the account in bank.

MORRISON, C. J., and THORNTON J., concurred.

GUTIERREZ v. BRINKERHOFF ET AL.

In Bank. Filed December 28, 1883.

CONTRACT, BY THE TERMS OF WHICH ONE PARTY AGREES TO PAY ALL THE EXPENSES, and furnish the skill and labor necessary for obtaining a patent to certain lands from the United States, in consideration of a conveyance of a part of the land so obtained, is valid and binding in the absence of actual or constructive fraud.

DEED UNTAINTED BY FRAUD IS NOT IMPEACHABLE FOR FRAUD COMMITTED AFTERWARDS in the obtainment of another deed, for different premises, by the same grantee from the same grantor.

ONE WHO IS A PARTICEPS CRIMINIS IN CERTAIN FRAUDULENT TRANSACTIONS to obtain land from the United States, can not enforce a cause of action against his alleged partners in fraud, growing out of such transactions.

APPEAL from an order of the superior court for the city and county of San Francisco, granting the defendants a new trial. The opinion states the facts.

Irving, Benham & Packard, for the appellant.
Winans & Belknap, for the respondents.

McKee, J. The case in hand arises out of an action which was brought by the plaintiff, as widow and sole devisee of Octaviano Gutierrez, deceased, to obtain a decree annulling and setting aside certain documents affecting a tract of land in Santa Barbara county, known as the Rancho La Laguna, upon the grounds that the same were obtained by fraud and without consideration.

Upon a trial of the issues raised by the pleadings, decision and judgment were rendered in favor of the plaintiff. Within statutory time defendants moved for a new trial upon a statement of the case, settled and certified by the judge who heard and decided the case; but, before the motion came on to be heard, his term of office ended, and the motion was argued and submitted, upon the statement, to his successor in office, who ordered the judgment vacated and the case to be retried. From that order the plaintiff has appealed; and it is contended that the judge of the court below not only abused his discretion in granting a new trial, but committed error prejudicial to the rights of the plaintiff.

The statement of the case, upon which the order was made, shows that Gutierrez claimed the Laguna ranch under two inchoate grants from the Mexican government, one of which was dated March 12, 1844, and the other November 13, 1845. The first was a provisional grant "for three leagues of land of the tract called La Laguna," and the second a grant of the same character for "the land described and set forth in the map accompanying the grant." When these grants were made and delivered Gutierrez was a married man, and the husband of the present plaintiff. He and his family continued to occupy the ranch after the acquisition of California by the United States, and in 1854 he presented his grant for confirmation to the United States board of land commissioners. Confirmation of his claims to the extent of three square leagues of land was made by the board. But the case was afterwards taken into the United States district court for the eighth district of California, where a decree of confirmation was obtained as follows: "To the extent of eleven square leagues within the boundaries called for in the grant, and described in the map accompanying it, provided that should there be a less quantity than eleven square leagues contained within said boundaries, then confirmation is hereby made to such less quantity."

That confirmation became final, and under the decree the United States surveyor general for California, in October, 1860, caused a survey of the ranch to be made, which included four leagues of land. The plat of this survey was returned and filed in the surveyor general's office at San Francisco. In December, 1860, that officer indorsed upon it his final approval, and for making the survey and the work appertaining to it he was paid by the United States government, in March, 1861. But instead of forwarding the approved plat of the survey and the documents connected with it to the commissioner of the general land office at Washington, for final approval, they were permitted to remain in the office at San Francisco.

Gutierrez, having been awarded four leagues of land where he applied only for three, was satisfied with the survey, and acquiesced in it for several years. But in the beginning of the year 1865, the surveys of surrounding ranches had uncovered a large area of public land, from which

it became possible to obtain an extension of seven leagues in addition to the four leagues which had been already awarded to him. In January, 1865, he had given the defendants Brinkerhoff and Scollan a lease and executory contract for the exploration of the ranch for oil.

While working under that contract, Brinkerhoff satisfied himself, after a careful examination of the records of Gutierrez's claim, of the feasibility of obtaining an extension of the ranch under the decree of confirmation, and a patent for eleven leagues; and he proposed to Gutierrez that he would, in consideration of two leagues of the extension, procure, at his own cost and expense, such an extension and patent. This was in March, 1865. Gutierrez accepted the proposition, and Brinkerhoff immediately commenced proceedings in the United States surveyor general's office in San Francisco to set aside the approved survey of December, 1860, and to obtain an order for a new survey of the ranch. Pending these proceedings, Gutierrez, in performance of his agreement, on June 14, 1865, executed and delivered to Brinkerhoff and Scollan a deed, reciting a consideration of ten dollars, for two leagues of the ranch outside the four leagues; and afterwards, in December, 1865, Brinkerhoff obtained a conveyance of the remaining five leagues, outside the four leagues, by a deed which recited a consideration of one thousand five hundred dollars. By these deeds Brinkerhoff acquired the title to about thirty thousand acres of land for the consideration of one thousand five hundred and ten dollars.

It is charged that at the times of the transactions which resulted in the transfer of the title to these seven leagues of the ranch, the owner, Gutierrez, was an unsuspicious old man, feeble in mind and body, ignorant of the English language, and unacquainted with business transactions; that Brinkerhoff was his family physician, friend, and confidential adviser, to whom had been intrusted the management and control of the proceedings relative to the ranch; that he abused this confidence by using it to cheat and defraud Gutierrez out of his title to the ranch; and that in the execution of this design he procured the deeds and other documents in connection with them, to be executed and delivered to him, by false promises and without consideration, and by false and fraudulent representations of the nature and contents of the documents and of the uses to which Brinkerhoff intended, with the assistance of Scollan, to apply them.

Brinkerhoff was a practicing physician; and, at least about the time of the execution and delivery of the last deed, was the family physician of Gutierrez, and continued to act as such until the time of the death of Gutierrez. In November, 1863, he had succeeded in obtaining an order from the surveyor general's office for a new survey of the ranch, and while he was engaged in that proceeding, he also acted as agent and attorney in fact for Gutierrez, under two powers of attorney, one of which was executed in October, 1865, empowering him to sell and convey the five leagues of the extension of the ranch; and the other on November 29, 1865, empowering him to sell and convey his entire interest in the ranch, including the four leagues. At the time of these transactions and of the execution of the deed of the twenty-ninth of December, 1865, Gutierrez was in "embarrassed circumstances," "harassed for money," and in debt to Brinkerhoff for borrowed money, for which the latter held his promissory notes bearing interest at one and one half per cent. per month. Under these circumstances Brinkerhoff procured the deed of December 29th.

The court found that Gutierrez was deceived by Brinkerhoff into the execution and delivery of both deeds; that Brinkerhoff induced him to

execute and deliver the deed of the fourteenth of June by willful, false, and fraudulent representations "that his business relative to said ranch would be facilitated;" and under these representations the deed was executed and delivered without any consideration being paid, or intended to be paid. That Brinkerhoff, after obtaining the title to the two leagues, and while he was acting as the agent of Gutierrez, entered into certain secret and corrupt arrangements with some of the officers in and connected with the surveyor general's office in San Francisco, for procuring the extension of the ranch and a patent for eleven leagues, to carry out which, he, regardless of his duty as physician, friend, and confidential adviser, by false and fraudulent representations procured the execution and delivery of the deed of the twenty-ninth of December, for a grossly inadequate consideration, which was never paid.

The finding as to the non-payment of the consideration of the last deed is contrary to the evidence. And whatever there may be arising out of the fact of inadequacy of consideration, and out of the legal relations of principal and agent, of debtor and creditor, and of the other relations of confidence existing between the parties at the time of obtaining that deed, from which fraud in fact might be inferred, there is nothing in the statement of the case tending to show the existence of such legal relations between them at the time of the arrangement for obtaining an extension of the grant, or that the deed of June 14th, executed in consummation of that arrangement, was procured by fraud in fact.

In the absence of actual or constructive fraud, the arrangement was valid and binding. Both parties deliberately entered into it; the one agreeing to pay all the expenses and furnish the skill and labor necessary to carry on the proceedings for obtaining the extension and patent, and the other to convey two leagues of the seven leagues of land which would be obtained from the government. In no respect was Gutierrez deceived in entering into the contract. He knew exactly its terms, and its scope and object; and after the proceedings had been commenced for the attainment of that object, he performed his part of the contract by the execution and delivery of the deed. There was not a single circumstance adduced by the plaintiff to show that that deed was tainted with fraud. The evidence that it was executed and delivered in good faith, and for a valuable consideration rendered, appears to be all one way; and its validity could not be affected or changed by any subsequent conduct of Brinkerhoff in obtaining the deed of December 29th, even if the circumstances under which that deed was obtained tainted it with fraud. A deed untainted by fraud is not impeachable for fraud committed afterwards in the obtainment of another deed, for different premises, by the same grantee from the same grantor.

There is no pretense that the original arrangement for the obtainment of an extension of the ranch and a patent for eleven leagues, under the decree of confirmation, was intended, by the parties to it, to swindle and defraud the government out of its public lands, or that the grantees, in performance of the arrangement, procured the deed for that purpose; and even if that were so, it is difficult to see how Gutierrez, as a party to it, could invoke out of such a transaction an enforceable cause of action against his alleged partners in fraud: Depuy v. Williams, 26 Cal. 309; Gregory v. Haworth, 25 Id. 653; Davis v. Mitchell, 34 Id. 90.

Order affirmed.

SHARPSTEIN and MYRICK, JJ., concurred.

McKINSTRY, J., concurring. I concur in the judgment. The transcript shows a substantial conflict in the evidence bearing upon several of the issues and findings. It has frequently been held here that a motion for a new trial on the ground of the insufficiency of the evidence is addressed to the sound legal discretion of the court below, and that an order granting a new trial on that ground will not be reversed unless it appears there has been a manifest abuse of discretion: Pierce v. Schaden, 55 Cal. 406; Bronner v. Wetzler, 55 Id. 419; Phelps v. Union C. & M. Co., 39 Id. 410; Hall v. Emily Banning, 33 Id. 521. Such manifest abuse of discretion does not appear.

The circumstance that there was a change in the incumbency of the bench, intermediate the trial and the determination of the motion for a new trial, makes no difference in the application of the rule: Altschul v. Doyle, 48 Cal. 535; Macy v. Davila, Id. 646; Blum v. Sunol, 11 Pac. C. L. J. 275.

PEOPLE v. LEWIS.

In Bank. Filed December 29, 1883.

CONTINUANCE ON ACCOUNT OF THE ABSENCE OF A WITNESS SHOULD BE REFUSED, unless such attendance can be procured within a reasonable time.

AFTER A PLEA OF NOT GUILTY TO AN INDICTMENT CHARGING THE DEFENDANT with a previous conviction of a like offense, the defendant is not entitled, as of right, to withdraw such plea on the trial, and plead guilty to the charge of previous conviction.

INSTRUCTING THE JURY IN ACCORDANCE WITH THE LANGUAGE OF THE PENAL CODE, without identifying the sections read by number, is not error.

INDICTMENT FOR LARCENY SHOULD ALLEGE THE OWNERSHIP in the thing stolen as of the date when the offense was committed.

APPEAL from a judgment of the superior court for Sonoma county, convicting the defendant of the crime of grand larceny, and from an order refusing him a new trial. The opinion states the facts.

Hurley, Whipple & Oates, and *Campbell*, for the appellants.

Attorney general, for the respondent.

THORNTON, J. In this action the defendant was indicted for grand larceny, and in the indictment was charged with a previous conviction of a like offense. The defendant was arraigned, and pleaded "not guilty to the offense charged in the indictment."

The continuance was properly refused. It did not seem that the attendance of the alleged absent witness could have been procured in a reasonable time: People v. Cleveland, 49 Cal. 580; People v. Ah Yute, 53 Id. 613.

On the trial, the defendant offered to plead guilty to the charge of previous conviction. The court denied the offer. It is urged that this was error. We can not accord with this view. The nine hundred and sixty-ninth section of the penal code, specially relating to the arraignment when a previous conviction was charged, had been repealed before the arraignment was had. The arraignment was had in May, 1882, while the section was repealed in 1880: See Desty's ed. of Penal Code of 1881, sec. 969. Under these circumstances the arraignment had to be made under the statute, as it was left unrepealed: Penal Code, sec. 1017. Under this section the defendant was properly arraigned, and on such

arraignment he pleaded not guilty as charged. This we regard as a compliance with the statute.

Having, then, regularly pleaded, the court was not bound afterwards on the trial to accept the plea of guilty to the previous conviction. It may be in its discretion to do so or not—not a discretion, however, to be arbitrarily exercised, but one in accordance with the principles of law and its analogies. If the court abused its discretion in so ruling, a reversal would follow, but we can not see that it went beyond what the law permitted. Viewing the question as one addressed to the discretion of the court is the most favorable that can be taken for the defendant, and in that view there is no error. We will add here that the answer of defendant in section 1158, penal code, is the plea which he tenders on arraignment: See People v. King, 12 Pac. C. L. J. 322.

It is stated that the court, in charging the jury, read certain sections of the penal code, the number of which is not given, and therefore it is in error. The bill of exceptions states what occurred in the following words: "The Court—I will instruct you, gentlemen, in the language of the statute [reads section — of penal code]. *Larceny in other cases is petit larceny.*"

The words underscored are the words used in section 488 of the penal code. It does not appear that more than one section was read, and the language of one section is given in the charge. Does this disclose error? We can not say that it does. It may be that the court read other sections, but this does not appear. Error must be deducible from the record. If it does not appear, it does not exist; and it must be recollected that all intendments are in favor of the correctness of the action of the court below.

It may be argued that the language used, "that larceny in other cases is petit larceny," shows that a section was read defining cases which were not petit larceny. Granting this to be so, it would also show that the other sections in relation to grand larceny were read, and this would identify them sufficiently to bring them within the rule of People v. Mortier, 58 Cal. 262. Sections of the code may be identified otherwise than by the numbers. If it was stated that the sections in relation to grand larceny were read, this would identify them sufficiently, and according to the rule in People v. Mortier, *supra*, there would be no error.

The defendant was charged in the indictment with stealing, on the twenty-ninth of December, 1881, a cow, the property of Robert Farran, William A. Boose, and Edward Clysdale. At the time the indictment was found (third of May, 1882), Boose had deceased. It is said the indictment should have alleged the ownership, and the proof should have followed the allegation. This is assigned as an error. The indictment alleged the ownership as of the date when the offense was committed. The ownership was properly alleged of the date mentioned, and the evidence established the allegation.

The defense of one in jeopardy is untenable under the settled law of this state: People v. Stanley, 47 Cal. 113.

The direction as to the form of the verdict was correct, and the evidence was sufficient to justify the verdict.

No error appearing in the record, the judgment and order are affirmed.

MORRISON, C. J., and MYRICK and SHARPSTEIN, JJ., concurred.

SWIFT ET AL. v. SHEPPARD.

In Bank. Filed December 29, 1883.

SUPREME COURT HAS NO POWER TO STAY THE OPERATION OF AN INJUNCTION restraining the appellant from diverting the waters of a certain stream, pending an appeal.

APPLICATION for an order staying the operation of an injunction pending an appeal. The opinion states the facts.

Wright & Canfield and *Boalt*, for the petitioner.

W. C. Stratton, for the respondents.

THORNTON, J. This is an application in this court by appellant Sheppard for an order staying the operation of an injunction pending the appeal.

The action in the court below was for an injunction restraining the diversion of the waters of Brush creek, and on final hearing there was judgment in favor of plaintiff for a perpetual injunction. From this judgment, the applicant has prosecuted an appeal to this court, which was here for hearing when this application was made. The application bears the marks of an original suit for an injunction, and we can not see that it comes within the original jurisdiction held to be conferred on this court by the constitution. This court is authorized by the constitution to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction: Const., art. vi., sec. 4. But there is here no impediment to the exercise of the appellate jurisdiction. The cause is here on appeal as fully as the appellant desired to bring it, and the appellant has encountered no obstacle in so doing. There is then no ground for invoking this jurisdiction: See Eldridge v. Wright, 15 Cal. 88; Hicks v. Michael, Id. 107.

The court below in this case having adjudged on the trial, after full hearing, that the plaintiff was entitled to an injunction, it does seem to us that this court would be going very far in interfering to suspend the force of its judgment. Such action would have very much the appearance of taking A.'s property and handing it over to B., and referring A. for compensation to an action on a bond.

We are referred to Hill v. Finnigan, 54 Cal. 495. In that case the appellant filed an undertaking to stay execution, the sureties were excepted to, and they failed to justify. This court on application allowed the appellant to file a stay undertaking. In relation to this it was observed that "the statute does not treat of undertakings in the supreme court, and we have no doubt but this court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right."

It will be found that the court had held, as the opinion shows, that the appellant had a right to file a stay undertaking under the statute.

The excuse for not filing it previously, in accordance with the provisions of the statute, was satisfactory to the court, and it, acting under the general equity powers pertaining to every court, and so frequently availed of and administered on motions, duly accorded to appellant a right which the statute gave him. But in granting it under its inherent equity powers, it declared in effect that when the granting of the applica-

tion would deprive the respondent of a substantial right, this power should not be exercised.

Of this application it may be observed that neither statute law nor law of any kind accords the applicant a stay such as is asked for on filing an undertaking or bond. It is different in that regard from the condition of the appellant in Hill v. Finnigan; and further, it having been on full hearing and trial adjudged that the plaintiff was entitled to the injunction to restrain the diversion by the moving party of the waters mentioned above, it would be depriving the respondent of a substantial right to suspend or interfere with the exercise of a right as to these waters solemnly decreed to him.

The application must be denied, and it is so ordered.

MORRISON, C. J., and MYRICK, J., concurred.

SHARPSTEIN, J., concurring. It was early held in this state that an injunction is not dissolved or superseded by the taking of an appeal from the order granting it: Merced Mining Co. v. Fremont, 7 Cal. 130. That case has not been overruled, and the statute, in respect of the question now raised, has not been substantially changed. The only question raised by the appeal is whether the injunction was properly granted, and that question must be determined upon the record. Until so determined the presumption is in favor of the correctness of the judgment of the court below. We could not grant this motion without at least modifying the judgment appealed from.

If the judgment be reversed, it will then be apparent that the appellant was deprived of the use of his property by the granting and continuance of the injunction. But if we grant this motion, and finally affirm the judgment, it will be equally apparent that the respondent was deprived, in the mean time, of the use of his property.

There is nothing in this case which materially distinguishes it from most of the cases in which appeals are taken from orders or judgments granting injunctions.

MCKEE and MCKINSTRY, JJ., concurred.

PFISTER *v.* SUPERIOR COURT.

In Bank. December 29, 1883.

SUBPŒNAS ISSUED BY A NOTARY PUBLIC IN PROCEEDINGS BEFORE HIM to take the depositions of witnesses, can not be quashed by the court on the ground that the affidavit upon which they were issued was not sufficient.

PARTY DESIRING HAS THE RIGHT TO TAKE DEPOSITIONS, and the adverse party may object to them when the same are offered in evidence, if the proceedings are irregular.

CERTIORARI to the superior court of Santa Clara county. The opinion states the facts.

J. J. Burt, for the petitioner.

No appearance for the respondent.

THE COURT. This is a proceeding by a writ of review, to review an order of the court below quashing subpœnas. An action was pending in said court, and upon affidavit and notice the plaintiff therein was proceeding to have the depositions of witnesses taken before a notary public, when, upon the motion of the defendant therein, the court made an order

quashing the subpœnas, on the ground that the affidavit upon which they were issued was not sufficient. The subpœnas had been issued by the notary under subdivision 2, section 1986, code of civil procedure.

Without determining whether or not the affidavit was sufficient, we find no provision in the code authorizing the order to quash the subpœnas. The party desiring to do so has the right to take depositions, and the adverse party will have the right to object when the depositions shall be offered to be read, if the proceedings shall be found to be not in compliance with the statute.

Order annulled.

PRESTON ET AL. v. HOOD ET AL.

In Bank. Filed December 29, 1883.

SURETIES ON AN UNDERTAKING GIVEN IN PURSUANCE of section 540 of the code of civil procedure, which recites the issuance of a writ of attachment, and that the undertaking is given in order to prevent a levy of the same, are liable, although sufficient property had been seized under the writ to satisfy the plaintiff's demand, and afterwards released by the sheriff.

SURETIES ARE DISCHARGED BY A VALID CONTRACT BETWEEN THEIR PRINCIPAL AND HIS OBLIGEE to extend the time of payment, if made without their consent.

SURETIES ON AN ATTACHMENT BOND ARE NOT RELEASED FROM LIABILITY by reason of a stipulation of counsel staying execution on the judgment, to secure which their undertaking was given.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

Splivalo and *Moore & Moore*, for the appellants.

Van Dyke & Powell, for the respondents.

MYRICK, J. This is an action on an undertaking given under section 540, code of civil procedure, the defendants being the sureties. Two questions are presented for consideration:

1. The complaint avers the issuance of the attachment, and that the sheriff proceeded to execute the writ, and that the defendant in the action, to prevent the levy, gave the undertaking herein sued on; that upon the delivery of the undertaking the sheriff released the property attached, and returned the writ and undertaking. The undertaking recites the issuance of the writ, whereby the sheriff was commanded to attach and safely keep the property of the defendant therein named, unless he give security by undertaking in an amount sufficient to satisfy the demand, and states that, "whereas the said defendant is desirous of giving the undertaking mentioned in the said writ, now, therefore," etc., "in consideration of the premises, and to prevent the levy of said attachment," etc. The court found that the sheriff, upon receiving the writ, proceeded to execute it, and levied upon some property belonging to the defendant named therein, and that upon the giving of the undertaking the sheriff did not attach any further property, and released what property he had levied upon, and returned the writ with the undertaking.

The defendants herein contend that their undertaking was to prevent a levy, not for the release of a levy, and that as property of sufficient value to pay the demand had been seized before the giving of the undertaking, there is no liability on their part.

There are in the code of civil procedure two distinct provisions for undertakings in attachment proceedings: 1. That in section 540, by which the undertaking is delivered to the sheriff, and the parties deal directly with him; and, 2. That in section 554, where the court is to order the discharge, after the defendant has appeared. This case is under section 540. The undertaking refers to a writ authorized by that section, and recites: "Whereas the defendant is desirous of giving the undertaking mentioned in said writ," and the section distinctly states that the writ must require the sheriff [which the writ in this case did] to attach and safely keep the property of the defendant, unless an undertaking be given in an amount sufficient to satisfy the demand, or in an amount equal to the value of the property which has been or is about to be attached—in which case to take the undertaking. Here is a distinct recognition of the fact that the sheriff may have commenced the execution of the writ, and may have attached some property, before the delivery of the undertaking: Curiac v. Packard, 29 Cal. 199, *per* Sawyer, J.; and he is required to take the undertaking and proceed no further. In the absence of an undertaking, he is commanded not only to attach, but to *safely keep;* the giving of the undertaking not only prevents him from making any further levy, but it prevents him from keeping any property already attached, and releases any levy already made, and substitutes the security of the undertaking in the place of property which *has been* or *is about to be* attached.

2. The plaintiffs offered in evidence the judgment roll in the attachment suit, showing the rendition of judgment in their favor. No extension of time appeared in the roll. The defendants offered in evidence the minutes of the court, stating that the cause came on regularly for trial, the attorneys for the respective parties being present, and that by consent of counsel in open court, judgment was directed to be entered in favor of plaintiffs and against defendants; then followed the sentence: "By consent of respective counsel it is ordered that proceedings on execution be stayed for sixty days." The plaintiffs objected to the evidence, on the ground that the judgment, as appearing in the roll, could not be changed or modified by the evidence offered. The minutes did not change or modify the judgment; it was competent for the defendants to prove, if they could, an agreement between the parties to that suit for an extension of time; and the evidence was offered for that purpose. The defendants in this action claim that such extension, being without their consent, released them from liability on the undertaking, they being sureties merely. That they are sureties, and not original obligors, is amply sustained, as well by section 540, code of civil procedure, as by the opinion of this court in Curiac v. Packard, 29 Cal. 197.

There is no doubt as to the general proposition that if the obligee make a valid contract with the obligor, for a consideration, to extend the time for payment, such contract will discharge the sureties if made without their consent. The question is, Does this case come within the general proposition?

Forbearance will not discharge the surety, nor will a direction to the sheriff to return an execution without levy; but if a seizure of personal property has been had, a direction to release the property seized will operate as a discharge *pro tanto*. In Hulme v. Coles, 2 Sim. 13, an action was commenced in June, on a bond, and on the twenty-third of that month, without the privity of the surety, the obligee took from the

obligor a *cognovit* for the amount of the debt, with a stipulation that no judgment should be entered up or execution issued until the first of August following; held, by the arrangement complained of, time was not given, but the remedy was accelerated.

So, in Fletcher v. Gamble, 3 Ala. 335, it was held that a confession of judgment by the principal debtor, and stay of execution by the creditor until the next term of court, was not such a giving day of payment as would exonerate the surety; the delays which the debtor may have by operation of law, even if by arrangement between the parties, is not giving time: See also Suydam v. Vance, 2 McLean, 99, to the same effect.

In Baker v. McClure, 2 Blackf. 14, it was held that the single fact of taking a judgment by confession, with stay of execution for six months, was not sufficient to discharge the surety, in the absence of proof that with the judgment by confession and stay, the money could not have been collected as speedily as by the usual course of proceedings.

In the case before us, the judgment was by consent. By consenting to the judgment, the defendant practically waived any ground he might otherwise have had for motion for new trial and of appeal.

We can not say, nor did the defendants in this case attempt or offer to prove, that without the consent for the judgment it could or would have become final and conclusive (in the sense of not being reviewable) before the expiration of sixty days. It may have been, that when this case was called for trial, the plaintiffs were not ready, in consequence whereof a continuance might have been granted to a day beyond the sixty days, the time depending upon other business before the court, and the plaintiffs, rather than have such delay, were willing to grant the time named, taking their judgment then.

We have not noticed all the points presented; but the above is practically a disposition of them.

Judgment and order affirmed.

MORRISON, C. J., and SHARPSTEIN and MCKINSTRY, JJ., concurring. By the express terms of the undertaking the defendants in this action undertook to pay, on demand, any judgment which the attaching creditor might recover against the attachment debtor. In view of this, we think the defendants can not, as between themselves and the plaintiff, be considered in the light of mere sureties.

PEOPLE v. FLORES.

In Bank. Filed December 29, 1883.

INFORMATION CHARGING THE DEFENDANT WITH THE CRIME OF EMBEZZLEMENT is not demurrable for describing him as a "*bailee accommodatum*," if otherwise unobjectionable.

APPEAL from a judgment of the superior court for the county of Merced, entered in favor of the defendant. The defendant was charged with the crime of embezzlement. The information described him as a "*bailee accommodatum.*" A demurrer was interposed on this ground and sustained. The people appealed.

Attorney General, for the appellant.

Geiss and *Ostrander & Knox*, for the respondent.

McKee, J. Eliminating from the information the word "*accomodatum*," the description of the offense charged against the defendant was unobjectionable. It may be conceded that the word has no common acceptation; it was, therefore, useless in connection with the charge, and as its insertion in the information did not tend to the prejudice of the defendant in respect to a substantial right, and did not prejudice the information nor the description of the offense, it should have been disregarded: Secs. 960, 1404, P. C.

Judgment reversed and cause remanded with instructions to overrule the demurrer.

Morrison, C. J., and McKinstry and Ross, JJ., concurred.

Luning *v.* Wise.

In Bank. Filed December 29, 1883.

Mere Authority to Execute a Promissory Note does not include authority to pay the same when it becomes due.

Presentment of a Promissory Note for Payment to a Joint Maker thereof is Excused, if, at the time of the execution and maturity of the note, such maker resided in a state other than that in which payment should be made.

Indorsement of a Promissory Note is Presumed to have been Made for a valuable consideration, and before maturity, in the absence of evidence to the contrary.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Tully R. Wise, in propria persona, for the appellant.

Sidney V. Smith & Son, for the respondent.

McKee, J. Action by the indorsee against the indorser upon a promissory note, of which the following is a copy:

"$475.00. San Francisco, March 24, 1879.

"Thirty days after date, without grace, we promise to pay to the order of T. R. Wise, four hundred and seventy-five dollars, with interest at the rate of one per cent. per month from date until paid. Principal and interest payable only in gold coin of the government of the United States, for value received. "Edward W. Jones.

"By his attorney in fact, Thomas H. Holt.

"Thomas H. Holt."

At its maturity the note was not presented to Jones, one of the joint makers, and upon that fact the indorser makes his contention that he is not bound to pay.

The note is not made payable at any particular place; but being dated at San Francisco, the presumption is that the makers resided, or had their place of business there, or at some other place within the state: Story on Prom. Notes, 230.

Upon that presumption it would be necessary for the holder, in order to charge the indorser, to make presentment of the note at maturity to the makers, at their respective places of residence or business at the place where it was dated, or elsewhere within the state, if with reasonable diligence their places of residence or of business could be ascertained: Subds. 1, 2, 4, sec. 3131, C. C.

Holt had his residence or place of business in San Francisco, and to him the note was duly presented at maturity, and payment refused. Yet he had executed the note for his co-defendant Jones, upon a power of attorney which authorized him to execute and deliver the note for Jones, but the power of attorney gave him no authority to pay for Jones; and it is well settled, that mere authority to execute a promissory note for another does not include authority to pay the note when it becomes due.

Now it is undoubtedly true that a presentment to only one of two joint makers of a promissory note is insufficient to charge an indorser, unless some legal excuse be shown for the failure to make presentment to the other: Blake v. McMillan, 22 Iowa, 358; S. C., 33 Id. 150; Arnold v. Dresser, 8 Allen, 435; Union Bank v. Willis, 8 Metc. 504. The death of one of the joint makers does not constitute an excuse, if presentment may be made to the executor or administrator of his estate: Hale v. Burr, 12 Mass. 86; Haight v. Kindhart, 1 S. C., 189.

But the circumstance in this case which distinguishes it from those cases is the fact, proved in the case, that at the time of the execution and maturity of the note Jones had no residence or place of business in San Francisco or within the state of California. He resided in the state of Kentucky, and the question arises, whether that constitutes a legal excuse for the non-presentment of the note to him at maturity.

"It seems," says Justice Story, in his work on Promissory Notes, "that if the maker of a promissory note resides or has his domicile in one state, and actually dates and makes and delivers a promissory note in another state, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker can not personally, upon reasonable inquiries, be found within the state, and has no known place of business there."

In Rickets v. Pendleton, 14 Md. 330, which was an action upon a promissory note dated at Baltimore, and in which it was admitted as a fact that the makers of the note had not, nor had either of them, his or their place or business within the state of Maryland, the supreme court of that state held that the fact excused the holder from making demand upon them at Baltimore where the note was made payable. "The attempt to make demand," said the court, "would have been futile:" See also Selden v. Washington, 17 Ind. 379. And in an action upon a promissory note dated at New Orleans, made by one who resided in the state of Kentucky, it was held by the supreme court of Louisiana that the holder of the note was not obliged to go out of Louisiana to make demand: Hepburn v. Toledano, 5 Martin, 316. "If," say the court, "the maker lives in another country, the indorsees can not be presumed to know his residence; and all that the law requires of the holder is due diligence at that place where the note is drawn:" Id. "This," says Mr. Justice Sharkey, "must be the rule of law; for it is impossible to send notice to the domicile of a party who has none, and it would be absurd to require a party to prove that he diligently tried to find that which he proves had no existence:" Tunstal v. Walker, 2 Smed. & M. 638; Moore v. Coffield, 1 Dev. (N. C.) 247; McKee v. Boswell, 33 Mo. 567.

Section 3131, civil code, affirms the rule of these cases. "If," says the code, "the principal debtor have no place of business, or if his place of business can not, with reasonable diligence, be ascertained, presentment for payment is excused."

Error is also assigned that there was no evidence to show that defend-

ant indorsed the note for a consideration. But the presumption was that he had indorsed it for a valuable consideration before its maturity: C. C., secs. 3104, 3122; and he offered no evidence to the contrary.

Judgment and order affirmed.

MORRISON, C. J., and MYRICK and MCKINSTRY, JJ., concurred.

SHARPSTEIN, J., concurring. In addition to the grounds stated by Mr. Justice McKee, I attach some importance to the circumstance of payment being demanded of the agent of Jones, who had authority to and did execute this note in the name of Jones. In Philips v. Astling, 2 Taunt. 306, it was held if the drawee of a bill went abroad, leaving an agent in England with power to accept bills, that a bill so accepted by such agent must be presented to him for payment, if the drawee continued absent. If the drawee had accepted the draft himself, and then gone and continued abroad, that would have excused presentation to him. And although it does not appear that the agent who accepted said draft for the drawee had any authority to pay it, or to do more than accept it for said drawee, Lord Mansfield held that in order to charge the indorser, said draft must be presented to the agent who accepted it.

SOUTHERN PACIFIC RAILROAD CO. v. BENNETT.

In Bank. Filed January 3, 1884.

JUDGMENT OF THE LOWER COURT WILL BE REVERSED FOR FAILURE TO FIND on a material issue.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The questions presented by this appeal were similar to those in the case of the Southern Pacific Railroad Co. v. Compton, 11 Pac. C. L. J. 429.

Glassell & Smith, for the appellant.

W. D. Gould, for the respondent.

THE COURT. In Southern Pacific Railroad Co. v. Compton, 11 Pac. C. L. J. 429, the judgment and order denying plaintiff's motion for a new trial were reversed, on the ground that the court had omitted to find upon one of the material issues. The issues and findings in this case are the same as they were in that, and on the authority of that case the judgment and order denying the motion for a new trial are reversed.

ESTATE OF BILLINGS.

Department Two. Filed January 4, 1884.

WRITING PROPOSED AS AN OLOGRAPHIC WILL CAN NOT BE ADMITTED TO PROBATE, where any part of the date, such as the year, is not written by the deceased, although the rest of the writing complies with the statutory requirements in reference to such wills.

APPEAL from an order of the superior court for Sacramento county, revoking the probate of a document alleged to be the last will and testament of E. L. Billings. The further facts appear in the opinion.

Young & Young and *A. C. Freeman*, for the appellant.

S. C. Denson, for the respondent.

MYRICK, J. The body of the script proposed as an olographic will was entirely written and was signed by the hand of the deceased. The date reads thus: "Sacramento, April 1st, 1880." The words "April 1st" were written by the deceased; the balance was printed, the deceased having evidently taken a sheet of paper with a letter-head, stating the business and location of his firm, the name of the place, "Sacramento," and the year, "1880," printed, and filled in the month and day, "April 1st."

We had occasion to consider the principle underlying the facts of this case, in Estate of Martin, 58 Cal. 530; and Estate of Rand, 61 Id. 468. Section 1277, civil code, requires that a paper, to constitute an olographic will, must be entirely written, dated, and signed by the hand of the testator. It must be entirely written, it must be entirely dated, and it must be entirely signed by him. If it be partly written by him and partly written by another or printed; if it be partly dated or signed by him and partly by another, it is not a compliance with the statute. The words "April 1st" do not constitute a date—do not show on what April 1st the paper was written—there being, as was suggested on the argument, many days "April 1st" in the life of any man; it was requisite that the whole date, April 1, 1880, should have been written by him, in order to comply with the statute.

Order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

SUPREME COURT OF IDAHO.

PEOPLE ETC. *v.* MCDONALD.

Filed September 13, 1881.

MURDER—INSTRUCTION AS TO IMPLICATION OF MALICE.—Where the statute provided that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," an instruction is sufficient to the effect that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart."

LANGUAGE OF SUCH STATUTE IS IN THE ALTERNATIVE, AND IS EQUIVALENT to the provision that malice shall be implied in either case, when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, and it was proper for the court below to instruct the jury upon either ground, for the implication of which, in its judgment, there was evidence applicable.

OMISSION FROM THE INSTRUCTION OF THE WORD "ALL" as given in such statute was not error. The word "all" in the connection used in the statute is a word of emphasis only, and is not in any sense essential to the completeness of the direction.

APPEAL from a judgment of the district court of Owyhee county, entered upon a verdict convicting the defendant of murder in the first degree. The opinion states the facts.

Alanson Smith, for the appellant.

Thomas D. Cahalan, district attorney, for the people.

MORGAN, C. J. Defendant was indicted, tried, and convicted of murder in the first degree.

The first point urged upon the attention of the court, and which seems to be relied upon by the appellant as the main point, or as the only ground upon which he asks a reversal of the judgment below and an order for a new trial, is, that the court erred in the instructions giving the definition of murder, or in the direction as to when malice is to be implied.

The language of the statute is, "that malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

The language of the statute is in the alternative, and is equivalent to the following: Malice shall be implied either when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart; that is, in either case malice shall be implied. It is proper, then, that the court should give either cause for the implication that may in his judgment be applicable to the evidence.

The question remains, then, whether leaving out the word "all" makes such a change in the statute as to mislead the jury. It is proper first to inquire what kind of an error or omission would authorize an appellate court to reverse a judgment of the court below, and direct a new trial. It is not error to give general instructions, and if an omission occurs in a general instruction, unless it actually misleads the jury and procures a wrong verdict, it can not be assigned for error. Thompson, in his work on Charging the Jury, section 81, says: "A party can not in a court of error avail himself of an omission which he made no effort to have supplied at the time," and cites a large number of authorities, running through the reports of a number of the states.

Neither is it sufficient if there is a mere tendency in the instructions to mislead the jury. In such a case, also, the defendant must ask additional explanatory instructions in order to avail himself of the defect in a court of error: Thompson on Charging Jury, sec. 82; Kenan v. Holloway, 16 Ala. 53.

A proper jury is composed of men of sound judgment and ordinary intelligence. It can not be supposed that such men would infer from this instruction that they were to take a part of the circumstances and from these imply malice. Such men would know that when the court said the circumstances of the killing, all the circumstances was intended, and not a part.

It can not be said, and it is not said by the appellant, that this instruction in the form given misled the jury; and it can scarcely be said that it had a tendency even to mislead the jury. The word "all," in the connection used, is a word of emphasis only, and is not in any sense essential to the completeness of the direction. The court is never required to give instructions in the exact language of the statute: it would be, in some cases, erroneous to do so. It is sufficient if the substance is correctly given.

When all the instructions are taken together, no improper inference can be drawn. The jury are repeatedly, and in differing language, charged that every reasonable doubt arising from the evidence must be resolved in favor of the defendant.

This reasonable doubt is defined in the instructions to be not speculative in its nature, but a real uncertainty and a wavering of the mind after consideration of all the evidence; and the concluding clause of the instructions of the court is: "You will carefully consider *all* the facts

and circumstances of the case as detailed by the evidence." The different degrees of murder and manslaughter are also clearly defined.

The six instructions refused had been substantially given by the court. These six instructions are clearly bad on account of their mystical character also, and appear to have been framed to confuse the jury instead of to instruct them. We find no error in the causes assigned.

Judgment is therefore affirmed.

SUPREME COURT OF NEVADA.

KELLY *v.* KELLY.

Filed July 11, 1883.

EXTREME CRUELTY TO WARRANT A DIVORCE ON SUCH GROUND need not be accompanied by physical violence, but must be such as to occasion danger to life, limb, or health, or the reasonable apprehension of such danger.

FALSE ACCUSATIONS OF MARITAL INFIDELITY ON THE PART OF THE HUSBAND, made by the wife, may in certain cases constitute such extreme cruelty as to entitle him to a divorce.

SUFFICIENT EVIDENCE IN SUPPORT OF A JUDGMENT WILL BE PRESUMED to have been given, in the absence of an affirmative showing to the contrary. This principle is always applied in appeals upon the judgment roll alone.

VERIFICATION OF A COMPLAINT IN WHICH NOTHING IS STATED ON INFORMATION OR belief need not contain the statutory words, "except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true."

APPEAL from a judgment of the first judicial district court, Storey county. The opinion states the facts.

Mitchell & Woodburn, for the respondent.

Crittenden Thornton, for the appellant.

BELKNAP, J. This is an appeal from a judgment of divorce in favor of the husband and against the wife, upon the ground of extreme cruelty. Neither the findings of the court nor any statement of the evidence has been brought here. The appeal is taken from the judgment roll alone, and the principal question presented for consideration is whether the allegations of the complaint are sufficient to support a judgment of divorce.

The complant, after setting forth the necessary jurisdictional facts, proceeds as follows:

"That since the said marriage defendant has been guilty of extreme cruelty towards the plaintiff.

"That on the sixth day of July, A. D. 1881, at the city of San Francisco, defendant falsely charged plaintiff with committing adultery, and frequently since said date, has accused him of conjugal infidelity, and with living and cohabiting with other women, and has since then constantly circulated among their mutual friends charges of the same character.

"Plaintiff further avers that since the said sixth day of July, A. D. 1881, defendant has been in the habit of vilifying, slandering, and abusing the plaintiff, and applying to him the most opprobrious epithets, and has frequently threatened to abandon plaintiff.

"That by reason of the acts of the defendant hereinbefore set forth,

the life of the plaintiff has been rendered unendurable and miserable, so that he has been forced to cease cohabiting and living with defendant."

In considering extreme cruelty as a ground of divorce, courts have cautiously given it negative rather than affirmative definitions. The difficulty in giving an affirmative definition arises from the fact that cruelty is a relative term; its existence frequently depends upon the character and refinement of the parties, and the conclusion to be reached in each case must depend upon its own particular facts. "We do not divorce savages and barbarians because they are such to each other," said the supreme court of Pennsylvania, in Richards v. Richards. "We can exercise no sound judgment in such cases [divorce cases] without studying the acts complained of in connection with the character of the parties, and for this we want the common sense of the jury rather than fixed legal rules:" 37 Pa. 228.

In the great case of Evans v. Evans, 1 Hag. Con. 35, Lord Stowell laid down certain principles which have been universally approved. He said: "What is cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health and even the life of the party. * * * What merely wounds the mental feelings is in few cases to be admitted, when not accompanied with bodily injury, either actual or menaced.

"Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly—not innocent, surely, in any state of life, but still they are not that cruelty against which the law can relieve. * * * In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait until the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of the mind."

Adopting the principle, that the element of danger to life, limb, or health, or the reasonable apprehension of such danger, must exist, in order to constitute legal cruelty, can it be affirmed as matter of law that the plaintiff may not have established a cause of action under the complaint? If the conduct of which the defendant confesses to have been guilty, and which she admits drove the plaintiff from his home, could have resulted in injury to health, then the judgment must be allowed to stand.

The result which the law is intended to prevent may be accomplished without any physical violence. The health of a sensitive wife may be as effectually destroyed by systematic abuse and humiliating insults and annoyances as by blows and batteries. It would be a reproach to the law, as is said by Mr. Bishop in his work on Marriage and Divorce, to say

that a husband may not by personal violence ruin the health of his wife or kill her, and yet allow him to produce the same result in some other way: Sec. 733.

Upon this subject the Pennsylvania court of common pleas employed the following language: "A husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. Would the wife have no remedy in such circumstances under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty when the subject is considered with reference to the principles on which the divorce for cruelty is predicated. The courts intervene to dissolve the marriage bond under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged from its effects—not solely from the means by which these effects are produced. To hold, absolutely, that if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means short of those which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given to the wrong-doer.

"The more rational application of the doctrine of cruelty is, to consider a course of marital unkindness with reference to the effect it must necessarily produce on the life or health of the wife; and if it has been such as to affect or injure either, to regard it as true legal cruelty.

"This doctrine seems to have been the view of Sir H. Jenner Fust, in Dysart v. Dysart, where he deduces from what Sir William Scott ruled in Evans v. Evans, that if austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion, *do threaten bodily harm, they do amount to legal cruelty.* This idea, expressed axiomatically, would be no less than the assertion of this principle, that whatever form marital ill treatment assumes, if a continuity of it involves the life or health of the wife, it is legal cruelty:" Butler v. Butler, 1 Pars. 344.

We scarcely need the aid of judicial authority for the enforcement of the truth that there may be cruelty without personal violence, and that such cruelty, working upon the mind, may affect the health. Wretchedness of mind can hardly fail to have this result.

In causes of divorce, upon the ground of cruelty, wives appear as complainants more frequently than husbands. This arises from the fact that the husband is generally physically stronger than the wife, and less susceptible to the effects of ill treatment than she. He, too, may, in fact, frequently restrain the wife's violence by the exercise of marital power in the domestic forum, without the aid of the courts. But the law does not encourage him to measure strength with her. "The fact that the husband can defend himself is the very grievance. It is because he may be tempted in defending himself to retaliate upon his wife that the court is bound to interfere, and to decree a judicial separation, when such acts are proved. When a man marries an ill-tempered woman he must put up with her ill-humor, but the moment she lifts her hand against him the court must interfere, for if it does not, how can it answer the husband if he should subsequently allege that he had been forced to use violence in self-defense?" Forth v. Forth, 36 L. J. 122. The statute contemplates cases

in which the husband may be the complaining party, and, in such cases, expressly affords him the same relief which it extends to a complaining wife. Although he is generally physically stronger than she, he may be the weaker party. And cases may arise in which the wife may cause the husband to suffer as seriously, mentally and physically, as she would, were he to be the aggressor. To reverse this judgment would be to say, as matter of law, that no such cases could exist.

Under the allegations of the complaint, a case of extreme cruelty could have been proven. Whether such a case was, in fact, proven, can not be reviewed upon this appeal, because of appellant's failure to make the evidence a part of the record. The general principle of law is, that when matter is necessary to be proven in order to support the judgment, it will be presumed to have been proven in the absence of an affirmative showing to the contrary. And this principle is always applicable in an appellate court to causes presented, as this has been, upon the judgment roll alone.

Objection is made to the verification of the complaint. Each allegation of the complaint is made positively, and nothing is stated upon information or belief. The verification follows the form prescribed by the statute, omitting the words, "except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true."

"If a party who, in his answer, has stated nothing on information and belief, thinks it advisable to swear that he believes such statement to be true, he doubtless has a right to do so; but if, in such a case, he confines himself to swearing that his answer is true to his knowledge, he not only complies with the requirements of the code, but avoids what, to say the least of it, is a harmless absurdity:" Kinkaid v. Kipp, 1 Duer, 692.

Judgment affirmed.

Tognini et al. *v.* Hansen.

Filed July 24, 1883.

New Trial will be Granted when the Jury are Instructed to find upon a material fact concerning which no evidence has been introduced at the trial.

Defendant's Previous Consent to or Subsequent Ratification of certain work done by the plaintiff can not be inferred from the fact that, at the latter's request, he gave them a statement of such work, especially when it appears that the work was originally done against his protest.

Appeal from an order of the sixth judicial district court for Eureka county, granting the defendant a new trial. The opinion states the facts.

F. W. Cole, for the appellants.

R. M. Beatty and *Wren & Cheney*, for the respondents.

Leonard, J. This action was commenced May 27, 1881. In their complaint plaintiffs allege that on or about August 11, 1879, the defendant entered into a contract with the firm of Leonardi & Co. and Alberigi & Co., by which contract said firms agreed to manufacture charcoal on the Daney & Ellison ranch, in Eureka county, and deliver the same to defendant, and in consideration thereof defendant agreed to pay to said firms, on delivery of said charcoal, the sum of fourteen cents per bushel,

for each and every bushel so delivered; that on or about the twenty-sixth day of March, 1880, plaintiffs succeeded to the right of said firms in said contract by virtue of an equitable assignment of the same to plaintiffs, and that ever since the last-named date defendant has recognized plaintiffs as the successors in interest in and to said contract.

Then follows an allegation that under and by virtue of said contract, since March 26, 1880, plaintiffs manufactured charcoal and delivered the same to defendant to the amount of fifty thousand bushels, and that defendant has received the same. That there is now due and owing thereon from defendant to plaintiffs the sum of seven thousand dollars.

For a second and separate cause of action, it is alleged that plaintiffs, since January 1, 1881, at defendant's request, have sold and delivered to defendant fifty thousand bushels of charcoal, of the value of seven thousand dollars, and that defendant has not paid for the same.

At the trial, by an amendment to the complaint, plaintiffs were permitted to further allege, that between January 1, 1880, and May 27, 1881, plaintiffs, at defendant's request, manufactured and delivered to defendant fifty thousand bushels of charcoal, of the value of seven thousand dollars, no part of which had been paid. Defendant denied each and every allegation in the original complaint contained, and those in the amendment thereto were and are treated as denied. Plaintiffs obtained verdict and judgment for two thousand six hundred and seventeen dollars and seventy-eight cents and costs.

This appeal is taken from an order granting a new trial because plaintiffs' instruction number one was given to the jury, when, in the opinion of the court, there was no evidence to justify the same, and in consequence of which the jury were led into an error in rendering their verdict.

The instruction in question is as follows: "It is a question of fact for you to consider, whether the firms of Leonardi & Co. and Alberigi & Co. were one and the same firm, and as to whether the wood cut or charcoal burned was so cut or burned by one or both of such firms, or how much was cut or burned by each of said firms."

It is not claimed by appellants that the court erred in granting a new trial, if its conclusion was correct that there was no evidence tending to show that the firms of Leonardi & Co. and Alberigi & Co. were one and the same firm.

The record discloses but one contract, and that was made by defendant and Leonardi & Co., although the court, in its opinion, says that upon the trial the defendant introduced in evidence the original written contract between himself and Alberigi & Co., which disclosed the same terms as that between him and Leonardi & Co., and was dated July 26, 1879. The contract between defendant and Leonardi & Co. was dated August 11, 1879.

Defendant testified that there was no connection between the two firms mentioned; that they worked under different contracts, the terms of which were substantially the same; that before plaintiffs and Torre levied upon the wood and coal, as hereinafter stated, Leonardi & Co. had cut a large amount of wood and burned it into coal, and that he had paid them over one thousand six hundred dollars therefor; that Alberigi & Co. also cut wood under their contract, enough to make twenty-three thousand bushels of charcoal, and that about the first of December, 1879, they

threw up their contract and turned the wood over to him in satisfaction of certain indebtedness due from them to him.

Defendant also testified that at the time of the sheriff's sale in Torre's suit, March 26, 1880, he notified plaintiffs that the wood cut by Alberigi & Co. was his, and that he did not want it burned into charcoal.

Plaintiffs did not undertake to disprove this testimony. So, as stated by the court below, "there was no attempt to contradict the testimony of the defense that the Alberigi & Co. wood was cut and paid for before plaintiffs came upon the scene; that plaintiffs were notified that defendant owned the same, and did not wish it burned into charcoal; and that, notwithstanding, plaintiffs proceeded at their peril and burned that wood into charcoal."

Defendant testified that Leonardi & Co. had cut very little wood, if any, at the time Alberigi & Co. turned their wood over to him; that his wood-ranch was made up of two or three different ranches that he had bought; that Leonardi & Co. cut wood in one place and Alberigi & Co. in another; that the Leonardi coal was manufactured by Leonardi and Alberigi after they went in together, about the first of December, 1880. We quote from his testimony: "That [the Leonardi] was the coal that I gave Tognini & Co. notice that I would receive from them. That had nothing to do with the Alberigi wood or coal. I never gave Tognini & Co. notice that I would receive any coal burned from the Alberigi & Co. wood, and I never in any way recognized the right of Tognini & Co. to burn it into charcoal."

The notice given in evidence corresponds with this testimony. It was given in January, 1881, and referred only to the coal burned by Leonardi & Co.

Again, plaintiffs' rights in this action, whatever they are, are based upon the fact that plaintiffs are the successors of Leonardi & Co., for the reason that they made a certain purchase at sheriff's sale, in the case of John Torre v. Giovanni Demetro, Giuseppe Ludessi, and Antonio Leonardi; and the further reason, as they claim, that they were recognized and treated by defendant as the successors of Leonardi & Co.

But the names of each of the defendants in that case appear in the judgment, execution, sheriff's return on execution, notice of sale, and sheriff's certificate of sale, and in neither document does the name of Alberigi & Co., or any member of that firm, appear. It was a part of the judgment in that case that execution issue against the separate property of the defendants served with summons, and the joint property of all the defendants, to wit: Giovanni Demetro, Giuseppe Ludessi, Antonio Leonardi, and Adnaino Andreucetti.

If Alberigi & Co., or any member of that firm, had any interest in the property or property rights purchased, they were not conveyed to plaintiffs under the sale. Defendant not only notified Torre and plaintiffs that he owned the property in question, but Torre gave the sheriff an indemnifying bond, with plaintiff Tognini as one of the sureties. This was as early as March 26, 1880, before plaintiffs burned any coal from the Alberigi wood.

Besides, plaintiffs brought suit in the justice's court, and attached ten thousand bushels of charcoal, and wood sufficient to make thirty thousand bushels of coal, more or less, as the property of Antonio Leonardi and A. Andreucetti.

The coal attached in the last-named suit, we understand, was that ad-

mitted by defendant to have been burned by Leonardi & Co., under their contract, which was on the ranch when plaintiffs commenced to burn coal, and the wood was cut by Alberigi & Co., under their contract, which was abandoned about December 1, 1879, by consent of defendant, who took the wood cut in satisfaction of Alberigi & Co.'s indebtedness to him.

But counsel for appellants says defendant's statement that the two firms were separate and worked under distinct contracts, is contradicted by his further statement that Alberigi & Co. and Leonardi & Co. cut wood together after November, 1879, and that a certain pass-book, admitted in evidence, was kept in the name of Alberigi and Leonardi.

Defendant stated that Alberigi went to work with Leonardi, after he threw up his contract, and there is nothing to prove that the purchases shown by the pass-book were made prior to that time. Alberigi might have been a member of the firm of Leonardi & Co., after November or December, 1879, and consistently with that fact, the pass-book thereafter might have been kept as stated. But the fact that Alberigi was a member of the firm of Leonardi & Co. after the contract of Alberigi & Co. had been abandoned, does not tend to show that, prior to that date, Alberigi & Co. and Leonardi & Co. were one and the same firm, or that the wood cut previously by Alberigi & Co. was the property of Leonardi & Co.

Plaintiff Tognini testified as follows: "There were three or four members of the firm of Leonardi & Co. Leonardi and Alberigi were all I know." The witness might have meant, and we presume did mean, that Alberigi was one of that firm after he abandoned his own contract, November or December, 1879. That view accords with the testimony of defendant, and is not inconsistent with plaintiffs'.

Finally, it is said, the fact that defendant gave plaintiffs a statement of the Alberigi & Co. coal, shipped by him in February, 1881, is inconsistent with the idea that he did not, prior to that time, consider the Alberigi & Co. coal and the Leonardi & Co. coal were one and the same.

Defendant said he gave the statement because plaintiffs asked for it. But he had given previous notice that the wood cut by Alberigi & Co. was his property, and that he did not want it burned into coal.

Plaintiffs not only failed to get defendant's consent to the manufacture of the Alberigi wood into coal, but they did so against his protest. They were not misled by his words or acts. And the fact that he subsequently, at plaintiffs' request, gave them a statement is not any evidence of his previous consent or his subsequent ratification.

We think the order appealed from should be affirmed, and it is so ordered.

HIRSCHFELD *v.* WILLIAMSON, Sheriff, etc.

Filed July 25, 1883.

DECLARATIONS OF A VENDOR, MADE AFTER A SALE BY HIM, and after he has parted with the possession to his vendee, can not be received in evidence against the vendee, for the purpose of affecting or impeaching the *bona fides* of such sale, or of defeating the vendee's title, on the ground that the sale was in fraud of the vendor's creditors. Nor are such declarations admissible as being part of the *res gestæ*.

CREDITOR OF A VENDOR IN ATTACKING THE VALIDITY OF A SALE by him, on the alleged ground of fraud, can not question the authority of the vendor's agent by whom such sale was made.

APPEAL from an order of the first district court for Storey county, granting the plaintiff a new trial. The opinion states the facts.

Wal. J. Tuska, for the appellant.

Lewis & Deal, for the respondent.

LEONARD, J. Defendant appeals from an order of the court below granting to the plaintiff a new trial.

The record shows these facts: Louis Ehrlick, a resident of New York city, on and prior to January 15, 1880, had a store in Virginia City, in this state, wherein he sold dry goods, clothing, etc. On the twelfth day of August, 1879, he executed and delivered to his son, Moses Ehrlick, a power of attorney to do and perform, in his name, the matters and things therein stated. On the fifteenth of January, 1880, Moses Ehrlick, as attorney in fact of Louis Ehrlick, sold and delivered to Joseph Hirschfeld, plaintiff herein, all the goods in the store at Virginia City, and plaintiff retained possession thereof until February 6, 1880, when defendant, as sheriff of Storey county, attached the goods in question, as the property of Louis Ehrlick. On the sixteenth day of February, 1880, plaintiff commenced this action to recover the goods so attached, or their value, to wit, four thousand eight hundred and seventy-six dollars and fifty cents. On the third day of February, 1880, after being informed by telegram and letter, dated January 15, 1880, of the circumstances and conditions of the sale, Louis Ehrlick ratified the same, by an instrument in writing, signed, sealed, and acknowledged by him.

At the trial, and against the objections of plaintiff, defendant was permitted to prove certain declarations made by Louis Ehrlick, in New York city, on the nineteenth and twentieth of January, 1880, the tendency of which was to impeach the *bona fides* of the sale, and impair the title of plaintiff.

The only question presented for our consideration is as to the admissibility of these declarations. The defendant, in his answer, alleged that the pretended sale was made for the purpose of defrauding the creditors of Louis Ehrlick, one of whom was the plaintiff in the suit wherein the goods in question were attached by the defendant in this action, February 6, 1880. The verdict of the jury was for the defendant. It is general, and sustains the allegations of fraud. But it was found, in part, upon the declarations of Louis Ehrlick, admitted in evidence against plaintiff's objection. Those declarations were harmful to plaintiff's case. Their tendency was to invalidate the sale. Defendant ought not to retain a verdict obtained upon material illegal testimony.

If anything is well settled in the law, it is that the declarations of a vendor, made after a sale by him, and after he has parted with the

possession to his vendee, can not be received in evidence against the vendee, for the purpose of affecting or impeaching the *bona fides* of such sale, or of defeating the vendee's title, on the ground that the sale was in fraud of the vendor's creditors. Counsel for appellant do not deny that such is the law; but they say the declarations were made on the nineteenth and twentieth of January, when, to all intents and purposes, Louis Ehrlick was in possession, because, under the power of attorney, Moses Ehrlick did not have authority to sell out his father's entire business in Virginia city; that the sale and consequently the delivery of possession to plaintiff were void when made, and the ratification was not made by Louis Ehrlick until afterwards, on the third day of February, 1880. It is claimed, therefore, that the rule of law stated above does not apply to this case.

Our impressions are, that the power of attorney was sufficient to authorize M. Ehrlick to make the sale and transfer; but under the allegations contained in the answer, we shall not base our decision upon this point. Defendant's theory of the case, as shown by his answer and at the trial, was that the transfer was made on the fifteenth of January, 1880, by L. Ehrlick, by and through his attorney in fact, M. Ehrlick, but that the transaction was void for fraud.

A portion of defendant's answer is as follows: "And defendant avers, upon his information and belief, that on or about the fifteenth day of January, 1880, said (Louis) Ehrlick, intending to cheat and defraud his said creditors, did then and there combine and collude with the plaintiff herein, and said plaintiff did then and there conspire and confederate with said Ehrlick, to cheat and defraud the said creditors of said Ehrlick, and in pursuance of said scheme and in furtherance thereof, said Ehrlick did, on or about said day, pretend to make, and did made, a transfer of his said stock in trade, including the goods and chattels mentioned and described in the complaint herein, unto said plaintiff; and said plaintiff, at said time, well knew that said Ehrlick was largely indebted as aforesaid, and that said transfer was made with intent to cheat and defraud the creditors of said Ehrlick. And defendant avers, upon his information and belief, that plaintiff paid no consideration for said goods and chattels described in the complaint herein, and that he accepted said pretended transfer with intent to cheat and defraud the said creditors of said Ehrlick, and now claims said goods and chattels in secret trust for said Ehrlick."

The alleged fraudulent transfer referred to by defendant was the one made by M. Ehrlick on the fifteenth of January. In fact, that was the only one made. Referring to that transaction, defendant alleges that L. Ehrlick transferred to plaintiff the property in question, but that said transfer was made to cheat and defraud the creditors of L. Ehrlick. In the face of these allegations, defendant can not now question the power of M. Ehrlick to make the transfer. He can not now dispute the correctness of his own allegations. His only right under the pleadings was to show, by competent evidence, that the transfer was void for fraud.

The declarations in question were not admissible, by reason of their being a part of the *res gestæ:* Meyer v. V. & T. R. R. Co., 16 Nev. 343 *et seq.*

The order of the court appealed from is affirmed.

SUPREME COURT OF NEW MEXICO.

SMITH *v.* MONTOYA.

Filed January, 1883.

JUDGMENT CAN NOT BE RENDERED AGAINST ONE SUMMONED AS GARNISHEE, until after judgment has been recovered in the action against the principal debtor. In proceedings against the garnishee, he may show either by the record, or other competent evidence, that the judgment against the principal debtor was void for want of jurisdiction.

JURISDICTION OF A COURT OF GENERAL JURISDICTION WILL BE PRESUMED from the judgment itself, although the record does not recite the facts conferring jurisdiction. Otherwise if the entire record discloses a want of jurisdiction.

PUBLICATION OF A CITATION TO NON-RESIDENT DEBTORS in a proceeding by attachment, as provided by Prince's Statutes, section 11, page 138, which fails to notify the defendants that their property has been attached and will be sold to satisfy whatever judgment is rendered against them, is insufficient and confers no jurisdiction on the court. Such statute is in derogation of the common law, and must be strictly construed.

PERSONAL JUDGMENT CAN NOT BE RENDERED AGAINST A NON-RESIDENT DEBTOR, who has failed to appear, upon a constructive service upon him by publication.

PROPERTY OF A NON-RESIDENT DEBTOR WITHIN THE JURISDICTION OF THE COURT may be attached and a judgment *in rem* recovered against it, upon publication of the notice to the non-resident debtor, as required by statute.

VALIDITY OF A CHATTEL MORTGAGE CAN ONLY BE ATTACKED by one not a party thereto on the ground of fraud, in that it was given to hinder, delay, or defraud the mortgagor's creditors, and the facts determining its invalidity must be submitted to the jury.

FACT THAT A CHATTEL MORTGAGE WAS GIVEN TO SECURE FUTURE ADVANCES, if done in good faith, does not render such instrument invalid as to the mortgagor's creditors.

ERROR from a judgment of the district court for the county of Santa Fé, entered in favor of the plaintiff. The opinion states the facts.

Catron & Thornton and *Breeden & Waldo*, for the plaintiff in error.

Gildersleeve & Knaebel, for the defendant in error.

BRISTOL, J. The record in this case shows that Feliciana Montoya, the defendant in error, on the twenty-sixth of December, 1878, sued out an attachment against the property of Jerome J. Hinds, George E. Kirk, Ulysses E. Fisher, and George L. McDonough, to satisfy his money demand in the sum of four hundred dollars.

On the following day said Montoya filed his declaration in *assumpsit* against the said Hinds, Kirk, Fisher, and McDonough, *as copartners*, and alleging them and each of them to be non-residents of the territory, and claiming damages in the sum of three hundred and fifty dollars.

On the same day that the declaration was filed, that is, the twenty-seventh of December, 1878, the plaintiff in error herein, Gustavus A. Smith, was summoned as garnishee.

The following notice was published in a weekly newspaper at Santa Fé for four successive weeks, commencing on the fourth of January, 1879, to wit:

"In the district court, county of Santa Fé, Feliciana Montoya v. Jerome J. Hinds, George E. Kirk, Ulysses E. Fisher, and George L. McDonough. The said defendants, Jerome J. Hinds, George E. Kirk, Ulysses E. Fisher, George L. McDonough, are hereby notified that a suit by attachment has been commenced against them in the district court for the county of Santa Fé, territory of New Mexico, by said plaintiff, Feliciana Montoya, for the work and labor, care and diligence, of the plaintiff, horse-feed, horse and mule hire, corn, hay, meat and drink, rent, wood,

board and lodging, had by the said defendants of and from the said plaintiff. Damage claimed, four hundred dollars. That unless you enter your appearance in said suit on or before the next February term of said court, commencing on the tenth day of February, A. D. 1879, judgment by default therein will be rendered against you. Jno. H. Thompson, clerk. C. H. Gildersleeve, for plaintiff."

That at some term of the court below in 1880—but which term of that year the record does not disclose—judgment by default to appear was rendered against said Hinds, Kirk, Fisher, and McDonough, and the damages of the plaintiff assessed by a jury at three hundred and seventy-three dollars and fifty cents, and judgment in *assumpsit* rendered for that sum and costs in favor of the plaintiff, Montoya.

At the February term of the court below for the year 1879, the plaintiff, Montoya, filed allegations in the garnishee proceedings against Smith, covering money, property, and effects belonging to the defendants in his hands or under his control, and at the same term filed and exhibited appropriate interrogatories touching any property, effects, and credits of the defendants in the hands of said garnishee.

Some of the answers of the garnishee to the interrogatories were traversed by the plaintiff, Montoya, and upon the issues thus joined a trial was had before a jury, whereby the following facts, among others, seem to have been established:

That on the fourteenth day of November, 1878, the defendants in the action of *assumpsit*, by the name of the "Fisher Stage Line Company, by Jerome J. Hinds, president and general manager," executed to the garnishee, Smith, a chattel mortgage covering all the property of defendants that subsequently came to the possession of said garnishee.

That the consideration of said mortgage purported on its face to be the sum of two thousand five hundred dollars, to them at that date advanced by said Smith, the receipt whereof was thereby acknowledged by said defendants, and in the further consideration that said Smith should thereafter advance all money necessary to honor and pay all drafts then drawn and thereafter to be drawn for the benefit of said stage company, and to enable said Hinds, as such president and general manager, to carry on the business of said stage company.

That the conditions of said mortgage were that the same should be void if said company should pay or cause to be paid to said Smith said sum of two thousand five hundred dollars, and all moneys advanced and paid or to be advanced and paid by him on draft of or for the benefit of said company, or otherwise.

That the possession and control of the property covered by the mortgage to be in said Smith, but the said company to have the privilege of using and employing the same in its said business, with the understanding, however, that if any other creditor should attach the same, or if any member of said company should attempt to remove or dispose of the same, then said Smith was to take the property from the hands of the company, for his own use and disposal.

That notwithstanding the recitals in the mortgage, no moneys had been advanced to said company at the time of the execution and delivery of the mortgage or prior thereto.

That from the time of the execution and delivery of the mortgage, on the fourteenth of November, 1878, up to the time said Smith was summoned as garnishee, on the twenty-seventh of December of this same

year, he had altogether advanced to said company not to exceed the sum of three hundred dollars. But that he had obligated himself under the terms of the mortgage to pay upwards of four thousand dollars. Up to that date it does not appear how he had obligated himself to pay that sum in the aggregate, except the general obligation under the mortgage to make future advances—except, it may be, some five hundred dollars which he obligated himself to pay by indorsement of a draft drawn on the company in Washington by said Hinds, in favor of the Second National Bank of Santa Fé, and another draft between the same parties, but not indorsed by Smith, in the sum of one thousand dollars, which he claims he became obligated to pay through some parol agreement, and taking charge of the company's stock.

For what particular purpose these drafts were drawn does not clearly appear.

That Smith, after he had been summoned as garnishee and before answering the interrogatories propounded in the garnishee proceeding against him, had property of said company in his possession under said mortgage, the value of which was much more than enough to satisfy the judgment rendered in favor of the plaintiff, Montoya.

A trial was had on the issues joined in the garnishee proceedings, resulting in a judgment against Smith as garnishee, in the sum of four hundred and twenty-four dollars and costs.

A multitude of errors are assigned upon the record, only a few of which, based upon the foregoing statement of the case, do we deem it necessary to notice.

The first question of importance raised is, as to whether the court below had acquired jurisdiction to render a judgment in favor of the plaintiff, Montoya, against Hinds et al., in the action of *assumpsit*, and to order a sale of attached property.

As no judgment could be legally rendered against Smith as garnishee until after judgment had been rendered against the defendants in the action in which he was summoned as garnishee, it follows that the garnishee had the right, as a matter of defense, to show, either by the record, or if the record was silent, by other competent proofs, that the judgment was void for want of jurisdiction.

Upon the trial between the plaintiff and garnishee, the plaintiff offered in evidence the record of the judgment alone rendered by default in his favor and against Hinds et al. This was objected to, on the ground that there was nothing in the record as presented showing that the court had acquired jurisdiction.

This objection was prematurely raised and properly overruled at the time, since the jurisdiction of a court of general jurisdiction will be presumed from the judgment itself, though the record does not recite the facts conferring jurisdiction: 8 How. 586; 16 Id. 65; 2 Wall. 358; 30 Cal. 439.

But this presumption does not arise when the record of the entire case discloses a want of jurisdiction: 8 Cal. 562.

And the question here presents itself whether other parts of the record do not disclose facts showing affirmatively that the court had not acquired jurisdiction to render the judgment it did against Hinds and his co-defendants.

The act of 1874 (Prince's Stat. 133), in regard to service of citations by publication, did not change the law then in force as to the form and

substance of published notices in attachment proceedings. That act expressly prescribes that the notice therein provided for "shall conform as far as practicable, *in form, time, and substance*, to the laws governing publication in causes of attachment."

This language is clearly inconsistent with the assumption that the legislature intended to change the form and substance of the notice in attachment proceedings.

It is true that the act itself prescribes a form of notice; but it is quite evident from the tenor of the whole act, including the form of notice prescribed, that its provisions were intended as an addition to the notice in attachment proceedings, and to cover only citations by publication in ordinary actions at law and suits in chancery.

Among the necessary parts of the notice to be published in attachment proceedings under the Kearny code was a notice to the defendant that "his property had been attached," and that unless he appeared, etc., "judgment would be rendered against him, and his property sold to satisfy the same:" Prince's Stat., sec. 11, p. 138.

This requirement has never been repealed by subsequent legislation. The act of 1862 merely changed the law as to the officers or persons authorized to make publication: Id., sec. 36, p. 143.

While the aforesaid act of 1874 makes another change, by conferring the authority on the clerk of the court, and, in addition to the previous law as to attachments, as already stated, providing for citation on non-residents by publication, in ordinary actions at law and suits in chancery.

The record discloses the fact, that the only notice to the non-resident defendants, Hinds et al., was the notice already set out in full in the statement of the case. This contains no notice to the defendants that their property had been attached, nor that such property would be sold to satisfy the judgment that would be rendered against them on their failure to appear as therein cited.

These constituent parts of the notice, as provided by statute (Prince's Stat., sec. 11, p. 138), are certainly material and substantial, and their omission—the defects not having been cured by a voluntary appearance of the defendants—renders the notice ineffectual and void.

As a citation and notice to non-resident defendants by publication is in derogation of the common-law mode of personal service, the statutory requirements as to what the notice shall contain must be strictly complied with. Unless this is done in the case of non-resident debtors who do not appear, the court acquires no jurisdiction for any purpose whatever, as against them or their property.

Even in proceedings *in rem* against the property of non-resident debtors, the citation, by publication or otherwise, to the defendant, as expressly provided by law, must be given, whereby they may have their day in court, otherwise the court will acquire no jurisdiction or authority to adjudge a sale of their property to satisfy their debts.

Even when citation and notice by publication, in the mode provided by statute, is given to a non-resident defendant who does not appear, no valid *personal* judgment can be rendered against him: 5 Otto, 714.

In such case, if the non-resident defendant has property within the territorial jurisdiction of the court, the same may be reached by attachment properly instituted; and the court, upon seizure of the property under the writ of attachment and proper notice by publication, so far acquires jurisdiction of the property as a proceeding *in rem* as to ascer-

tain the pecuniary obligations of the defendant and to apply the proceeds of the attached property in satisfaction of the same: 5 Otto, 714.

We have a statute substantially to the same effect, which is as follows: "When the defendant shall be notified by publication as aforesaid, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded to final judgment as in ordinary actions, but such judgment shall only bind the property attached, and shall be no evidence of indebtedness against the defendant in any subsequent suit:" Prince's Stat., sec. 12, p. 138.

This is all the court could do, in any event, in the present case.

Everything, therefore, relating to jurisdiction depends upon the regularity and sufficiency of the attachment proceedings. As the proper citation and notice was not published, it follows that the court below had acquired no authority to adjudge a sale of the attached property to satisfy the plaintiff's demand; and as a legal judgment against the attached property was a necessary prerequisite to a valid judgment against the garnishee, it further follows that the final judgment rendered against the garnishee, Smith, was premature and unauthorized.

Several errors are assigned on the charge of the court to the trial jury, only one of which do we deem it necessary to notice.

Among other things, the court said to the jury as follows: "Smith says, by way defense, that the property he held for Hinds was held under a mortgage; and he puts this mortgage in evidence. If this mortgage is a valid one, and covers the property which is claimed to have been garnished in Smith's hands, and Smith has not received from the property received therefor enough money to cover the total amount secured by said mortgage, then he is not responsible in any sum to the plaintiff. If said mortgage was not valid, then of course it is no defense."

This part of the charge was objected to on the ground that as to the mortgage it only submitted to the jury the question of its validity. The objection being overruled, the same was excepted to.

This submission to the jury of the validity of the mortgage, without submitting the facts on which its validity or invalidity must be determined, was error that was well calculated to confuse and mislead the jury. The tenor and terms of the mortgage, and what transpired under it, was sufficient to cast grave suspicions on it as to the *bona fides* of the transaction.

The only ground on which the mortgage could be attacked was that of fraud in making a disposition of the property with the view of hindering or delaying the creditors of the defendant Hinds et al. in the collection of their demands.

The fact that the mortgage was given to secure future advances, if done in good faith, was not objectionable.

But the question of bad faith may be properly raised in all such cases, and especially where the mortgage is interposed as a shield against attaching creditors: 1 Pet. 387; 4 Id. 306; 7 Cranch, 341; 23 How. 14.

The questions of fact as to the *bona fides* and the purpose of the mortgage ought to have been submitted to the jury, as a prerequisite to the determination of its validity.

Judgment reversed, and the cause remanded to the court below, with instructions to grant leave to the plaintiff to proceed to a proper citation of the defendants, Hinds et al., and to proper proceedings thereon, and thereupon to proceed with a new trial between the plaintiff and garnishee Smith. The defendant in error to recover his costs.

All concur.

ORR ET AL v. HOPKINS.

Filed January, 1883.

TERMS OF A PROMISSORY NOTE PROVIDING FOR THE PAYMENT OF EXCHANGE, where the instrument is made payable at a particular bank in a designated city, may be rejected as surplusage, and do not render the note non-negotiable by reason of the amount due thereon being uncertain.

NEGOTIABLE PROMISSORY NOTE IMPLIES A CONSIDERATION for the promise therein contained.

DECLARATION ON A PROMISSORY NOTE, WHICH DESCRIBES SUCH INSTRUMENT as payable generally or absolutely, can not be supported by evidence of a note in which the place of payment is specifically designated.

UPON AN ACCOUNT STATED THE LAW IMPLIES A VALUABLE CONSIDERATION, and it is not necessary to inquire into the nature of items of the original account. Proof of a settlement and stated account between the parties makes out a *prima facie* case for the plaintiff.

PROMISSORY NOTE IS THE MOST SATISFACTORY EVIDENCE of a settlement between the parties thereto, and may be received in evidence in support of the common count upon an account stated.

WHERE JUDGMENT HAS BEEN RECOVERED IN EXCESS OF THE AMOUNT claimed in the declaration, and such excess is capable of exact computation, the proper practice on appeal is, to permit the judgment creditor to file a remission of the excess, and if such is done, to affirm the judgment as to the residue; otherwise to reverse the judgment and order a new trial.

APPEAL from a judgment of the district court for the county of Bernalillo, entered in favor of the plaintiff. The opinion states the facts.

Conway & Cheldero, for the appellants.

Catron & Thornton, for the appellees.

BRISTOL, A. J. The declaration in the case, in addition to the common counts in *assumpsit*, contains a special count upon a promissory note, in the words as follow:

"For that whereas the said defendant heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-one, at, to wit, the city of St. Louis, Missouri, that is to say, at, to wit, the county of Valencia aforesaid, written St. Louis, made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, four months after the date thereof, to the order of said plaintiffs the sum of thirteen hundred and fourteen and sixty-five hundredths dollars, for value received, with interest at the rate of ten per cent. per annum from maturity, and then and there delivered the said promissory note to the said plaintiffs, by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay the said plaintiffs the said sum of money in the said promissory note (mentioned), and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, to wit, the county of Valencia aforesaid, undertook and then and there faithfully promised the plaintiffs to pay them the said sum of money in the said promissory note specified, according to the tenor and effect thereof."

At the time of filing the declaration there was also filed therewith a promissory note in writing, in the words and figures as follow:

"$1314.65. ST. LOUIS, October 1, 1881.

"Four months after date, I, the subscriber, of Fort Wingate, county of ——, state of New Mexico, promise to pay to the order of Orr &

Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley), thirteen hundred and fourteen and sixty-five hundredths dollars, with exchange, for value received, with interest at the rate of ten per cent. per annum after maturity until paid, without defalcation or discount, negotiable and payable at First Nat. Bank, Santa Fé, N. M.

"L. N. HOPKINS, Jr."

The defendant pleaded the general issue.

Upon the trial the plaintiffs offered in evidence the promissory note filed with the declaration. This was objected to on the ground—1. That it was not a negotiable promissory note, in that it provided for the payment of exchange over and above the principal and interest therein specified, which rendered the amount to be paid thereon unliquidated and uncertain, and not being a promissory note, it did not import a consideration. The note was further objected to as evidence on the ground of variance between it and the note declared on in special count. Both of these objections were overruled by the court, and the note was received in evidence under exceptions.

The only additional evidence for the plaintiffs was that of the witness Childers, which was very brief and as follows:

"Gentlemen of the jury, I state under my oath to you that on or about the seventh day of March of this year I went to Fort Wingate for the purpose of seeing the defendant in this case, Lambert N. Hopkins, in regard to the note sued on, and the collection of the debt of which it is the evidence. I presented this note to L. N. Hopkins. Hopkins admitted the indebtedness, and asked me not to bring suit on it before the first day of April; that on that day he would pay it. He failed to pay it, and I therefore brought suit. I have computed the interest on the note and find it to be eighty-four dollars and eighty-three cents; note, one thousand three hundred and fourteen dollars and sixty-five cents; total, one thousand three hundred and ninety-nine dollars and forty-eight cents."

This testimony also was objected to on behalf of defendant, on the ground of its being immaterial, incompetent, and improper. The objections were overruled, and the evidence went to the jury under exceptions. No testimony was offered on behalf of the defendant. No instructions were asked for by either party.

The court thereupon, on its own motion, charged the jury to find for the plaintiffs. This instruction was excepted to on behalf of defendant. The jury rendered a verdict for plaintiffs in the sum of one thousand three hundred and ninety-nine dollars and forty-eight cents. Defendant interposed motions in arrest of judgment and for a new trial, which were overruled, and judgment rendered for the plaintiffs in the amount specified in the verdict, and costs. Numerous errors are assigned on behalf of the plaintiff in error; but it is necessary to consider only those that are based upon the objections and exceptions already referred to.

Whether under any circumstances the terms as to payment of exchange would destroy the character of an instrument in writing as a promissory note, which otherwise would be a perfect promissory note—which may be doubted—no such question can arise in this case. The terms of the note as to exchange are mere surplusage and have no significance whatever. The note was made negotiable and payable at the First National Bank of Santa Fé, and payment at that bank, principal and interest, without payment of any exchange, would have been a full and complete satisfaction of the note. The note received in evidence is

in all respects upon its face a valid, negotiable promissory note, and the law implies a consideration for the promise therein contained.

The objection to the note received in evidence, that it varies from the note as declared on, is no doubt well taken so far as the special count in the declaration is concerned.

No principle of law is better settled under any system of pleading than that when a promissory note, bill of exchange, or other instrument in writing is sued on, it must be set out in the declaration in each and all its material terms and conditions according to their precise legal effect: 1 Chit. Pl. 305, with note 3, and authorities cited.

What constitutes the variance between the note as declared on in this case and the note received in evidence is, the former is made negotiable and payable generally or absolutely, while a limitation is placed upon the latter, in that it is made negotiable and payable at a particular specified place. It can not be said, therefore, that the terms of both have the same legal effect. This has always been considered a fatal variance: 1 Chit. Pl. 309; 14 Pet. 43; 9 Wheat. 558; 4 Cranch, C. C. 11.

Had the declaration contained only the special count on the promissory note, it is clear that upon the evidence received under objection it would have been error to have rendered judgment thereon for the plaintiffs in any sum whatever.

But it seems that now the practice is sustained by high judicial authority of receiving promissory notes and bills of exchange as *prima facie* evidence in support of any or all the common counts in *assumpsit* between the immediate parties: 2 Greenleaf on Ev., sec. 112.

It is difficult to comprehend the reasonableness of this practice to the extent it has been carried by some of the courts. It must necessarily lead to many absurdities. For instance, upon the common count for money lent, etc., if supported by oral testimony, it would be necessary to prove that the transaction was essentially a loan of money; yet it is held that a promissory note, though it may have been given for work and labor, may be received to support the common count for money loaned.

However this may be on principle, it is clear that every promissory note or bill of exchange necessarily includes an account stated between the immediate parties thereto; that is, that there had been a prior transaction or transactions between the parties involving an indebtedness from one to the other—a mutual settlement thereof upon examination—an acceptance thereof by them, resulting in finding a certain amount in money to be due, and a promise express or implied to pay the same.

Upon every account stated the law implies a valuable consideration, and it is not necessary to inquire into the nature or items of the original account: 1 Chit. Pl. 358. Proof of a settlement and stated account between the parties makes out a *prima facie* case.

A promissory note, therefore, is from its very terms the most satisfactory evidence that there had been a settlement between the parties, and that the principal sum therein specified had been found to be due from the makers to the payee: Chit. on Contracts, 10th Am. ed., 723.

The promissory note, therefore, was properly received in evidence in support of the common count upon an account stated.

As no judgment could be properly rendered under the evidence on the special count on the promissory note, then we are to consider the case on the common counts exclusively and as though no such special count was in the declaration.

In this view of the case, it is evident that the judgment is for a larger sum than is claimed under the common counts, which can not exceed the sum of one thousand three hundred and fourteen dollars and sixty-five cents, and interest at six per cent. per annum from the date of the stated account between the parties to the date of the judgment. This is all that can be claimed under the common counts, and is all that is claimed in the declaration on these counts.

At common law, in the absence of any statutory provision as to interest, none whatever could be recovered on any of the common counts: 1 Chit. Pl. 356.

If at the date of the account stated there was a promise to pay interest at a stipulated rate above legal interest, then, to recover the same in addition to the amount due on the account stated, there should have been a count therefor alleging forbearance as the consideration for the promise: *Vide* Count for Interest, 2 Chit. Pl. 88.

Our statute allows interest at six per cent. per annum on money due upon the settlement of matured accounts: Prince's Stat. 414. This of course covers an account stated, and may be recovered on a count on an account stated. Judgment can not be rendered for a greater amount than the damages laid in the declaration: Hogan v. Taylor, Hempst. 20.

On the common counts, therefore, the plaintiff is entitled to recover only the sum of one thousand three hundred and fourteen dollars and sixty-five cents, and interest thereon from the first day of October, 1881, at six per cent. per annum, instead of ten per cent. as in the judgment rendered.

The proper practice on appeal where the record shows a judgment in excess of the amount laid in the declaration, and the amount of the excess is capable of exact computation, seems to be to permit the judgment creditor to file a remission of the excess, and if done, to affirm the judgment as to the residue; otherwise, to reverse the judgment and order a new trial: 14 Cal. 640; 10 Iowa, 233; 20 Ind. 306.

It is ordered that the defendant in error have leave until the second Monday of January, 1884, to file a remission, as indicated by this opinion; and if done within that time, the judgment to be affirmed as to the residue. And on failure so to do, the judgment to be reversed, and the cause remanded for a new trial.

All concur.

Romero *v.* Gonzales.

Filed January, 1883.

Neither the Legal Title to Land nor the Right to the Possession can be determined in an action of forcible entry and detainer.

Unlawful Entry, Unaccompanied by Actual Force, is Insufficient to sustain an action of forcible entry and detainer, under the statute of this territory, on the ground of such entry being constructively forcible.

Object of the Statute of Forcible Entry and Detainer is to prevent persons from disturbing the public peace, or perpetrating gross and willful wrongs, by maintaining by actual fraud or force what they claim as private rights in the possession of land.

Appeal from a judgment of the district court for the county of Mora, entered in favor of the plaintiff. The opinion states the facts.

Catron & Thornton, for the appellant.

Breeden & Waldo, for the appellee.

BRISTOL, J. This action was brought originally before a justice of the peace of Mora county, in the first judicial district, under the forcible entry and detainer act. An appeal was taken to the district court of that county, and having been tried in the latter court, and judgment rendered in favor of Romero, the plaintiff, the defendant appealed to this court.

There is no controversy as to the identity of the premises entered upon by the defendant and claimed by plaintiff. In the court below the plaintiff in his complaint alleged, as specific grounds of the action, that the defendant entered upon plaintiff's said premises "unlawfully and by force, stealth, intimidation, and fraud."

Upon the conclusion of the plaintiff's testimony on the trial in the court below, the defendant moved the court to instruct the jury that there was no testimony sufficient to justify a verdict for the plaintiff, and that they should find for the defendant. This motion was overruled by the court, and the case submitted to the jury, under the instructions of the court. The jury found for the plaintiff. Defendant interposed a motion for a new trial on substantially the same grounds as his previous motion. This also was overruled by the court. Judgment was entered upon the verdict. Defendant took proper exceptions, and appealed to this court.

The only assignment of error on behalf of the appellant that is necessary for this court to consider is, that there was no evidence before the trial jury to sustain their verdict.

The legal title to land, or even the right to the possession of land, can not be determined in this form of action.

The main point on which every forcible entry and detainer suit must be maintained, if at all, is the fact that the defendant by the mode of his entry or detention has committed a wrong in the nature of a public offense, and the object of the statute is to punish the wrong-doer by a restitution of the premises to the plaintiff without inquiry as to which has the legal right of possession. It was claimed by counsel for the appellee on the argument of the case, that every unlawful entry upon land is necessarily a forcible entry within the meaning of the statute.

With this view we can not concur. There may be a peaceful entry by one person upon the lands of another without actual force, stealth, intimidation, or fraud, under an honest though mistaken belief that he had a legal right to the possession. While such an entry might be without the authority of law, it would be a trespass simply, and not within the statute of forcible entry and detainer.

It is clear that an unlawful entry, unaccompanied by *actual* force, is insufficient to maintain this action, on the ground of its being constructively a forcible entry.

Under the California forcible entry and detainer statute an unlawful entry is specified as one of the causes of action. But there the courts hold, and no doubt correctly, that to maintain the action solely on the ground of an "unlawful entry," there must be some ingredient of fraud or willful wrong on the part of the party making the entry: Dickinson v. Maguire, 9 Cal. 46.

Our statute does not include an unlawful entry among the causes of action distinct from the other causes mentioned.

Under the California statute, which, like ours, specifies a forcibly entry

as one of the causes of action, it is held that where *force* is relied on, *actual* force in the nature of a breach of the peace must be shown: Frazier v. Hanlon, 5 Cal. 156; McConley v. Weller, 12 Id. 500; Watson v. Whitney, 23 Id. 375.

As already indicated, the main object and purpose of the statute is to prevent persons from disturbing the public peace or perpetrating gross and willful wrongs by maintaining by actual force or fraud what they claim as private rights in the possession of land.

The bill of exceptions containing all the evidence on the material issues being silent on the several issues of force, stealth, intimidation, and fraud in the defendant's mode of entry, it follows that there was no evidence to sustain the verdict.

It is accordingly ordered that the judgment be reversed, appellant to recover his costs, and the cause remanded to the court below, with instructions to dismiss this action.

All concur.

WHITNEY ET AL. *v.* MCAFEE.

Filed July 30, 1883.

SURVEYOR GENERAL OF NEW MEXICO, UNDER THE ACT OF CONGRESS of July 22, 1854 (10 U. S. Stat. 309), is clothed with judicial powers and duties with reference to Mexican and Spanish grants of land made prior to the acquisition of the territory by the United States.

COURTS HAVE NO AUTHORITY TO REVIEW, REVERSE, OR MODIFY ANY DECISION OF THE SURVEYOR GENERAL, as to the validity or invalidity of such grant, made in a case before him. Such power rests with congress alone, and until reversed or modified by congress, any such decision of the surveyor general is binding upon the courts, and must be regarded as *res adjudicata*.

REPORT OF THE SURVEYOR GENERAL, UNDER THE ACT OF JULY 22, 1854, PRONOUNCING VALID a Mexican grant, operates so as to segregate from the public domain the lands covered by such grant, and to except and reserve them from the operation of the homestead and other general laws of the United States providing for the disposal of the public domain; and pending the final action of congress on such decision, to vest by necessary implication in the grantee, and those claiming under him, the exclusive right of possession, in and to the entire tract covered by the grant as reported on.

APPEAL from a judgment of the district court for Bernalillo county. The opinion states the facts.

Fiske & Warren, for the appellant.

Francis Downs and *H. L. McComas*, for the respondents.

BRISTOL, A. J. The appellees, Joel P. Whitney and Franklin H. Story, brought an action of ejectment against the appellant, Robert McAfee, to recover the possession of certain lands and for damages for the wrongful withholding of such possession from them, and obtained judgment in their favor in the court below.

Appellees claim, as the source of their title, under a grant of lands from the republic of Mexico, made prior to the cession to the United States by that republic of the territory, under and by virtue of the treaty between the two governments of July 4, 1848, commonly called the treaty of Guadalupe Hidalgo. Said grant includes the Berrendo Springs, in Valencia county, claimed by the appellant, and covers the land in controversy.

The grant was made in the year 1845, to Antonio Sandoval. Sandoval,

the original grantee, conveyed to Gervacio Nolan, who, in 1858, died, seised of the premises covered by the grant. The heirs of Gervacio Nolan conveyed the entire grant to Joel P. Whitney, one of the appellees, who thereafter conveyed an undivided one half thereof to Franklin H. Story, the other appellee.

The defense of Robert McAfee, the appellant, is based mainly upon the ground, as claimed by him in the court below, that the land in controversy belonged to the public domain of the United States, and that he had settled upon and located the same under the homestead laws of the United States.

The turning point in the case, therefore, is the question, whether the lands in controversy are public lands of the United States, covered by the laws of congress providing for the disposal of the public domain, or have been segregated therefrom and excepted from the operation of the homestead laws, under section 8 of the act of congress of July 22, 1854, entitled "An act to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes."

Said section 8 provides as follows: "And be it further enacted, that it shall be the duty of the surveyor general, under such instructions as may be given by the secretary of the interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico. And for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States. * * * Such report to be made according to the form which may be prescribed by the secretary of the interior, which report shall be laid before congress for such action thereon as may be deemed just and proper with the view to confirm *bona fide* grants and give full effect to the treaty of 1848 between the United States and Mexico. And until the final action of congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act:" 10 U. S. Statutes at Large, 309.

Under this provision of the act of congress, the surveyor general of New Mexico is clothed with judicial powers and duties with reference to Mexican and Spanish grants of land made prior to the acquisition of the territory by the United States.

Neither this court nor the court below has any authority to review, reverse, or modify any decision of the surveyor general as to the validity or invalidity of any such grant made in a case regularly before him. That power and authority rests with congress alone, and until reversed or modified by congress, any such decision of the surveyor general is binding upon this court and must be regarded as *res adjudicata*.

The record discloses the fact that so long ago as 1855, and during the life-time of said Gervacio Nolan, and after the aforesaid conveyance to him, he made a formal application to the then surveyor general to investigate and report upon the validity of said grant, and that such proceedings were had thereon; that in January, 1873, the surveyor general made his official report to the effect, among other things, that the said grant had

not been surveyed, but was "reported" to contain about three hundred thousand acres of land; that the grant is valid, and the title perfect in the legal representatives of said Gervacio Nolan.

The legal effect of this decision of the surveyor general was to segregate from the public domain all the lands covered by the grant as reported on by him; to except and reserve them from the operation of the homestead and other general laws of the United States providing for the disposal of the public domain; and pending the final action of congress on such report of the surveyor general, to vest by necessary implication in the grantee and those claiming under him the exclusive right of possession in and to the entire tract covered by the grant as reported.

It is clear, therefore, that the appellant can not rightfully claim possession by virtue of his homestead entry. He is a mere trespasser without color of right.

There are various other questions raised, but it is not necessary to pass upon them, as they would not change the result.

Judgment below affirmed with costs.

BELL, A. J., concurring.

AXTELL, C. J., dissenting.

SUPREME COURT OF UTAH.

PEOPLE *v.* O'LOUGHLIN ET ALS.

Filed March 8, 1882.

JUROR, DISQUALIFICATION OF.—Impressions, or qualified and conditional opinions formed upon reports, which easily yield to the evidence of witnesses having personal knowledge of the facts and testifying under oath, constitute no valid objection to a juror.

BUT IF THE JUROR'S MIND IS CLOSED AGAINST AND IS IN OPPOSITION to the truth as it may be related by the witnesses, resists its force, and perverts the judgment, then such juror is disqualified for having "formed an unqualified opinion."

IN CLOSELY BALANCED CASES, MUCH WEIGHT SHOULD BE GIVEN to the judgment of the trial court before whom the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized.

JUROR, PEREMPTORY CHALLENGE OF.—One of several defendants, jointly indicted and on trial, can not for himself alone peremptorily challenge a juror; and the same rule applies where all the defendants, jointly challenging, have exhausted their challenges under an act of congress, even though they claim the right to severally challenge under a territorial statute.

"PARTY," MEANING OF.—The word "party" imports the person or persons having a joint right or liability, whether one or more.

CRIMINAL TRIAL, EXCLUSION OF WITNESSES ON.—The exclusion of witnesses from the court-room during the progress of a criminal trial is within the discretion of the court. It is not error for the trial court to permit the prosecution to call a witness who has inadvertently violated its order excluding witnesses.

CRIMINAL LAW—RIOT—"FORCE AND VIOLENCE"—"DISTURBANCE OF PUBLIC PEACE," WHAT CONSTITUTES—DECLARATIONS OF ONE RIOTER, WHEN ADMISSIBLE.—S., a mining company, having reduced the wages of its employees, the defendants, thirteen in number, and one hundred and fifty others, miners, some employees of S. and others not, comprising a miners' union, in pursuance of a resolution by them passed in mass meeting in Miners' Union hall and for the purpose of resisting such reduction of wages, organized in the village of Silver Reef, marched through the village to the neighboring mines, ordered therefrom all union men, and having collected a force of three hundred men, among whom were all of the defendants, marched back through the village to the mining properties of S., and there appointed from their number a committee, which, in the presence and view of the men outside and pursuant to their behests, entered the mining works of S. and demanded of the employees there in charge that they shut down all

works, quit possession of the shafts, shaft-houses, buildings, and works, and surrender the same to such committee, and not to start up the works again until ordered so to do by the union; which demands were acceded to by the employees of S., whereupon the body of men marched away, leaving their committee, one of whom was the defendant C., in charge and in possession of such works.

Held: 1. That if, by the resolution, meeting, marching, and demands of defendants and their companions, and the manner and circumstances under which the same were done and accomplished, well-grounded fear or apprehension of bodily harm or injury would be raised in the minds of reasonable men of ordinary courage and firmness, by a resistance to such demands, and that well-grounded fears existed in the minds of the residents of Silver Reef for the safety of life or security of property, the same constituted a breach of the "public peace" by "force and violence," within the meaning of the act defining riot.

2. That the terms "force" and "violence" do not necessarily mean the actual use of physical force, accompanied with turbulence or violence; but any unlawful act, however apparently peaceable and quiet, when done with such numbers, in such manner, and under such circumstances as show that the actors intend to, and are capable of, carrying out, and do so carry out, an unlawful purpose in an unlawful manner, rendering resistance thereto apparently, in the minds of reasonable men of ordinary courage, dangerous to life or property, is such "force" and "violence" as is contemplated by the statute.

3. That evidence of the effect upon the minds and the feelings of the residents of Silver Reef, as to fear for the security of life or property, occasioned by these unlawful acts, was admissible, as tending to show a breach of the public peace, and to show this, proof might be offered of the declarations, expressions of fear, and acts of such residents, during and while the acts of the defendants were being done and performed.

4. That the acts and declarations of defendant C., one of the committee of miners in charge of the works of S., while in possession in pursuance of the orders of the other defendants and other miners, comprising the miners' union, are admissible in evidence against all the defendants on trial.

APPEAL from the second district court.

The territorial criminal practice act of 1878, upon the subject of challenges to jurors, reads as follows:

"Sec. 225. When several defendants are tried together they can not sever their challenges, but must join therein."

"Sec. 238. If the offense charged is punishable with death or imprisonment in the penitentiary for life, the defendant is entitled to ten and the territory to five peremptory challenges. On a trial for any other offense the defendant is entitled to five and the territory to three peremptory challenges."

Riot is punishable by fine, or imprisonment not exceeding two years. The other facts appear in the opinion.

Philip T. Van Zile, United States district attorney, *Zera Snow*, assistant United States district attorney, and *Presly Denny*, for the people.

Arthur Brown, for the appellants.

TWISS, J. The indictment in this case charges the defendants, and divers other persons whose names are unknown to the grand jurors, to the number of about two hundred and fifty, of the crime of riot, on the first day of February, 1881, at the county of Washington, in the territory of Utah; that by the use of force and violence, and by threats to then and there use force and violence, accompanied by the immediate power of execution, and acting together without authority of law, did then and there feloniously disturb the public peace, etc., "and did take unlawful and forcible possession of the property of the Stormont Mining Company, * * * and did, by the use of force and violence, and threats to use force and violence, accompanied by the immediate power of execution, unlawfully, forcibly, and feloniously drive away from the possession of the said property, to wit, the Buckeye and Savage mines, one W. I. Allen, and other employees of

said company, having charge and control of said property and mines, and engaged at work thereon, and did feloniously and unlawfully, by the use of force and violence as aforesaid, compel and force said Allen and said employees to stop and quit work thereon, and leave the same, and then and there took forcible possession of the same, to the great damage of said company, and to the terror and disturbance of said employees, and of the public peace, contrary to the form of the statutes of Utah territory in such case made and provided, and against the peace and dignity of the people aforesaid."

Each of the defendants pleaded not guilty. No one of the defendants requiring a separate trial, they were jointly tried, and the jury found a verdict of guilty as to all of them. A motion for a new trial was overruled, and the case appealed to this court.

The error first alleged is the overruling of the challenge on the part of the defendants, of John Lowder, one of the jurors, who, upon his *voire dire*, said he had heard a report of the facts of the case, from which he had formed an opinion, which he believed to be true, but he did not know that he had ever expressed it; that it would take evidence to overcome such belief; "I believe it like other other reports I hear;" that it was a conditional and not an unconditional opinion; the condition was as to the truth of the story he had heard; "it was unconditional if the report was true;" when "I heard the story I believed there was something in it, of course," and the conditions about it were, "in case the transaction did really take place." That he would require proof in the case before he would be willing to act. That he had no opinion, bias, or prejudice, or belief as to the guilt or innocence of either of the defendants that would prevent him from acting impartially as a juryman. The challenge was made under the statutory provision disqualifying a juror who has "formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged."

We are of the opinion that there was no error in overruling the challenge. The condition of this juror's mind was such as would usually or naturally be formed by any person, upon hearing a report of an alleged commission of crime. He had heard a story; he believed it; he says, "I believed there was something in it, of course." "Nobody disputed it. I believed it like other reports I hear." It is obvious that this opinion or belief was liable to be changed by the statements of the next person he might meet. This is not a conviction of the mind, a fixed conclusion, "an unqualified opinion or belief."

Impressions, or qualified or conditional opinions, formed upon the mere hearing of a report, which, in the mind of an honest man capable of acting as a juror, easily yield to the testimony of witnesses under the sanction of an oath, having personal knowledge of the facts, constitute no objection to a juror; but an unqualified opinion or belief, which closes the mind against the testimony presented in opposition to it, resists its force, and perverts the judgment, does constitute a good and valid objection; an unqualified opinion or belief is fixed and certain, and is incompatible with reasonable doubt and uncertainty, and is not dependent upon the existence or non-existence of any extrinsic fact. The defendants were entitled to a trial by an impartial jury. This provision of our statute is a simplification of the common law, and the opinions of the state courts, where no statute exists, or where the same or similar statutes are in force, are authority with us in applying the facts of this case to the law,

and deducing conclusions. The question at issue is, Do the statements of the juror upon his *voire dire* show him to have had, at the time, an unqualified opinion or belief as to the guilt or innocence of the defendant? In Commonwealth v. Webster, 5 Cush. 297, C. J. Shaw said: "The opinion or judgment must be something more than a vague impression formed from casual conversations with others, or from reading abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment from a full hearing of the evidence." This is clearly the law: State v. Wilson, 38 Conn. 126; Curley v. Commonwealth, 84 Pa. St. 151; Staup v. Commonwealth, 74 Id. 458; People v. Reynolds, 16 Cal. 128; Gardner v. People, 3 Scam. 83.

In closely balanced cases, the appearance of the juror, the manner in which he is examined by the counsel, and its effect upon him, sometimes justly have great weight with the trial judge. In view of this, the court in Ortwein v. Commonwealth, 76 Pa. St. 414, said: "Much weight, therefore, is to be given to the judgment of the court below, in whose presence the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized."

The defendant Murphy, for himself alone, and not for himself and the other defendants, peremptorily challenged the juror Parry, which challenge was objected to by the prosecution, and the objection was sustained by the court. In support of this challenge, it was claimed, under the act of congress, June 23, 1874 (known as the Poland bill), providing that "each party, whether in civil or criminal cases, shall be allowed three peremptory challenges, except in capital cases, where the prosecution and defense shall each be allowed fifteen challenges," that each individual defendant had the right to three peremptory challenges; and in support of this claim the counsel urged that in criminal cases, each defendant must plead for himself in person, each makes a separate issue with the people on the question of his guilt; if convicted, each must suffer punishment for himself, or each may be pardoned on his own merits; one can appeal without affecting another. In all this, it is claimed, there is a distinction between criminal and civil cases. In a civil case one judgment only is recorded, one satisfaction pays for all, and therefore in a criminal case the trial is necessarily separate to a certain extent; in other words, the word "party," as used in the statute, means each individual defendant.

This reasoning, although plausible and ingenious, is not good. If it is, these thirteen defendants had the right to make in the aggregate thirty-nine peremptory challenges. The words "each party" seem to have the same force in the first clause of the provision above quoted as the words "prosecution and defense" have in the last clause; each of these expressions is synonymous with either party to the action, the plaintiff and defendant, regardless as to whether one or more than one person is included as plaintiff or defendant. The word "party" has its legal and technical import and signification, which is to be given to it at all times, except when, by its use, it is clearly intended that some other meaning or intent is given to it: State v. Reed, 47 N. H. 466. Bouvier says: "A party in law may be said to be those united in interest in the performance of an act; it may then be composed of one or more persons."

In Stone v. Segar, 11 Allen, 568, the court says: "It imports the person or persons in whom a joint legal right, interest, or title is vested, or

against whom a joint liability exists, and is properly applied to one person or to many persons, according to the subject-matter of the contract or cause of action; relates to or embraces a sole or joint interest or title or liability."

With this definition, accepted and announced by high legal authority, as the correct import of the word, in both civil and criminal cases, it is not at all probable that if the use or force intended to be given to it in the statute was that now claimed by the appellants, such intention would not have been expressed in unmistakable language; and such an important matter not left open to construction, with the ordinary legal and technical sense of the word opposed to such intended use. If our national legislature intended that the words "each party," in the provision in question, should mean one thing in a civil action and another and quite a different thing in a criminal action, the language used is an instance of negligent and bungling legislation never before equaled, we believe, in any act framed by that body; but such was not the intent, and this construction claimed by the appellants is an instance of extreme forced construction, inconsistent with the letter and spirit of the statute and the intention of its makers. The right of peremptory challenge is sanctioned by the statute, and the defendants were entitled to the full benefit of it, but no greater than the legal signification of the language used gives to them. By this claim of the appellants we are asked, in effect, to interpolate into the statute an exception, containing a provision that the word "party" in criminal cases means each individual defendant, whether one or more. This we can not do. We have no power to insert qualifications, ingraft exceptions, or make modifications, with the intention of creating a provision not expressed in the statute: Sedgwick on the Construction of Statutory and Constitutional Law, 326.

By the statute, riot is made a felony, and section 262 of the criminal practice act gives to any defendant jointly indicted with another or others, for a felony, the right of a separate trial if he requires it. All the defendants having waived this privilege, and declared their election to be tried jointly, their defense was joint and not several, and no one of them had authority to control the conduct of the defense. Their challenges should have been joint, not several: People v. McCalla, 8 Cal. 303; People v. Thayer, 1 Park. Cr. R. 595.

The defendant Enright peremptorily challenged the juror Lowder. This challenge was made under the provisions of section 238 of the criminal procedure act of 1878, which, by its terms, purports to give the defendant in a case like this five peremptory challenges. The defendants having jointly availed themselves of the provisions of the act of congress fixing the number of peremptory challenges at three, could not then be allowed to make individual peremptory challenges under the statute of the territory. The challenge was properly overruled.

Upon the request of the counsel for the defendants, with the assent of counsel for the people, the court ordered that all witnesses should be excluded from the court-room during the opening statement of counsel for the prosection and the examination of witnesses. After the opening statement on the part of the prosecution had been made, W. I. Allen was called as a witness by the prosecution; the defendants' counsel objected to his being sworn, because he had remained in the court-room during the opening statement of the counsel for the people, in violation of the order of the court.

The counsel for the people and the witness Allen stated they did not understand that the order of the court applied to the exclusion of witnesses during the opening statement for the people, but only while evidence was being offered and received. Allen said he did not intentionally violate the order of the court; that if he had understood the order as applying to the opening statement of the prosecution, he would not have been present. The counsel for the people then asked the court to so modify the order as to allow the witness to testify, and to remain in the court-room during all the trial, as he was necessary to them in aid of the prosecution, which request was granted. The witness Allen testified, and remained in the court-room during the trial. This ruling of the court is assigned as error. We are of the opinion that there was no error in this ruling permitting the witness to testify, and to remain in the court-room during the trial. As he did not understand the order of the court to apply to the opening statement of counsel for the people, he was not in intentional contempt. The modification of the order was a matter of discretion, as was also the making of it at first. Allowing the witness to testify and afterwards to remain in the court-room was a matter of discretion, and not error: 1 Greenl. on Ev., sec. 432, and notes; People v. Garnett, 29 Cal. 629.

Although the appellants have placed on record forty-one assignments of error, the brief of counsel contains but six points or divisions of argument, and no allusion is made to the greater part of the assignments. The first three points have been considered and decided; the fourth, fifth, and sixth, in which are grouped such of the errors assigned as are undisposed of and relied upon in argument, remain to be considered.

An intelligent understanding of these alleged errors necessitates a cognizance of the following portion of the record: "The evidence for the prosecution tended to show, among other things, that on the morning of the first of February, 1881, the Stormont Mining Company, mentioned in the indictment, by its manager and officer, issued an order reducing the wages of its miners working for it from four dollars per day to three dollars and fifty cents per day, in all its works except at the Savage shaft, where it was announced the old rate of wages, to wit, four dollars per day, would be continued; which reduction came to the knowledge of an organization then existing in Silver Reef, known as the 'miners' union.' Thereupon the defendants and others, comprising this union, met together to the number of about one hundred and fifty, in Miners' Union hall, in Silver Reef, in Washington county, Utah, at which meeting the defendant, O'Loughlin, president of said union, presided. That, after discussion, it was unanimously voted, among other things, that the miners' union and all its members would reject and resist such reduction, and would, as a miners' union, and in a body, order the works of said Stormont company to cease and shut down, and that if they, the said company, did not shut down, that they, the union and its members, would shut down the Savage works for them.

"That, in pursuance of said voting, said meeting immediately adjourned, and organized in the streets of the village of Silver Reef, and marched in a column of twos to the Barbee and Walker mine, through the streets, and then ordered out all the miners there working, who were members of the union, who joined the procession; and from there back through the village to the Tecumseh mine, in lower Silver Reef, and there ordered out all union men to join the procession, and from there,

having collected three hundred and four miners, among whom were all these defendants, marched in a body, in a column of twos (the president, O'Loughlin, riding horseback on the lead, or in command, the defendant Hanley carrying the United States flag), to the Savage shaft, surrounded the shaft building, and the president thereupon selected a committee of ten from said miners, among whom was the defendant O'Loughlin, and Dee, *alias* Chatham, which committee proceeded inside, and in presence of the miners outside, ordered the fires of the engines to be drawn and the works to close down and cease, which orders were obeyed. The works were closed down, and the shaft began to fill with water, while the employees of said company were ordered from the building, the committee remaining in possession of the property, the defendant Chatham remarking, in the presence of the committee, to the employees: 'You may go now, right off; we have possession.'

"The defendant O'Loughlin, while a witness on the stand, among other things, testified that the union had power to carry out its orders. The witness Fleming, among other things, testified he was in the employ of the Stormont Company at the Savage shaft, when the miners' union came there; so also was David McKelvy, the engineer in charge; the orders given by defendant O'Loughlin were: 'You are to cease all work on the Savage shaft, and draw the fire, and not start up until ordered by the union.' I asked to go into the mine and put out the light, and after consultation one of the committee told me no one would be allowed in the mine, and ordered McKelvy not to move his engine. When the orders came to cease work, McKelvy replied, 'All right, I know what that means, I have been there before,' or something to that effect."

The defense claims that "to constitute riot the public peace must be disturbed. Disturbing the public peace means actual, unlawful, physical violence. The public peace can not be disturbed by an orderly, quiet meeting, by the procession of miners walking in twos, and making a gentlemanly request of an engineer. Even if the acts complained of were unlawful, and were trespass, they could not constitute riot, unless done in a tumultuous manner, calculated to disturb the public peace."

Let us examine this position in the light of the statute of this territory, and other recognized authorities. In Commonwealth v. Runnels, 10 Mass. 518, the court says: "To disturb another in the enjoyment of a lawful right is a trespass; and if it is done by numbers unlawfully combined, the same act is a riot." Bishop on Criminal Law, section 1143, defines riot as follows: "A riot is such disorderly conduct, in three or more assembled persons actually accomplishing some object, as is calculated to terrify others."

This learned author, in quoting Lord Coke's definition of riot, says: "Riot in the common law signifieth when three or more do any unlawful act, as to beat any man, or to hurt him in his park, chase, or warren, or to enter or take possession of another man's land, or to cut or destroy his corn, grass, or other profit."

In section 1147 Mr. Bishop says: "The principal point to be here considered is, that the act must be one calculated to create apprehension of danger in the minds of persons other than the rioters;" and again, in section 1148, the same author says: "The ingredient of terror excited, necessary in a riot, does not require that more persons than one be alarmed."

The court below instructed the jury as to the definition of riot, and

the force necessary under the statute to make out the element of force in case of riot, as follows: "Riot, by the statute of this territory, is defined to be 'any use of force or violence disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together and without authority of law:' Comp. L., p. 614, sec. 2054. From this definition we can determine what it is necessary to prove in order to make out a case of riot.

"1. A riot can not be committed by one person alone. The statute provides that there must be two or more persons. Therefore, in order to make out a case, it is incumbent upon the prosecution to prove beyond a reasonable doubt, that there were two or more of the defendants engaged in what they allege was the riot.

"2. That two or more persons acted without authority of law, and that they so acted together.

"3. That the two or more persons so acting without authority of law used, or threatened to use, force or violence.

"4. That the two or more persons so acting together without authority of law, and using or threatening to use force or violence, were accompanied with—had present with them—the immediate power of executing their purpose.

"5. That the two or more persons so acting together without authority of law, and using force or violence, or threatening to use force or violence, accompanied by immediate power of execution, disturbed the public peace.

"One of the elements of a riot, as defined by our statute, is the use of force or violence, or threatening to use force or violence if such threatening is accompanied by immediate power of execution. It was not necessary, in order to use the force meant by the statute, that the defendants, and those accompanying them, should have been armed with guns, pistols, or clubs, or any kind of weapons. The facts, if you find such to be the facts, that they, accompanied by a large body of men, marched in a procession under the command or direction of their president to the Savage mine and hoisting works, and there were halted by their commanding officer, who selected from among them a committee, who ordered, or demanded, or stated the demand of this body of men to the persons in charge of the works, namely, that they must cease working, or that in substance, and that this large body of men remaining outside, near to and in view of the persons employed by the Stormont Company, and in charge of said works. These facts, if you find them to exist, and find from them and all the circumstances in evidence in the case, that the officers and men having in charge said works and property of said company feared or believed that bodily harm to themselves, or severe injury or damage to the said works or property in their charge, would result from a refusal to comply with the command or request, and that the circumstances in which such officers or men in charge of said works or property were placed were such as would, in your opinion, justify such belief in the minds of persons possessed of ordinary firmness and reason, are sufficient use of force to make out, so far as the element of force is necessary, a case of riot."

In regard to what constitutes a disturbance of the public peace, within the intent of the statute, the court instructed the jury in substance as follows: "If the defendants, with others, met in Miners' Union hall on the first day of February, 1881, and resolved to march in a body through

the town of Silver Reef, and to close down the works and mining machinery and property of the Stormont Company, and that they did so march, and by the use of such force as I have before mentioned did order or direct to be closed down the said works, and hinder, obstruct, and prevent, without authority of law, the said Stormont Company from operating the Savage shaft in the hoisting works mentioned in the indictment; and if you further find that by means of, and from the manner in which said defendants, and others associated with them, met in said hall, and from the manner in which said marching was done and said works closed down, feelings of fear or terror, of disquiet or unrest, and insecurity as to the safety of property were created or engendered among the residents of Silver Reef, then and in such case, I instruct you that this is such a disturbance of the public peace as is contemplated by the statute defining riot, under which the defendants stand charged."

It is claimed with much earnestness that these instructions are erroneous, as they do not correctly state the law as to the amount of force necessary to make it a component part of riot; that there must have been "such actual force or violence as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like." Our statute in defining riot, says: "Any use of force or violence disturbing the public peace, or any threats to use force or violence, if accompanied by immediate power of execution, etc., is riot." These words do not imply that such use of, or threat to use, force or violence should be noisy, boisterous, or tumultuous, or be accompanied with threatening speeches or turbulent gestures, or that the men using force or threatening to use it need be armed. A riot does not so much depend upon the strength of voice, as upon the intent or purpose, and the power of immediately executing the purpose. Force in animate and inanimate nature is not necessarily boisterous, nor the execution of it attended with noise and turbulence. The man who silently, and perhaps with extreme politeness of manner, administers a few grains of strychnine to his unsuspecting victim, uses force, and is just as much a murderer, as the man whose murderous intent is accompanied by the flash and explosion of gunpower in the shot-gun. It is not so much the manner in which a thing is done, as the execution of the intent, that constitutes crime. A half-dozen brigands may demand the pocket-book of a traveler without the least exhibition of turbulence, or violence in manner or gesture, and this demand may be in the form of a request, couched in terms of most exquisite politeness, and behind it all exist a diabolism that does not hesitate to take human life upon the least resistance or hesitation to deliver; and is it any the less robbery because the victim chooses to give up his money rather than to further risk his life, although there is, in fact, no exhibition of violence, yet every act and word implies not only violence, but power and force, a resistance of which endangers human life?

O'Loughlin, in giving the order to those in charge of the Savage shaft, "You are to cease all work on the Savage shaft, and draw the fire, and not start up until ordered by the union," was carrying out the vote adopted by the union, and "the union had power to carry out its orders." This was an order full of significance, expressing an unlawful purpose, and being backed by three hundred men, resistance by those to whom it was directed would have been useless, and would undoubtedly have been followed by consequences which the men in charge were wise in avoiding.

The evidence does not show that the defendants or their associates, at their meeting in Miners' Union hall, or on their march through the streets, or at the time of the order of O'Loughlin, "to cease work," etc., was made, were either boisterous or noisy; but it does show that these defendants, and those acting with them, were regardless of the rights and property of others; that they voted to stop the works and business of the Stormont Mining Company; that they went to the premises with force sufficient to do it, and, without right, obtained possession of them, closed down the works, stopped business, retained possession, and excluded the lawful occupants therefrom. The question whether the acts of the defendants, and those with whom they were acting, were a sufficient use of force, or a threat to use force with the power of immediately executing the same, and were such a breach of the public peace as to be within the intent of the statute defining riot, was properly submitted to the jury by the court: Bell v. Mulloy, 61 Ill. 167; State v. Straw, 33 Me. 554; 3 Greenl. Ev., secs. 231–233; 1 Bishop's Cr. L., secs. 546, 548, 560, 562.

The testimony of Allen, the superintendent of the mining works of the Stormont Company, that defendant Chatham, one of the committee appointed to shut down and stop the works at the Savage shaft and premises, refused to allow Allen to enter the works on the same day, but after the procession and crowd had left, was properly admitted; his possession, with that of others of the committee with him, was in obedience to the vote at the hall, and was carrying out the purpose for which the procession was formed, the march performed, and the committee selected; his acts in executing the expressed will of his associates and co-defendants were competent evidence, not only against himself, but them also.

Testimony tending to show that the marching of the miners' union, their vote at the hall, and the proceedings at the Savage shaft caused a general feeling of insecurity and alarm, and that the witnesses themselves had such feelings, and that they at the time heard others express the same, was rightly admitted. It was competent to prove in this way that the actions of the defendants and their associates did disturb the public peace.

The defense asked for a large number of instructions, a great portion of which were given. Upon an examination of them and the other instructions contained in the charge of the court, we are all of the opinion that the charge to the jury was quite as favorable to the defense as the law permitted, and that there was no error in refusing those not given.

The order of the district court overruling the motion for a new trial is affirmed.

BOOK REVIEWS.

LAWSON ON EXPERT AND OPINION EVIDENCE. The law of expert and opinion evidence reduced to rules, with illustrations from adjudged cases. By JOHN D. LAWSON, author of "Words and Phrases," "Usages and Customs," etc. St. Louis: F. H. Thomas & Co. 1883.

The appearance of the above book illustrates a tendency among modern legal authors of choosing for the subject of their consideration some very special branch of the law, and discussing it with a degree of fullness that would be impossible in an ordinary sized treatise on a general subject. Such books can not, nor are they intended to, take the place of works of the latter class. Their object is to furnish the practitioner with all the law and authorities on a special topic, in the most convenient form for constant reference. That branch of the law of evidence which Mr. Lawson has selected for the subject-matter of his admirable book has, unfortunately, become most conflicting and uncertain, and great criticism has been heaped upon it. Such criticism, both by the profession and the public at large, has been directed, not so much at the rules which should govern the admission or rejection of the testimony of experts and the opinions of witnesses, as at the weight which should be given it when received. Juries constantly, and judges not infrequently, have either tacitly ignored or openly repudiated such evidence. With this particular aspect of his subject, Mr. Lawson does not deal. He concerns himself entirely with a consideration of the legal rules governing the admission or rejection of evidence of experts and the opinions of witnesses. In the discussion of the various questions which present themselves, Mr. Lawson has pursued a method of treatment which has heretofore not been adopted by any American text-writer, although Sir James Stephens, in his Digest of the Law of Evidence, has rendered it familiar to the profession in England, and to some extent, but not nearly so much as it deserves, in America. The peculiarity of this method, which the learned author has so successfully adopted and carried into execution, consists in embodying into various rules the principles which have been laid down by the courts, and then giving illustration of and reasons therefor. The illustration and reasons which Mr. Lawson makes use of have all been taken from actual cases, and are very full and well selected. He has reduced his subject into one hundred and sixteen general rules, which for purposes of convenience have been collected in a compact form at the beginning of the volume. The manner in which the book has been

printed is excellent, and the use of different sized type, in order to distinguish the rules from the illustrations and reasons given, furnishes great assistance in actual use. The index is very full and well arranged.

WOOD'S COLLYER ON THE LAW OF PARTNERSHIP. With an appendix of forms. By John Collyer, of Lincoln's Inn, Esq., Barrister at Law. With additions from Lindley and other English authors, and full American notes and references to American cases. By H. G. WOOD, author of "The Law of Nuisances," "The Law of Master and Servant," "The Law of Fire Insurance," etc., etc. In two volumes. Albany, N. Y.: W. C. Little & Co. 1883.

This book has been so long before the profession, and justly occupies so high a rank among legal text-books, that no notice of its original merits is necessary. In the present edition the learned editor has embodied in the notes and text much that is valuable from the works of Lindley, Dixon, Bissett, and Gow, besides adding thereto extensive references to American cases. The text of the original work has been preserved entire, with the exception of the chapter upon Practice in Bankruptcy. The text has been divided into appropriate sections, and headlines added, which materially facilitate ready reference. This edition is by far the most valuable that has yet appeared of this authoritative work.

NOTES.

THE supreme court of Wisconsin has recently decided the interesting case of Van Steenwyck v. Washburn, construing the will of the late Governor C. C. Washburn. The principal questions discussed by the court concerned the necessity of the widow to make an election under the terms of the will, and the manner in which such election should be made. By the statutes of Wisconsin, the common-law rules governing the necessity of an election are radically changed, and it is provided that any provision made by a testator for his widow shall be presumed to have been made in lieu of dower, unless the contrary plainly appears from the language of the will. At the time of the testator's death, his wife was, and had been for over twenty-five years, hopelessly insane. The will provided that the executors should "bear constantly in mind the wants of my wife, and to set aside, use, and expend whatever moneys may be necessary, consistently with her condition, to provide for her comfort and physical health; and I place no limit upon the sums which they may spend for the purposes indicated." This provision the court held was sufficient to put the widow to an election. That proposition being decided, the more important questions remained, Who should make the election? and what considerations should control in so doing? The widow being insane, could not, of course, make an election for herself. Neither could her guardian exercise that right by virtue of any of the powers conferred upon him. The only recourse left was that the court, acting in accordance with its inherent equity jurisdiction over the persons and estates of those insane, should make the election. This they proceeded to do, and elected for her the provision made by the will, although it was conceded that under such provision the widow would receive but a small fraction of the share, amounting to about seven hundred thousand dollars, to which she was legally entitled had the election been otherwise. Mr. Justice Lyons, while concurring with the majority of the court in holding that the right to make the election resided in the court, dissented from the conclusions reached by them as to the nature of the considerations which should govern their action. In his opinion the controlling criterion was, What election would the widow make were she sane and capable of exercising reasonable judgment? In view of the vast difference between the pecuniary value of the testamentary provision and that which the law allowed her, he had no doubt but that she would have elected to take the latter.

IN the case of Rombach v. Piedmont etc. Ins. Co., recently decided by the supreme court of Louisiana, a novel question in the law of life insurance was passed upon. The plaintiff had effected an insurance upon the life of his mother-in-law, one Mrs. Geisler, his object being to benefit his only child. An action against the company on the policy was held not maintainable. The court said: "Rombach was in none of the categories of permissible insurers. He had no insurable interest in the life of his mother-in-law. This is conceded by his counsel; but as he is the natural tutor of his child, who is the grandchild of Mrs. Geisler, it is claimed that 'the relationship of plaintiff by affinity to the deceased, and by blood to his own child, and the latter's relationship by blood, as a forced heir, to both his father and grandmother, does constitute a substantial insurable interest.' This lengthened tie long drawn out is too attenuated to support a policy of insurance."

AT a meeting of the judges of the superior court of the city and county of San Francisco, held January 2, 1884, Judge Hunt was unanimously elected presiding judge for the term of one year.

WEST COAST REPORTER.

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RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

IT may be instructive to compare these early views of the California court with the recent judgments pronounced by the supreme court of the United States. In Atchison v. Peterson,[1] which came up from Montana, Mr. Justice Field said: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate." [The judge gives a summary of the common-law doctrines as they are stated in the preceding part of this article, and then proceeds as follows]: "This equality of right [at the common law] among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its convenience for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the pub-

[1] 20 Wall. 507 (1874).

lic lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrines of riparian proprietorship with respect to the waters of these streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does in natural justice acquire a better right to its use and enjoyment than others who have not given such labor.

"So the miners on the public land throughout the Pacific states and territories by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories." [He quotes from some of the early California decisions hereinbefore cited, and further says]: "This doctrine of right by prior appropriation was recognized by the legislation of congress in 1866 [quoting the statute of congress]. The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made." [Having thus explained the origin of the doctrine, the opinion goes on to state more particularly the extent and limits of the right thus acquired, the relations of the appropriator with other occupants, and the like. This portion of the opinion will be quoted in connection with subsequent discussions.] In the case of Basey v. Gallagher,[2] the same doctrine was applied by the United States supreme court to all other beneficial purposes for which water is essential, as well as to mining. Mr. Justice Field, after quoting the decision in Atchison v. Peterson, said: "The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in the states and territories of the Pacific Coast by the customs of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." [He quotes an early California decision to this effect,[3] and proceeds]: "Ever since that decision it has been held generally throughout the Pacific states and territories, that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel

[2] 20 Wall. 671 (1874).

[3] Tartar v. Spring Valley M. Co., 5 Cal. 397 (1855).

machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupany to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual. The act of congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes, as well as for mining. * * * It is evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water, which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or by the decisions of the courts. The union of the three conditions, in any particular case, is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control."

These extracts have been given for a definite purpose, and they have a most important bearing upon the future discussion of other questions. It is essential to any accuracy in such discussions, that we should ascertain at the outset the exact grounds of the peculiar doctrine which lies at the foundation of the entire law concerning water rights in the Pacific communities. The question will afterwards arise, whether this doctrine determines all the special rules which may apply to all circumstances and to all conditions of ownership; or whether, on the other hand, this doctrine only partially displaces the common law, leaving it applicable under different circumstances and conditions. It is plain, upon the most superficial examination, that the opinions which have been quoted—and the same is true of other cases—do not profess to derive their conclusions from the common law. On the contrary, they openly avow that these conclusions are directly opposed to the common law. They base their reasoning and its results upon the peculiar social and industrial needs of the early settlers, especially the miners; upon the condition of the public domain in which the mining was carried on; upon the evident intention of the federal government in throwing open the mineral wealth of the public lands

to all comers, so that its advantages might be enjoyed equally by all persons; and upon the fact that the common-law rules would defeat this intention, and retard, if not wholly destroy, the development of the mineral resources. Although this departure from the common law was, at the very first, made with reference solely to the use of water for mining, it was soon necessarily extended to all other beneficial uses. There are undoubtedly some *dicta* to be found in a few of the California cases, which seem to assume or to suppose that the conclusions reached by the court were in agreement with the common-law doctrines. These *dicta* differ widely from the general course of reasoning pursued by the state judges, and especially from that adopted by the United States supreme court; and they are, as it seems to me, utterly irreconcilable with many subsequent decisions, establishing more special rules, made by the state and the federal courts.

It has been urged, although the position has never, I believe, been sustained by any authoritative decision in the Pacific states or territories, that the common law, in its early and original form, recognized and permitted a prior appropriation of the waters of running streams; that the contrary rules, as laid down by Story and Kent, and as they are briefly formulated in our first article, are a modern departure from the primitive common law, first made by some comparatively recent English decisions; and that, as a necessary consequence, these original common-law doctrines, denying what are ordinarily called "riparian rights," and not the modern innovations acknowledging such rights, are binding upon and should be followed by the courts of the Pacific commonwealths. In alleged support of this view, reference has been made, among others, to some New York decisions.[4] Into the discussion of this question I shall not at present enter. In the very recent case decided by the New York court of appeals,[5] described in our first article, the same position was urged by counsel. As a consequence, the common-law doctrine was examined by the court with much learning and ability, the early authorities were copiously cited, and the conclusions reached were in complete accordance with the common rules as they are universally understood at the present time by the courts of England and of the United States. The cases of The People v. Canal Appraisers, and others like it, which seem to be antagonistic, it is shown are confined to the Mohawk and the Hudson rivers, the rights of riparian owners on these two streams being

[4] For example, to The People v. Canal Appraisers, 33 N. Y. 461.

[5] Smith v. City of Rochester, 92 N. Y. 463.

derived, not from the common law, but from the civil law, as it prevailed in the Netherlands during the colonial periods.

It should be carefully observed, in concluding this subdivision of the subject, that the fundamental doctrine which has so far been considered, and which is established by the state and the federal courts, is confined to the rights of the prior appropriator of waters from the streams and lakes which lie wholly within the public domain of the United States. We shall now proceed to examine the further applications and extensions of this doctrine, and the limitations upon or exceptions to it, which have been made by the courts.

II. A prior appropriation of water thus made upon the public domain, and the rights thus acquired by it, are good also as against any subsequent grantee from the government.

Where a stream or lake was throughout its entire extent on the public land, the prior appropriator obtained a right, we have seen, good against all the world except the federal government. The government might have denied this right and treated it as non-existing. On the contrary, congress formally acknowledged it, and by the declaratory statute of 1866 made the national ownership of the public domain bordering on the stream or lake subject to the claims and uses of the prior appropriator. Wherever the title of the United States to any portion of the public domain was thus burdened, the same burden would, on general principles, accompany the title if transferred to any subsequent or private owner; whoever succeeded to the title of the United States, through any mode of acquisition or conveyance, would acquire and hold it subject to the same servitude which before existed in favor of the prior appropriator. This consequence would naturally follow from the operation of well-settled principles, independently of any express enactment; but it has not been thus left as a matter of inference. By an act of July 9, 1870, amending the statute of 1866, congress has provided, "that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory" [*i. e.*, act of July 26, 1866]. In the very recent case of Osgood v. El Dorado Water Co.,[4] it appeared that the plaintiff Osgood first went upon a certain tract of public land bordering on a stream, in 1863, and had resided there ever since. The land at the time was unsurveyed. The land was

[4] 56 Cal. 571 (1880).

surveyed by the government surveyor in 1865. The plaintiff filed his declaratory statement as a pre-emptor in June, 1868; in June, 1870, he had completed his payments; and on October 25, 1871, he received his patent from the United States. In March, 1867, the predecessors of the defendant had posted a notice of their appropriation of the waters of the same stream which ran through the plaintiff's tract; from that date they had been engaged in constructing a ditch or canal, and were in active prosecution of the work at the time plaintiff obtained his patent, although they did not finally complete it until some time after that date. The action was brought to restrain the defendant from diverting the water, based upon the plaintiff's asserted rights as a riparian owner. The court held that the plaintiff's rights accrued only from the date of his patent, and did not relate back to the time of his first settlement, or of his filing a declaration of pre-emption.[7] The defendant was thus in the position of a prior appropriator. In determining the rights of such an appropriator against a subsequent grantee from the United States, the court entered into no discussion of the question upon principle; it rested the decision wholly upon the statute of congress. Mr. Justice Ross said: "The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, which has all along been recognized and sanctioned by the local customs, laws, and decisions, was thus expressly recognized and sanctioned by the supreme court of the United States, and also by the act of congress of 1866." The same policy, he continues, led to the further act of 1870, previously quoted. "The defendant's grantors, therefore, had the right to appropriate the water in controversy, and if they acquired a vested right therein prior to the issuance of the plaintiff's patent, the plaintiff's rights, by express statutory enactment, are subject to the rights of the defendant."[8]

J. N. P.

(TO BE CONTINUED.)

[7] In support of this conclusion the following cases were cited: Megerle v. Ashe, 33 Cal. 74; Daniels v. Lansdale, 43 Id. 41; Smith v. Athern, 34 Id. 574; Lansdale v. Daniels, 10 Otto, 118.

[8] 56 Cal. 580, 581. See also Barnes v. Sabron, 10 Nev. 217.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

WOODRUFF *v.* NORTH BLOOMFIELD GRAVEL MINING CO. ET ALS.

Filed January 7, 1884.

PUBLIC AND PRIVATE NUISANCE FROM MINING DEBRIS.—The Yuba river rises in the Sierra Nevada mountains, and after flowing in a westerly direction about twelve miles across the plain after leaving the foot-hills, joins the Feather. At the junction, within the angle of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles and empties into the Sacramento. These three rivers were originally navigable for steamboats and other vessels for more than one hundred and fifty miles from the ocean, at least as far as Marysville—the Sacramento being navigable for the largest-sized steamers. The defendants have for several years been and they are still engaged in hydraulic mining, to a very great extent, in the Sierra Nevada mountains, and have discharged and they are discharging their mining debris—rocks, pebbles, gravel, and sand—to a very large amount, into the head-waters of the Yuba, whence it is carried down, by the ordinary current and by floods, into the lower portions of that stream, and into the Feather and the Sacramento. The debris thus discharged has produced the following effects: It has filled up the natural channel of the Yuba above the level of its banks and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It has buried with sand and gravel and destroyed all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It is only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public expense by the property owners of the county and inhabitants of the city, which levees continually and yearly require to be enlarged and strengthened to keep pace with the increase in the mass of debris thus sent down, at a great annual cost, defrayed by means of special taxation. It has polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It has filled to a large extent, and is filling up the bed and narrowing the channels of these rivers, and the navigable bays into which they flow, thereby lessening and injuring their navigability, and impeding and endangering their navigation. All these effects have been constantly increasing during the past few years, and their still further increase is threatened by the continuance of the defendants' said mining operations. *Held*, that these acts, unless authorized by some law, constitute a public and private nuisance, destructive, continuous, increasing, and threatening to continue, increase, and be still more destructive.

SPECIAL INJURIES TO THE COMPLAINANT.—During all this time the complainant was and he now is owner in fee of a block of buildings in Marysville, in the business portion of the city, about five hundred feet from the levee on the Yuba. Originally the steamboat landing for the city was on the Yuba, nearly opposite to this block, but by reason of the filling up of that river its navigation has been prevented, and the landing is now in the Feather, three fourths of a mile distant from said block. By a break in the levee of the Yuba during one of its annual floods, the city of Marysville was inundated, the water stood several feet deep in this block, debris was deposited in it; its underpinning was washed out so that the roof fell in, and the repairs of these injuries cost between two thousand and three thousand dollars. The building is liable in the same manner to similar injuries from every flood in the river. The complainant, also, owns two farms, one of nine hundred and fifty-two acres abutting on the Feather a few miles below Marysville, upon which there was formerly a public steamboat landing for shipping and receiving freight and passengers, but which has become useless by the filling up of the river in front; the other of seven hundred and twenty acres abutting on the opposite bank of the Feather. Seventy-five acres of one of these tracts and fifty acres of the other have been completely buried and destroyed by the debris, and the remaining portions are only protected from destruction by the levees, which, on several occasions, have broken, and the lands have been damaged by water charged with debris, and they are in danger of being overflowed and injured in a similar manner from a breach of the levees at any flood. The value of the complainant's land has been depreciated from these causes; his access to the river from his farms for the purpose of shipping or receiving freights has been cut off; he has been obliged to pay an extraordinary, onerous, annual tax

for the erection and maintenance of the levees to protect his property from the constantly increasing danger of loss or destruction. *Held*, that these facts constitute special injuries to the complainant, which entitle him to maintain a suit in equity to restrain the further commission of the public nuisance created by the defendants.

SUIT BY A PRIVATE PERSON TO RESTRAIN A PUBLIC NUISANCE.—When a private person has sustained special injuries from a public nuisance, he thereby gains a standing in court which enables him to maintain a suit for such injury. In the suit so brought, the plaintiff acts on behalf of all others who are or may be injured, as a public prosecutor rather than on his own account. The court, in deciding such suit, has regard to the interests of the public, as well as to those of the plaintiff.

SUCH NUISANCE NOT AUTHORIZED BY LEGISLATION.—The acts of defendants creating such a public and private nuisance are not authorized or justified by the legislation of congress recognizing, permitting, and regulating mining on the public lands of the United States, or on lands granted by the government to private owners (U. S. R. S., sec. 2338, act of 1866); or by statutes providing for the improvement of the navigable rivers of California, which recognize the injuries above described as existing facts (river and harbor bills of 1880 and 1882); or by the legislation of California regulating mining operations, or purporting to permit the condemnation of lands for the uses of miners (C. C. P., sec. 1238, subd. 5); or by the act of 1878 (sec. 1, subd. 8), concerning the Sacramento and San Joaquin rivers, and recognizing the injuries as above described from the mining debris.

NUISANCES NOT AUTHORIZED BY IMPLICATION.—Under the provisions of the California civil code, section 3482, defining nuisances, acts otherwise constituting a nuisance can not be justified and legalized by implication but only by the express authority of some statute.

IT IS A CONDITION ALWAYS IMPLIED BY LAW, that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons.

POWERS OF THE UNITED STATES OVER PUBLIC LANDS WITHIN A STATE.—Over the public lands within a state the United States has only the rights of a proprietor, and it has no power to authorize its grantees of such lands to invade the private rights of other proprietors.

POWERS OF CONGRESS OVER NAVIGABLE STREAMS.—Congress has no power, even by express statute, to authorize a public nuisance destroying or materially obstructing the navigability and navigation of navigable streams within a state, for purposes wholly unconnected with commerce or post-roads. Its power over such streams is limited to the regulation of commerce and establishing post-roads, and it can not authorize the navigability of a navigable stream to be totally or partially destroyed for purposes having no connection with or tendency to benefit the operations of commerce or the carrying of the mails.

POWERS OF THE STATE TO AUTHORIZE SUCH A NUISANCE.—A statute of the state of California expressly authorizing the acts of the defendants, and the injuries caused by them, would be in conflict with the fourteenth amendment of the United States constitution, and with similar provisions of the state constitution. Such legislation would either deprive the complainant and others of their property without due process of law, or would take or damage their property for alleged public use without compensation.

POWERS OF THE STATE OVER NAVIGABLE STREAMS.—A state can not, except under its power of eminent domain, and upon making just compensation, interfere with the navigable streams within its territory, in any manner, or for any purpose, other than that of regulating, preserving, and protecting the public easement of navigation therein.

ACT ADMITTING CALIFORNIA INTO THE UNION.—The provision of the act admitting California into the Union "upon the express condition * * * that all the navigable rivers within said state shall be common highways and forever free as well to the inhabitants of said state as to the citizens of the United States," is valid as a law under the authority of congress to regulate commerce, which the state has no authority to violate, and with which it can not interfere.

PRESCRIPTION, NATURE OF.—The statute of California merely fixes the time in which a right by prescription shall be acquired at five years; but it nowhere determines the circumstances which constitute prescription, and thus leaves them to be determined by the settled law as it stood prior to the code.

NO PRESCRIPTION IN FAVOR OF A PUBLIC NUISANCE.—No right or title can be acquired by prescription to commit, or continue, a public nuisance.

SAME, IN SUIT BY A PRIVATE PERSON.—The same doctrine applies to a suit brought by a private person who has sustained special injuries from a public nuisance, as to a suit brought by the attorney general, or by some corporate portion of the public. A

public nuisance is not unlawful as to the whole public, and lawful as to its constituents; it is absolutely and wholly unlawful.

No PRESCRIPTIVE RIGHT ACQUIRED.—The defendants have acquired no right or title by prescription to commit or continue the nuisance complained of, whether regarded as a public or a private nuisance; there has been no acquiescence, either by the public or by complainant, in the acts of defendants as done under an adverse claim of right.

DELAY AS EVIDENCE OF ACQUIESCENCE.—How far delay may be evidence of acquiescence must depend upon the circumstances of each case. In the present case, the complainant is entitled to the benefit of the conduct of the community, and this conduct shows a constant opposition on their part to the acts of defendants during the whole period of their hydraulic mining operations, since the injury became material. Acquiescence in a certain amount of nuisance, is not acquiescence in a similar nuisance which is constantly increasing in magnitude, and in its destructive effects. For the same reasons, the delay or lapse of time in bringing this suit does not constitute laches.

ADVERSE POSSESSION.—Defendants have not acquired title by adverse possession to the two tracts of complainant's lands—one of seventy-five acres, the other of fifty acres—which have been completely buried by their mining debris. These tracts have not been "protected by a substantial inclosure," or "usually cultivated or improved," by defendants, as required by the code of civil procedure, section 325, in all cases where the adverse possession is "not founded upon a written instrument, judgment, or decree," and there has been no ouster of the complainant by defendants.

CUSTOMS OF MINERS.—The acts of defendants are not authorized by the "customs of miners" recognized by the legislation of California and of congress, which customs so recognized are only local, not general customs. A custom which authorized such acts, if it existed, would be "in conflict with the laws and constitution of the state," and would be illegal and void.

INCONVENIENCE TO DEFENDANTS.—In granting relief, where the complainant's rights are certain, and the invasion of them is clearly established, a court of equity can not consider the inconvenience which will result to defendants from the relief. Nor is it the province of the court to speculate upon, or to consider, or to suggest, any possible modes by which defendants may avoid the injurious consequences of their acts, or to decide upon the conflicting opinions of scientific experts concerning the feasibility or sufficiency of such suggested modes. The only duty of the court, is, to grant the relief to which the complainant is entitled upon the law and facts of the case.

BILL in equity for an injunction. The opinion states the facts.

George Cadwalader, *I. S. Belcher*, and *John N. Pomeroy*, for the complainant.

Stewart & Herrin, *J. K. Byrne*, and *W. C. Belcher*, for the defendants.

By the Court, SAWYER, Circuit Judge. This is a bill in equity to restrain the defendants, being several mining companies, engaged in hydraulic mining on the western slope of the Sierra Nevada mountains, from discharging their mining debris into the affluents of the Yuba river, and into the river itself, whence it is carried down by the current into Feather and Sacramento rivers, filling up their channels and injuring their navigation; and sometimes, by overflowing, and covering the neighboring lands with debris, injuring, and threatening to injure, and destroy the lands and property of the complainant, and of other property owners, situate on, and adjacent to, the banks of these watercourses.

In March, 1882, the secretary of war transmitted to congress the official report of Lieutenant Colonel Mendell, of the "corps of engineers upon examinations and surveys to devise a system of works to prevent the further injury to the navigable waters of California from the debris of mines arising from hydraulic mining," which surveys and report were made in pursuance of the act of congress, relating to rivers and harbors, of June 14, 1880. This report, made in January, 1882, was introduced in evidence, and it has been quoted and recognized by both sides in the case, as showing the injurious results of hydraulic and other mining, up to its date, and the remedies attempted and suggested. It is, also, fully

confirmed by the other evidence in the case, and by the condition of things as disclosed upon actual inspection and observation, made by the judges who traversed and examined the country affected by the operations complained of, in the presence and with the consent of representatives of the respective parties and their counsel. Many of the facts in the general statement will, therefore, be taken in a condensed form from that report.

Hydraulic mining, as used in this opinion, is the process by which a bank of gold-bearing earth and rock is excavated by a jet of water, discharged through the converging nozzle of a pipe, under great pressure, the earth and debris being carried away by the same water, through sluices, and discharged on lower levels into the natural streams and watercourses below. Where the gravel or other material of the bank is cemented, or where the bank is composed of masses of pipe-clay, it is shattered by blasting with powder, sometimes from fifteen to twenty tons of powder being used at one blast to break up a bank. In the early periods of hydraulic mining, as in 1855, the water was discharged through a rubber or canvas hose, with nozzles of not more than an inch in diameter; but later, upon the invention of the "Little Giant" and the "Monitor" machines, the size of the nozzle and the pressure were largely increased, till now the nozzle is from four to nine inches in diameter, discharging from five hundred to one thousand inches of water under a pressure of from three to four or five hundred feet. For example, an eight-inch nozzle, at the North Bloomfield mine, discharges one hundred and eighty-five thousand cubic feet of water in an hour, with a velocity of one hundred and fifty feet per second. The excavating power of such a body of water, discharged with such velocity, is enormous; and, unless the gravel is very heavy or firmly cemented, it is much in excess of its transporting power. At some of the mines, as at the North Bloomfield, several of these Monitors are worked, much of the time night and day, the several levels upon which they are at work being brilliantly illuminated by electric lights, the electricity being generated by water power. A night scene of the kind, at the North Bloomfield mine, is in the highest degree weird and startling, and it can not fail to strike strangers with wonder and admiration. The amount of debris discharged into the rivers by these operations can only be duly appreciated by actual observation.

The Yuba river is a tributary of Feather river, entering it at Marysville, thirty miles above the mouth of the Feather, where the latter joins the Sacramento. It is the fourth river in size in the Sacramento valley, and drains about thirteen hundred and thirty square miles of the western slope of the Sierra Nevada mountains, comprising portions of Sierra, Nevada, and Yuba counties—its extreme breadth being about thirty-six miles, and its extreme length about sixty miles, excluding the twelve miles of its lower course from the foot-hills to its junction with Feather river at Marysville. The elevation of the Yuba basin above tide-water is from two hundred feet at its lower parts to about eight thousand feet at the summit of the mountains; but the gold deposits of this basin only extend to an elevation of from four to five thousand feet, in a belt from forty to fifty miles wide. The upper portion of the river is divided into five principal branches, the north, middle, and south Yubas, and Deer and Dry creeks. The first four—Deer creek being nearly as large as the smallest main branch—unite in the mountains be-

fore reaching the valley; Deer creek, not far from it; the last, Dry creek, joining the main river in the valley, shortly after it leaves the foot-hills. The debris complained of is mostly discharged into the middle and south Yubas and Deer creek, and their numerous smaller tributaries.

The auriferous deposit on the San Juan ridge, between the south and middle Yubas, embracing most of defendants' mines—and a larger part of the mines now actually worked being under their control—is much the largest and most important in the state, and is favorably situated for working—the beds of the ancient channels in which it lies being elevated several hundred feet above the beds of the Yubas and their affluents, and the annual floods of the Yuba may be relied on to carry off a large portion of the debris resulting from mining. Says the report referred to: "The linear extent of the gravel channel and its branches on this ridge is about twenty-five miles. Deducting liberally for the portion already worked, and for that too deeply covered by lava to be available for hydraulic mining, there remain, probably, not less than fourteen miles of channel, available for washing, from which only a comparatively small portion of the top gravel has been removed. Below San Juan, the gravel body has a surface width of over one thousand feet, and is, say, one hundred and forty feet deep. From Badger Hill to Bloomfield, it is for the greater portion very much wider and deeper. At Columbia Hill, its surface width varies from three thousand or four thousand to eight thousand feet, and it is from three hundred to six hundred feet deep. The gravel at Lake City is probably three hundred or four hundred feet deep. At North Bloomfield it is opened to the bed-rock, showing a depth of more than three hundred feet. Roughly estimating the average width of the remaining gravel range at four hundred yards, and, after allowing for the portion worked off, placing its average depth at seventy yards, the sum is an average of, say, fifty million yards per mile, or for fourteen miles, say seven hundred million yards."

"Allowing for the amount washed since 1876, one hundred million yards, there remain six hundred million to be removed;" adding to this the estimated amount still remaining to be worked at Smartsville, lower down the river, and the amount remaining to be washed will appear. Says Colonel Mendell: "Seven hundred million of cubic yards may be assumed to represent the amount of gravel remaining to be worked by hydraulic process, tributary to the Yuba." Approximately, then, according to the evidence, over one hundred million of cubic yards in these mines have been washed out by the hydraulic process, and the debris deposited in the Yuba and its affluents; and seven hundred million more remain to be washed out, and its debris deposited in these watercourses in the same manner.

The following shows some of the results of former washings, and unmistakably indicates what must result from a continuance of the work. The Yuba with its branches, and smaller affluents, were necessarily characterized by heavy grades, the waters falling about eight thousand feet in a distance of ninety or a hundred miles from their extreme sources to the Feather river. They ran through deep, rocky canyons and gorges, over a rough rocky bottom, with frequent rapids, and water-falls of greater or less height, and there were many deep holes excavated by the action of the water at the foot of falls, rapids, and the like. The beds of all these streams, from the very dumps of the higher mines to

the junction of the main Yuba with Feather river, a distance of seventy-five miles or more, have all been filled up many feet deep—at some places to the depth of one hundred and fifty feet—and all the streams have regularly graded themselves, so that a railroad track might be laid upon their beds for the whole distance—the grade, of course, being steeper in the upper parts, but equally regular.

Thus, the main branches of the Yuba and Deer creek, Shady creek, Bloody run, Grizzly canyon, Humbug canyon, and the other smaller tributaries, all exhibit this result. There are many square miles, in the aggregate, in the beds of these streams, buried many feet deep with debris, and these channels are choked and clogged with it—the heavier material being deposited higher up and the lighter passing further down. Most of it will from year to year be carried further down, and ultimately find its way to the valley. The transporting capacity of the water, however, is unequal to the task of carrying off all the debris at once, as it is discharged into the stream. So, also, the ordinary floods, from year to year, are unable to carry off all the debris discharged into the streams during the year; and it, consequently, accumulates from year to year along the upper portions of the watercourses, within the mountains, till an extraordinary flood comes. When such a flood occurs, it transports a much larger amount at once, and precipitates it upon the valleys below. Vast amounts are now accumulated in the upper courses of the Yuba and its branches, which are liable to be precipitated in immense quantities into the valleys below, by any extraordinary flood—such as that of 1862—that may hereafter occur. With reference to the amount of these deposits remaining in the Yuba above Marysville, Colonel Mendell, in his report, says: "The estimates by Mr. Manson, reported to the state engineer, give the estimated deposits, in 1879, on the Yuba, above the foot-hills, as forty-six million four hundred and sixty-two thousand one hundred cubic yards, the great bulk in eight or ten miles; and below, twenty-three million two hundred and eighty-four thousand—a total of seventy-one million seven hundred and forty-six thousand one hundred cubic yards. In the light of later information, it seems probable that this estimate is altogether too low, the deposits in small tributaries not having been taken into account, and the amount in the lower river having been much underestimated. The *actual amount is not capable of being ascertained, and the statements are given merely for the purpose of illustration.*

"At its escape from the mountains, where the foot-hills recede and give width to the plain, the Yuba spreads out its *load of sand and gravel* over a plain of fifteen thousand to sixteen thousand acres, which has risen until it now *stands above the level of the adjoining country on either side.*

"This plain has a slope of about ten feet to the mile, varying above and below this limit as you ascend or descend, the slope of the river-bed being fifteen feet at the foot-hills and five feet at Marysville, ten miles below. The sizes of material have some correspondence to the grades. Ascending the stream, one passes to a continually increasing average size of material. While it is nearly all sand below, above it becomes nearly all gravel, with, however, considerable admixture of different sizes everywhere.

"This irruption from the mountains has *destroyed thousands of acres of alluvial land.* The state engineer, in 1880, estimated that fifteen thou-

sand two hundred and twenty acres had been seriously injured by these deposits from the Yuba.

"On the Yuba, the great deposits of *gravel* are found on a grade of thirty feet to twenty feet to the mile. The *sands* predominate greatly in slopes of ten feet and below."

The portion of the valley here referred to as covered with sand is that portion of the borders of the Yuba river extending across the Sacramento valley from the foot-hills to its junction with Feather river at Marysville—a distance of about twelve miles. Formerly, before hydraulic mining operations commenced, the Yuba river ran through this part of its course in a deep channel, with gravelly bottom from three hundred to four hundred feet wide, on an average, with steep banks from fifteen to twenty feet high, at low water, on either side. From the top of the banks, on each side, extended a strip of bottom-lands of rich, black, alluvial soil, on an average a mile and a half wide, upon which were situate some of the finest farms, orchards, and vineyards in the state. Beyond this first bottom was a second bottom, which extended some distance to the ridge of higher lands, the whole constituting a basin between the higher lands on either side, of from a mile and a half to three miles wide. Not only has the channel of the river through these bottoms been filled up to a depth of twenty-five feet and upwards, but this entire strip of bottom-land has been buried with sand and debris, many feet deep, from ridge to ridge of high land, and utterly ruined for farming and other purposes to which it was before devoted, and it has consequently been abandoned for such uses.

Dr. Teegarden's lands afford a very striking example of individual injuries inflicted by this mining debris. Dr. Teegarden is a prominent citizen of Yuba county, having for some years represented the county in the state senate. He owned twelve hundred and seventy-five acres on the Yuba bottoms, some three or four miles above Marysville, on the north side. All except the seventy-five acres now lying outside the levee have been buried from three to five feet deep with sand, and utterly destroyed for farming purposes; for which injuries he has received no remuneration. He now lives in a small house near the levee, on the outside, which is liable to be swept away should the levee break opposite to him during an extraordinary flood. Dr. Teegarden testifies that the main filling up was in 1879 and 1880; but that there has been a constant addition to it ever since; and that, during the last year, it has filled up faster than at any other time; that he built three miles of levee to protect it, but it proved insufficient; and that the land is five to six feet higher with sand and sediment on the river, or inside of the levee, than on the outside, where he lives.

A considerable portion, but not all, of the lower bottoms of the Yuba was covered by the accumulated debris brought down by the great flood of 1862; but it has been extending and deepening ever since. Much, perhaps most of it, was more or less covered as early as 1868 or 1869. Since that time levees have been built by the citizens of Marysville and Yuba county along the ridge on either side, for the purpose of preventing a further spread of the devastation, and for the protection of Marysville and the adjacent country. In addition to the levees so erected, as O'Brien, who did the work, testifies, the miners themselves five years ago also built a levee for the same purpose, being the levee on the south side of the Yuba, from the foot-

hills to the Hedges' grade, with which it connected at Hedges' station, a distance of eight miles, at a cost of eighty-six thousand dollars, of which sum the defendants in this suit paid eighty per cent. This is the levee which, connected with Hedges' grade from its connection to the Feather river, protects the country from overflow on the south. It broke in three places in Linda township, in June last, when the English dam gave way, and the country for a considerable distance below, extending to the Eliza tract, several miles distant, was flooded, with some, though not great, damage—the flood from the reservoir having soon spent itself. Not only has all the space between these levees been filled with this debris to a level with the high lands upon which they are built, but for miles of the lower portion of the river, the filling, between the levees, is several feet above the level of the surrounding country on the outside. The intervening space is grown up with young cottonwoods and willows.

The river has now no definite channel within these bounds, but runs anywhere over the space between the levees, situate two to three miles apart, according to the obstructions its waters meet from time to time by growing trees, or accumulations of drift-wood, or deposits made by itself, thereby raising the bed, where it actually for a time runs, to a higher level than the bed of such surrounding channel as it has. This broad channel, or bed, such as it is, is several feet higher than the lands of the surrounding country outside the levees, which outside lands have no protection from overflow of the waters of the Yuba, surcharged with debris, except the slender intervening artificial banks, so erected by the people and the miners for that purpose. The lands thus already buried and destroyed are over fifteen thousand acres, or twenty-five square miles; or, taking the average width, a tract from the foot-hills to Marysville, twelve miles long along the river, by two miles wide. The filling in the river-bed is generally twenty-five feet or more, and, at its immediate junction with Feather river at Marysville, is about twenty feet deep—some witnesses make it deeper—where it forms a bar of nearly that depth across Feather river. The depth of the filling is increasing year by year, and raising the bed of the river within the levees higher and higher above the surrounding country outside the levees. The depth of the filling increases as the river is ascended, till at Squaw Flat, near Park's Bar, below Smartsville, at the entrance of the foot-hills, according to the testimony of O'Brien, a witness for defendants, it is one hundred and fifty feet deep. Opposite Sucker Flat ravine it is ninety, and at the narrows above Smartsville sixty, feet deep. The deposits constituting the first fifty feet, at Squaw Flat, have been there ten or twelve years, and the rest has accumulated since. At a point near this, at Rose's Bar, where the channel was once but one hundred to three hundred feet wide in the bed of the canyon, it has now been raised by filling till it is three thousand feet wide. But at these points no valuable lands are covered.

The result, as affecting the navigability of the waters of the state, will be stated upon the authority of Mendell's report, which was made upon instrumental surveys and actual measurements, and is amply supported by other evidence. The low-water level of Feather river, at Marysville, the head of navigation, at the date of his report, had been raised fully fifteen feet—at this time it is more—indicating a rise of the bed of the river to that height above its former bed. The filling, at the mouth of Feather river, is fully five feet. Says Mendell: "Taking fifteen feet at

Marysville and five feet at the mouth, the difference—ten feet—is to be added to the old fall. This increases the slope of the Feather, in its navigable part, four inches to the mile. This increase has impaired the depth of water and the practicability of navigation to a considerable extent.

"Applying to the navigable portion of the Feather the rule adopted for the minimum deposit in the Sacramento, namely, that the average filling is equal to the elevation of the plane of low water, we will have, for the thirty miles from Marysville to the mouth, an average depth of ten feet over the bed of the river. This estimate is thought to be here, as in the Sacramento, *considerably below the fact.*" Some witnesses say it is now fifteen feet. Again: "As a consequence of these changes, a higher flood line and *greater exposure to overflow now exists for all riparian lands on both these rivers. This is an element of considerable loss to the country*, but its description and discussion do not come within the limits of this investigation. * * *

"The elevation of the bed of the river is not accompanied by an equal rise in the level of the banks. *The level of the beds approaches, more and more, the level of the banks.* In the cases of the Yuba and Bear, non-navigable streams, the level of the beds has risen from a depth a number of feet below the banks to an *elevation of several feet above the banks.*

"These instances may be taken to illustrate the ultimate condition of the Sacramento and Feather rivers, under a continuance of the influences to which they are now subjected. The abandonment of existing channels *is a consequence to be apprehended.*" It is claimed by plaintiff, and the testimony on the point is conflicting, that there is danger of the Sacramento having its channel at Gray's bend, and running some distance from Sacramento city to the west."

In the Sacramento river, a similar rise in its bed has taken place, from similar causes. During the first twenty years of mining, from 1849 to 1869, the low-water plane in the river at Sacramento was raised two and nine tenths feet. During the next ten years of *hydraulic mining, from* 1869 *to* 1879, *the rise in this plane was doubled.* It has been raised fully *six feet from* 1849 *to* 1881. Says Mendell: "As a consequence of the elevation of the bed, the tidal influence which, in 1849, extended at least as high as *the mouth of the Feather, twenty-five miles above Sacramento, and was quite two feet at Sacramento, is now no longer noticeable above Heacock shoals, nine miles below Sacramento.* The tide, within the past thirty years, rose on these shoals as much as three feet." * * *

"Twenty-five miles below Sacramento the river divides into two delta channels, which unite below, the intermediate distance by the two channels *being eighteen miles by Old River and twelve miles by Steamboat slough.*

"In the earlier days of navigation, and until six or eight years ago [before 1881], Steamboat slough was the channel used by all boats and vessels."

It is a part of the public history of the state, with which all the early settlers are familiar, that for years the comparatively deep-draught steamers, Senator and New World, the former built to run from New York to Portland, Maine, and the latter to run on the Atlantic ocean out of New York, both of which either came round Cape Horn, or through the Straits, ran *regularly through Steamboat slough.* This slough is now filled up, so as not to be navigable for the light-draught river boats in use at the present day, and its navigation abandoned, steamers going by the

longer route of Old River. The beds of the river have not only been filled and raised for several feet, but the channels have been largely contracted in width. So, also, from similar causes, the shoal water in Suisun, San Pablo, and San Francisco bays, and in the straits of Carquinez, have largely increased, and the navigable channels of these waters have been considerably and materially contracted. The debris from Bear river and the American of course contribute their share to fill the Sacramento, below the mouth of the American, and Steamboat slough, as do some of the southern rivers, to swell the amount of deposits in the straits of Carquinez, and Suisun, San Pablo, and San Francisco bays, but the mines of the Yuba discharge a much larger amount of debris than all the other mines together.

In speaking of remedial means, Colonel Mendell says: "The statement of the case presented in the preceding pages seems to establish the necessity of measures of remedy or alleviation, *even in the event that no further contribution be made to mining detritus in the beds of streams.* * * *

"The preservation of river-beds and routes of drainage requires that effective restraint be imposed upon mining *detritus*. Otherwise, these drainage lines may be expected to suffer the fate which overtook their prototypes, the Pliocene rivers, which were obliterated by enormous deposits brought down by their own currents.

"It may be added, that the conservation of existing facilities for navigation equally requires restraint of the flow of sand and gravel; and *that no important improvement of the channels can be expected until this result shall be secured.* Under all circumstances, restraint is the first and essential step to any projects, whether of alleviation, conservation, or improvement.

"It has been shown that in the beds of the American, Bear, and Yuba there are now lying many millions of cubic yards of material in positions where it is comparatively harmless, and that each yard, as a rule, adds something to the volume of these deposits, but that, whether anything is added or anything subtracted, which is sometimes the case, depends upon the volume and power of the floods. As a rule, the mines supply more material annually than the floods are able to transport over the grades in the lower portions of the rivers. If the floods were of sufficient duration, the accumulations would be found lower down and in more dangerous positions. Instead of lying in the bed of the Yuba, they would be in the Feather and Sacramento."

The waters of the Yuba are so charged with debris that they are wholly unfit for watering stock, or for any of the uses, domestic or otherwise, to which water is usually applied, without being first taken out of the stream and allowed to stand in some undisturbed place and settle. As it comes down to Marysville, it is so heavily charged with sand as to render it unfit even for surface irrigation.

In pursuance of the provisions of the drainage act of 1880 (Stat. 1880, 130), the state, under the supervision of the state engineer and Colonel Mendell, as consulting engineer, erected a brush dam for impounding debris, about two miles in length, across the Yuba river from ridge to ridge of highlands, some eight miles above Marysville. At the first ordinary flood in the following rainy season, a large section on the northerly end and two other sections towards the south were swept away. According to the report of Hamilton Smith, its engineer, to the North Bloomfield Company, made in July, 1881, after the break by the floods, this

dam was at its greatest height fourteen feet, "its cost being in the neighborhood of one hundred and twenty thousand dollars," and it broke in three places, as follows: "The east embankment at the northern end has been washed away nearly down to the original level, from the end of the brush work to the shore, a distance of four hundred feet; the brush dam has been cut away entirely in two places—one seven hundred and sixty feet, and the other two hundred and thirty feet in length, measured on the crest. In two places there are small gaps, but the foundation is undisturbed. Out of a total length of ten thousand feet there has, therefore, been destroyed about one seventh." Afterwards, during the dry season, the dam took fire and a large portion of the remainder was burned. An impounding dam was also constructed by the state, under the same act, on Bear river, with similar results. These dams, with connecting and auxiliary levees built by the state, are understood to have cost over five hundred thousand dollars.

The North Bloomfield Mining Company, defendant, has constructed a dam to impound its debris, fifty feet high, near the junction of Humbug canyon with the south Yuba. The dam, not having been carried higher as it filled up, is now full, and the debris that has passed over the dam has filled the canyon and south Yuba below the dam to a level with the debris above, so that now the debris passes along down the canyon over the dam without obstruction, as though no dam at all existed at that point. A similar dam, erected across Sucker Flat ravine, at Smartsville, to impound the debris of the mines at that place, is in a similar condition.

The complainant has owned in fee, for more than twenty years, and he still owns, an undivided half of three parcels of land, held under a patent of the United States, issued upon a grant made by the Mexican government to John A. Sutter, and known as the New Helvetia grant. One is a city lot situated in Marysville, at the corner of D and Second streets, near the business center of the town, and about five hundred feet from the levee on the Yuba, which lot is covered by a brick block of stores, called the Empire Block, erected about 1854 or 1855, at a cost of somewhere between forty thousand and sixty thousand dollars. Formerly the steamboat landing was in the Yuba nearly opposite this block, just below the ferry on the Sacramento road, but now the Yuba is filled up and the steamboat landing is in Feather river, opposite Yuba city, which is in Sutter county, three fourths of a mile distant. Another is a tract of farming land, consisting of nine hundred and fifty-two acres, situate on the east bank of Feather river, a few miles below Marysville, known as the Eliza tract, upon which there was formerly a public steamboat landing, used for receiving and discharging freight and passengers; but by reason of the filling of the river in front to the depth of twelve to fifteen feet, it is now of little use. The third is a tract of land of seven hundred twenty and fifty-seven hundredths acres, known as the Hock Farm tract, on the western bank of Feather river, not far from the Eliza tract, but on the opposite side of the river. Of the Eliza tract, seventy-five acres, and of the Hock Farm tract, fifty acres of the bottom-lands, being the best land on these tracts, were buried by debris in 1862 and subsequent years, and they are still covered, from time to time, with fresh deposits. These lands have become covered with cottonwood and willows, and they are now useless for agricultural purposes. Other portions of these tracts are still within the levees erected and liable to overflow.

About 1868, the people of Marysville found it necessary to build levees around the city and along the north bank of Yuba river to protect it from the rapid encroachment of the debris coming down the Yuba; and levees were built. It has been found necessary to increase these levees in height and thickness from year to year, ever since.

In 1875 the levee on the north side of the Yuba broke, some three or four miles above the city; and the city and other lands were not only flooded, but a large amount of debris was deposited. This was the first time Marysville was ever flooded, although the amount of water that fell, or was in the valley at any one time, was much less than in the great flood of 1862. So in 1881, with much less water than at the great flood, it rose to a higher point at Marysville than ever before. This was, doubtless, owing in great part to the filling up of the channels and elevation of the beds of the rivers, and, probably, in part, also, to the general levee system adopted for the protection of the lands of the valleys. At the break of the levee and flooding of the city of Marysville in 1875, complainant's Empire Block, in Marysville, was materially injured. The water was over four feet deep in it, and debris from the Yuba was deposited in it to a considerable depth. The underpinning of the center of the building was washed out and the roof fell in. It cost between two thousand and three thousand dollars to put it in repair again. Not only this building, but many others, had valuable basements, in use prior to 1875, which were filled at that time, and since then the owners of basements in Marysville have been compelled to abandon their use. The level of the bed of the Yuba and the water flowing in it having been elevated, by these mining deposits, above the level of the floors of basements of the buildings in Marysville, the water in the basements rises and falls with the river, to a greater or less extent, from percolation, rendering them unfit for use, and compelling their abandonment. So, also, the sewerage of Marysville and of Empire Block has been greatly obstructed and injured by the same means. In 1881, the water is stated by some of the witnesses to have been four feet higher than in 1875, and eight feet higher than the great flood of 1861–2. The trestle-work of the D-street bridge in 1876 was ten to twelve feet above the ground. Now it is filled so that it is within two to three feet of the water, and one can step from the trestle-work to the bed of the stream; and in 1881 the flood went over the bridge, depositing gravel on it. In 1881 the inhabitants were called out in the night to increase and strengthen the north levee, and only by the most strenuous exertions of those able to work in raising the levees several feet in places, by means of gunny-sacks filled with sand, did they escape a break and inundation of water and sand.

The taxes of the citizens of Marysville from year to year amount to from two to seven per cent. upon the assessed value of their property, a large part of which is expended upon their levees, to widen and strengthen them, and to increase their height, as the height of the debris within the levees is increased. The levee tax alone in Marysville, and in Sutter county, opposite, in some instances has been as high as six per cent. During the present year a large amount has been expended by the city on the levee on the north side of the Yuba. For some miles there have been thrown out jetties every few yards, at an angle down stream, by means of timbers and poles resting on supports fastened to the earth, covered with willow brush, and packed with sacks filled with sand—the object being to check the flow of the current, turn it from the bank, so as to prevent its cutting

it away, and by deadening the current compel it to deposit its debris in the still water, and thus aid in widening and strengthening the levee itself. For all these purposes, and to protect his property, complainant annually pays large taxes that would, otherwise, be unnecessary. This levee is the only barrier which prevents the waters of the Yuba within the levee, the bed of which is higher than the lands outside, at flood-time from flowing over, loaded with sand to their full carrying capacity, and depositing their debris in Marysville, and from, at all times, flowing over and depositing their load of sand and other debris upon the surrounding country, which is now for some miles around below the level of the bed of what channel there is within the two levees. In 1881 the south levee broke in Linda township, seven miles above Marysville, and ran down over the country for several miles, flooding complainant's Eliza tract, which was under water till June, preventing the raising of a crop for that year. Any breaking of the south levee during a flood sends the water down to the Eliza tract and overflows it, unless the small private levee built by the occupant, the tenant of complainant, at his own expense, is sufficient to protect it.

In June last (1883), the English dam, near the summit of the mountains, which forms the reservoir of one of the defendants, gave way, and the accumulated waters came down the Yuba in a torrent, sweeping everything before them, a distance of eighty-five miles in about ten hours, rising at some places, in its canyons, it is said, to a height of ninety feet; and at Marysville, where the channel is broad, two and a half feet. At Linda, seven miles above Marysville, meeting some obstruction, its current was turned against the south levee, which broke at three points, the water rushing through and down over a broad stretch of the lower plains outside to and upon the Eliza tract again. The water having run out of the reservoir in an hour, the torrent soon spent itself, and no considerable damage was done to the Eliza tract, although considerable damage resulted to the intervening lands. In this case, however, the small private levee constructed by the tenant of Woodruff, for the protection of this and other lands held by him, would have protected this tract from this brief flood had there not been a culvert, the gate of which the proprietor refused to have shut, giving as a reason that he desired to show his neighbors, who refused to contribute to the expense of building this private levee, that their lands were in danger without it. Had the rivers all been high, and this torrent continued for several days, as sometimes happens from natural causes, there is no knowing what the result would have been. These torrents sometimes happen in nature on these mountain watercourses, as for instance, in 1862, when the Sacramento river rose between fifty and sixty feet at Folsom; and in 1881, the Sacramento river cut its way down to its old bottom. And they sometimes continue for several days. So in 1881, the Sutter levee broke below the mouth of the Yuba river, at Shanghai bend, one mile above Woodruff's land, and the river overflowed complainant's Hock Farm tract, washing off its soil, in many places as deep as it had been plowed, and depositing sediment on it. One witness says gravel as large as hens' eggs passed through the break. The Hock Farm tract was overflowed in 1862, 1867–8, 1871–2, and 1881—the later overflows being since the building of the levees. The Hock Farm of complainant is one of the best in the county, producing large crops of grain, in which it has been cultivated for many years. A mile below is O'Neil's landing, at which large amounts of grain

used to be shipped. This, like the Eliza landing, has been destroyed, or nearly so, by the filling in front from mining debris.

The defendants have attempted to show that much of the danger from overflows results from the acts of the people themselves, in consequence of the improper system of leveeing adopted, and the cutting off by such means of some outlets of water, available at high water. There is, as might be expected, some conflict in the testimony of experts and others on these points; but it is probable that they have not in all instances adopted the wisest plan possible in their efforts to protect life and property. These works are always erected on the judgment of engineers, or other men presumed to be competent, and rarely without some difference of opinion, and it is scarcely possible that any plan wholly unobjectionable to all could be adopted. However this may be, there can be no possible doubt not only that the deposit of mining debris has greatly augmented the injuries heretofore received, but that it largely enhances the danger for the future, and that it is the great source and cause of all or most of the evils which are suffered and threatened. The evils resulting from the occasional overflow of pure water, or water deteriorated only by natural erosions and causes, and which leaves no deleterious sediment behind to permanently destroy the land, are trifling, compared with those resulting from the addition and deposit of the enormous amount of debris arising from hydraulic mining. At every break of the levees on the Yuba, a heavy volume of water, charged to its full transporting capacity with sand and other deleterious material, is poured out and deposited on the lands over which it flows, where it remains on the subsidence of the floods, to work out its destructive effects. If there were not a levee on the river, and not a slough cut off, the mining debris deposited in the navigable and non-navigable waters of the state, and burying the twenty-five square miles of land between the levees of the Yuba, would not only still be there, but many other square miles of the adjacent country would also be buried but for the resistance interposed by the slender barriers erected by the people, including the complainant, at great, continuing, and ever-recurring expense, for their protection.

If the great and unexampled flood of 1862, by bringing down in one mass the accumulations of debris of previous years, did so much—as is claimed by the defendants—to fill the channel of the Yuba and cover the lower portions of its bottom-lands, what must be expected should there be a recurrence of such a flood, bringing down the vastly larger accumulations with which the watercourses of the mountains are now choked and gorged, and precipitating it in a mass upon the deposits now between the levees, which are already several feet higher than the surrounding country, and which levees constitute the only barrier upon which Marysville and the adjacent country can rely for protection? A concurrence of conditions which produced such an extraordinary flood as that of 1862, which has once happened, is liable to occur again. That concurrence of conditions was high water in the Sacramento and all its affluents on the first of January, 1862; immense deposits of snow already existing in the mountains along the whole water-shed of the Sacramento and its tributaries; and a *general* rain warm enough to melt the snow on which it fell throughout the same region, continuing through many days, with only short intervals, whereby the rain that fell at the time, aug-

mented by the water furnished by the rapidly melting snows, was precipitated into the valleys below, already full. Should there be a recurrence of such conditions in the present condition of the watercourses of the state, gorged with debris, no man can safely predict the result. To the most casual observer, even though but slightly acquainted with the operations of the forces of nature, the present condition of things, and the dangers to the residents of the valleys, that may reasonably be anticipated in the future, must be anything but assuring.

Unless the acts of the defendants complained of, in view of all their necessary consequences, are legal—unless they are authorized by some valid law—it does not appear to us to admit of doubt or discussion that the results of those acts heretofore developed, still existing and operating, and certain to continue and increase in the future, as disclosed by the evidence and indicated by the preliminary statement of facts, constitute a grievous and far-reaching public nuisance, most destructive in its character, or, in the terse language of one of complainant's counsel, a nuisance, "*destructive, continuous, increasing, and threatening to continue, increase, and be still more destructive.*" Nor can there be any doubt that the complainant has suffered, that he is still suffering, and that by a continuance of those acts he will continue to suffer special injuries, peculiar to himself, of a character to entitle him to equitable relief. The nuisance is both public and private. If the unlawful filling up of the channel of a river, above the level of its banks and of the surrounding country, and burying with sand and gravel, and utterly destroying all the farms of the riparian owners on either side, over a space two miles wide and twelve miles long, along its entire course through the Sacramento valley and across nearly an entire country; if the sand and gravel so sent down is, also, only restrained from working similar destruction to a large extent of farming country, other than that already buried and destroyed, and from, in like manner, destroying or injuring, or contributing to destroy or injure, a city of several thousand inhabitants, by means of levees erected at great expense by the land and other property owners of the county and the inhabitants of the city, such levees, continually and yearly requiring to be enlarged and strengthened, to keep pace with the augmentation of the mass of debris sent down, at a great annually recurring expense; and if the filling and narrowing, by similar means, of the channels of the largest and principal waters of the state, navigable for large vessels to the ocean, for a distance of one hundred and fifty miles or more, to the injury of their navigation and danger of the riparian owners of property—do not constitute a public nuisance of an aggravated character, then, we confess, that we do not know what a public nuisance is. So, also, if to unlawfully bury and destroy one hundred and twenty-five acres of a private party's best land; to from time to time cause injury to his remaining lands and buildings, necessitating large expense for repairs, and to impose upon him annually an extraordinarily onerous tax for the purpose of strengthening and enlarging levees for the protection of that portion of his property still left him against the constantly augmenting dangers, as in the case of complainant—does not inflict a special injury, peculiar to that party, which entitles him to relief, then it would be difficult to say what kind of injury, arising from a public nuisance, would entitle a private party to relief at his own suit.

The acts complained of, if unlawful, or, in the language of the code of

California, if not "done or maintained under the *express* authority of a statute," completely fill the definition given by the code of a public nuisance, and also one for which a private person injured by it may maintain an action. The provisions of the code applicable are as follows:

"§ 3479. Anything which is * * * an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

"§ 3480. A public nuisance is one which affects, at the same time, an entire community, or neighborhood, or *any considerable number of persons*, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

"§ 3493. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."

Are the acts, then, complained of lawful, or are they performed under the *express* authority of any valid statute? The counsel for the defendants, with a courage and confidence that challenge admiration, plant themselves upon the position that they are lawful, and so authorized; and they maintain this position with extraordinary earnestness and ability.

They are met upon the other side by arguments equally earnest, elaborate, and able. The vast store-house of authority upon the subject of nuisances has been exhaustively cited, examined, and elucidated in the masterly arguments of the respective counsel. Everything to be desired for ascertaining and elucidating the law applicable to the facts of a case of such vast importance to the real litigants has been done by counsel. While we have examined with care the numerous authorities brought to our notice, we shall content ourselves with stating the results of our examination, without commenting at length upon or even citing many of them.

Defendants allege that both congress and the legislature of California have authorized the use of the navigable waters of the Sacramento and Feather rivers, for the flow and deposit of mining debris; and having so authorized their use, all the acts of defendants complained of are lawful, and the results of those acts, therefore, can not be a nuisance, public or otherwise. It is not pretended that either congress or the legislature of California has anywhere in express terms provided that the navigable waters of the state may be so used, but this authority is sought to be inferred from the legislation of both bodies, recognizing mining as a proper and lawful employment; and encouraging this industry, knowing that mining of the kind complained of could only be carried on successfully by discharging the debris into the streams in the mining regions, which must, from the necessity of the case, find its way into the navigable waters of the state. As to congress, it might be sufficient to say that it has no authority whatever to say what shall, or what shall not, constitute a nuisance within a state, except so far as it affects the public navigable waters, and interferes with interstate or foreign commerce, or obstructs the carrying of the mails. Under its authority to regulate commerce between the states and establish post-roads, congress may, doubtless, declare and punish as such, the obstruction of the navigable waters of the state, as a nuisance to interstate and foreign commerce, but there its authority ends. The necessary results of the acts complained of clearly

constitute a public and private nuisance, both at common law, and within the express language of the civil code of California, already cited; and there is no limitation upon that definition, except that contained in section 3482 of the same code, which provides, that "nothing which is done or maintained under the *express* authority of *a statute* can be deemed a nuisance." That means, of course, a statute, and a *valid* statute, of the state. The case in hand is not within this limitation, because there is no statute of the state *expressly* authorizing the defendants to send their debris down, to the destruction or injury of the navigable waters of the state, or to the destruction or injury of the property of the riparian proprietors along the line of the watercourses of the state, navigable or otherwise; and if there were, the statute authorizing such injuries as are complained of, as against private parties at least, would be unconstitutional and void.

It is only sought to work out this authority by implication and inference from statutes recognizing mining in itself, without reference to injuries to the property of others, as a legitimate and proper business. It is not the general practice of legislative bodies in this country, where their powers are limited, in legislating upon various subjects within their province, to provide that in the exercise of rights provided for, no injury shall be done to the property of others. It is one of the conditions always implied by the law, that one's rights, whether granted or regulated by the legislature, shall be exercised with due regard to the rights of others—so exercised as not to injure another; and certainly no authority to encroach upon the vested rights of others can be inferred without being in express terms clearly authorized; and this principle is expressly recognized in the statutory limitation on the definition of a nuisance, cited. This *express* provision excludes the idea that the legislature contemplated any other limitation than such as is authorized in "*express*" terms. It is as potent in the form expressed, as if the statute had said, in express terms, that there should be no other limitation.

But no intention can be properly inferred, from any act of congress brought to our notice, to permit the destruction or injury of the navigable waters of the state, or the destruction or injury of the towns and cities, or property of the riparian and adjacent owners along the watercourses of the state, navigable or otherwise. As to non-navigable waters, congress had nothing to do with them, beyond the rights of the United States as a riparian proprietor, which are the same as the rights of other riparian proprietors, except that it might itself limit the rights of purchasers from the government of lands owned by it, sold subsequent to the passage of the act under which such limited sales are made. It had no power whatever to enlarge the rights of the vendees of the United States as against rights already vested in prior purchasers. It could in no way authorize any encroachment by the grantees of the United States upon, or injury to, the property of other private parties; and it will not be presumed that it intended any such consequences, where it has not manifested its intention in such express and explicit terms that it can not be misunderstood.

Upon the cession of California by Mexico, the sovereignty and the proprietorship of all the lands within its borders, in which no private interest had vested, passed to the United States. Upon the admission of California into the Union, upon an equal footing with the original states, the sovereignty for all internal municipal purposes, and for all purposes except such purposes and with such powers as are expressly conferred

upon the national government by the constitution of the United States, passed to the state of California. Thenceforth, the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the state, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject to taxation. In all other respects the United States stood upon the same footing as private owners of land. They could authorize no invasion of private property, either to enable their grantees to mine the lands purchased by them of the government, or otherwise: Biddle Boggs v. Merced Min. Co., 14 Cal. 375, 376; People v. Shearer, 30 Id. 658; Pollard's Lessee v. Hagan, 3 How. 223. The observations of Chief Justice Field in the first case cited, on pages 375, 376, are as applicable to this point as to that under discussion in that case.

As owners of the public lands, the United States, like any other owner, could sell them in large or small quantities, and convey a fee-simple title to their grantees; or could lease them, or reserve them from sale; or grant a limited estate, subject to easements granted to others; or in case of mines, might allow them to be worked free of charge, or upon payment of a royalty. They could do all this with their own lands, held in the character of proprietor, merely, as the public lands are held; but they could not grant lands, and in the grant, or by statute or otherwise, impose an easement for the benefit of their grantees upon lands already owned in fee by private parties, unincumbered by easements or conditions of any kind; or authorize any other trespass upon or injury to such other lands. They could only deal with their own, as other land proprietors deal with theirs.

Being the owners of the mineral as well as the agricultural lands of the state, not already become private property by prior grants, all the legislation of congress upon the subject has had reference to all those lands as their property in the character of property, and to their sale or other disposition. The agricultural lands the United States had, theretofore, sold absolutely, conveying a fee-simple title, without easements, incumbrances, or reservations of any kind. Had it been the policy of the United States to sell these mineral lands in a similar mode, according to the usual surveys and legal subdivisions in the case of other public lands, I apprehend that no one would have contended that by authorizing the sale and conveyance of such lands in fee simple, *the government* intended to give to its grantees authority to fill up the navigable waters of the state or its non-navigable water channels, and when these were filled, to send their debris over the neighboring country, to the destruction of the farms and improvements of their owners, on the ground that congress knew, when it authorized the sale, that the grantees of the United States could not make the lands so purchased available for *all* the uses for which they were valuable, and in many instances for which they are *only valuable*—such as mining for gold—without committing such nuisances. Yet, when the United States convey their lands in fee simple, they invest their grantees with all the rights they are capable of conferring. Now, the legislation of congress, instead of enlarging or attempting to enlarge the rights of the grantees of the United States in the mineral lands beyond the rights which the government possesses, has put limitations, restrictions, and incumbrances upon these grants, in many instances granting to one party one estate, and to another a sep-

arate estate, in the same lands, all the estates granted to the several grantees of different interests in the same lands, in the aggregate, making up the fee and no more; and it is to this end, and to this end alone, that the legislation of congress has been directed with reference to the mineral lands. Undoubtedly, it was the purpose of these restrictions upon grants of the mineral lands to encourage mining, which in itself, when pursued without injury to others, is a lawful pursuit, as are agriculture, manufactures, and commerce.

Until 1866, there had been no legislation by congress in regard to lands containing the precious metals, other than to reserve them from sale. In July of that year congress passed the "act granting the right of way to ditch and canal owners over the *public lands*, and for other purposes." That act declared that the mineral lands are "to be and are open to exploration and occupation by all citizens of the United States, * * * subject to such regulations as may be prescribed by law, and subject, also, to the local customs, or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." It also provided for a sale and patenting to miners of *quartz* lodes in limited quantities, with a right to follow the vein down on its dip to any depth, although it should extend under other lands, without the boundaries of the surface lines of the patent. So, also, it recognized the equities, as against the United States and other miners, of those who had acquired water rights for mining, agricultural, manufacturing, and other purposes recognized by the "local customs and decisions of courts," and provided that they should be maintained in these rights, and granting a right of way over the *public* lands; but it took care to provide, that where any party, after the passage of the act, should "injure or damage the *possession* of any settler on the *public domain* [no matter for what purpose he has settled], the party committing such injury or damage shall be liable to the party injured for such injury or damage:" 14 Stat. 251–3. This act but legalized what were before trespasses upon the public lands, and made lawful, as between the occupants and the United States, that which before was unlawful. It only provided for the sale of quartz mines and granting water rights on the public lands, although all kinds of mines were open to exploration and working.

In this case, the United States were absolute owners of the lands, and they might have granted an absolute right of way for ditches and canals, without providing for compensation for injuries to occupants; but so careful was congress not to injure others, even where it lawfully might, that it provided that a party constructing a ditch or canal should be liable for any injury or damage done to any *mere possessor of the public lands*. If congress was so careful to provide against authorizing any injury to the mere possessors of the public lands, where it might lawfully do otherwise, it can not be reasonably supposed or inferred that it intended by the same act to authorize, by inference merely, the commission of a great and intolerable nuisance, and the perpetration of aggravated injuries to large communities holding their own lands independent of the United States, and by the same title, and under the same treaty as those under which the government itself claimed—injuries to the lands over which the United States had no municipal or proprietary or legislative authority whatever. But one section of the act of 1866, now constituting section 2338 of the revised statutes, is especially relied

on as unmistakably showing an intent on the part of congress to authorize the filling up of the navigable rivers of the state. It reads as follows: "*As a condition of sale*, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; *and those conditions shall be fully expressed in the patent.*"

We draw an entirely different inference from this provision, from that sought to be deduced by defendants' counsel. To our minds, it seems perfectly clear that this provision is limited to a surrender of this right to the state, *so far, and so far only*, as the *public* lands are concerned. It authorized the states and territories, in the "*absence of specific congressional legislation*" on the subject, to make rules imposing easements and drainage, and other rights necessary to the complete development of the mines upon the lands of the United States; and subsequent purchasers from the government would take the lands purchased subject to these incumbrances, "*as a condition of sale;*" "*and those conditions shall be fully expressed in the patent.*" "Condition of sale" of what lands, and "fully expressed" in what patent? The United States could prescribe conditions of sale for no lands but their own, and could require those conditions to be inserted in no patent but their own. It is clear from the express terms of the statute that this section could have no possible reference to anything but the lands of the United States. It deals with them alone; and was only intended to give rights in the public lands of the United States. As to other lands, or property, either of the state or private parties, or as to any private rights of any kind, congress, by no possible legislation, could add anything to the legislative powers of the state upon the points mentioned in this provision of the statute; and it was never guilty of so absurd an act as to attempt it. Of course, as counsel very properly observes, this section "must be construed with reference to the subject-matter to which it refers," but that subject-matter is the *disposition of the public lands and the mines contained in them, and nothing more.* It had no relation to regulating commerce on the navigable waters of the state. The state, under the express terms of the act of admission, could not in any way interfere with the disposition of the public lands; and congress, under its constitutional power "to dispose of, and make all needful rules and regulations respecting the terrritory and other property belonging to the United States," was authorized to impose this condition on the state.

Such legislation as is here authorized, "in the absence of necessary legislation by congress," would be a direct interference with the proprietary right of the government, and "with the disposition of the public lands." The object, therefore, was to waive this right of the United States, under the circumstances, and in the particulars provided for, and that is all that can be inferred from the provision. The thing intended to be authorized was expressed in clear language, and not left to inference.

Subsequently, in 1870 and 1872, congress passed further acts regulating the disposition of mining lands, and extending the sale to placer mines, imposing on lands sold under prescribed circumstances, and upon prescribed conditions, easements of various kinds, such as tunnel rights, water rights, rights to follow lodes on their dips under lands sold to others, etc. But there is no provision more strongly indicating

a purpose to authorize the injuries complained of than those in the act of 1866, already disposed of, and they need not be more particularly considered.

Had all these lands on the water-shed of the Yuba, or all lands in the state containing mines, been owned under a Spanish grant by a private party, as was the Merced grant, confirmed to Fremont, the owner of the lands might have made precisely such regulations as to the sale or working of the mines, and giving water rights and other easements in his lands as the United States have done by their legislation; and with precisely the same effect. Had such been the case, would counsel for a moment have pretended that by such regulations he intended to subordinate the navigable waters of the state, and the rights of all property holders on the waters of the state below, to the uses of his grantees of mines? Yet the inference, that he did so intend, would be just as legitimate as the inference that congress so intended by the legislation relied on; and if he so intended, he had just as much power to give effect to his intention as had congress.

Because in the river and harbor bill of 1880 there was a provision directing the secretary of war to cause such examinations and surveys to be made "as may be necessary to devise a system of works to prevent the further injury to the navigable waters of California from the debris from the mines, and estimates of the cost of such works, and report the result of such examination, surveys, and estimates of cost," etc., to congress, at its next session; and because, in pursuance of the examination, surveys, estimates of cost, and reports, congress, in 1882, appropriated two hundred and fifty thousand dollars for the "improvement and protection of the navigable channels of the Sacramento and Feather rivers," it is urged, that congress assumed the responsibility of protecting the navigable rivers of California from any injuries to navigation occasioned by mining debris, and that by such legislation, and assumption of responsibility, congress had legalized the use of the navigable waters of the state for the flow and deposit of such mining debris. We do not think that any such authority to injure, or destroy, the navigable waters of the state can be inferred from these acts. If congress had the power to grant it, there is no affirmative authority given to use the navigable waters of the state for the flow and deposit of mining debris. This action of congress recognizes and admits the fact, that great injury has resulted, and continues to result, from the use of the waters for such purposes; that the injury is of such a character as not only affects the rights of the people of California, but of the whole United States, to such an extent as to make it a proper subject for congress to provide a remedy for the evil. *There could possibly be no better evidence that a great public nuisance has been committed,* which calls for redress, and congress has attempted to furnish a remedy. It has attempted a remedy that may or may not be effective, or that may or may not be the best that might be adopted.

In the same act provisions of a similar character are found for surveys, estimates, plans, reports, etc., for numerous other obstructions to navigation in the rivers, harbors, lakes, etc., in other parts of the United States, where there is no mining debris; and in the very act making the appropriation referred to, there are more than three hundred and fifty other items of appropriation for removing all sorts of obstructions, and for improving navigation, in a great variety of particulars, in every part of the United States. But no argument can be drawn from these pro-

visions and appropriations that congress authorized these obstructions, or assumed the original responsibility of their being there. Congress simply found them there, recognized the fact of their existence, and the necessity for their removal; and under its power to regulate commerce, endeavored to remove them, and thereby improve the navigation. Nothing more was done in this case, and no other inference can be drawn from its action in regard to it than that which flows from precisely similar action in the large number of the other cases provided for. They are all covered by the same act, and in like terms. There is nothing in the act to distinguish this appropriation from the hundreds of others. If congress has the power by legislative action to prohibit the discharge of debris into the navigable rivers of the state, and make it a crime against the United States, as it undoubtedly has, it has simply not done it, and it has not taken any affirmative action to authorize it. Mere failure to act—failure to prohibit the acts complained of—is an entirely different thing from affirmative action authorizing them. And a failure to prohibit the nuisance and impose penalties does not prevent its being a public nuisance: Wheeling Bridge Case, 13 How. 566, 567. It has merely endeavored to remedy the acknowledged evils—the necessarily admitted public nuisance—by other means, which may turn out to be far less effective. If the acts under the express laws of the state constitute a nuisance, there is no need for congress to declare them so to make them unlawful; and it would certainly require some affirmative legislation on the part of congress to make that lawful which the laws of the state declare to be unlawful, conceding the power of congress to so enact.

But if congress had attempted to authorize an unlimited discharge of mining debris into the navigable waters of the state, to the destruction of or great injury to their navigability, it had not the power to render it lawful. In Pollard's Lessee v. Hagan, 3 How. 223, the supreme court of the United States says: "When Alabama was admitted into the Union on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, *such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state, or elsewhere, except in the cases in which it is expressly granted.*" Again: "If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It can not be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of its royal prerogatives; and *much less can it be admitted that they have capacity to receive or power to exercise them.* * * * In the case of Martin and others v. Waddell, 16 Pet. 410, the present chief justice, in delivering the opinion of the court, said: 'When the revolution took place, the people of each state became themselves sovereign, and in that char-

acter hold *the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution.*' Then, *to Alabama belong the navigable waters, and soils under them*, in controversy in this case, subject to the rights surrendered by the constitution to the United States; and *no compact that might be made between her and the United States could diminish or enlarge these rights.*"

The court then recognize the authority of the United States to exercise such powers, and such powers only, as may be necessary, under the national constitution, "to regulate commerce with foreign nations, and among the several states, and to establish post roads." The court then says: "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs *exclusively* to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." It then states its conclusions upon the points discussed, as follows: "First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively; secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states; thirdly, the *right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.*"

This case has never been overruled, but often cited as authority and affirmed. If "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state," except so far as is "expressly granted;" if the "navigable waters" of California, "and the soil under them," belong to the state for its "common use," subject only to the right of congress to regulate commerce among the states thereon; and if no compact that might be made between her and the United States could diminish or enlarge these rights; if "the right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant" the soil under the navigable waters of the state—then it necessarily follows that congress can give no lawful authority to the miners on its public lands, or to anybody else, to fill up the channels and beds of such navigable waters, and destroy them for navigation, or for any other useful purpose. Congress is authorized to "*regulate*," but not to *destroy* "commerce among the states." It may, undoubtedly, in its wisdom, obstruct or perhaps destroy navigation, to a limited extent, at particular points, for the purpose of its general advantage and improvement on a larger general scale, such, for example, as by authorizing the building of a railroad, or post-road, bridge across a navigable stream; but it can not destroy, or authorize the destruction, entire or partial, of the whole system of navigable waters of a state for purposes wholly foreign to commerce or post roads, or to their regulation. If congress could so authorize, or, as is claimed, has so authorized, the acts complained of as to make them

lawful, then it can authorize, and it has authorized, the filling up and utter destruction of all the navigable rivers, streams, and bays of the state, for there is no limit fixed to the amount of debris that may be sent down; and upon the hypothesis claimed, if such waters are not filled up and destroyed, it is for want of physical capacity to do it, and not because it is unlawful.

But the injury to navigation is not the only element of a public nuisance in the case. The injuries already accomplished, and those still accruing, as well as those threatened to the cities and riparian proprietors of a large extent of country, if unlawful, constitute a public nuisance of themselves, irrespective of the injuries to navigation; and there can be no possible ground for maintaining that congress has authority to legalize such injuries, and take away their character of a public nuisance. There is, then, no plausible ground for holding that congress has ever attempted to make the acts complained of lawful; or if it had, that there is any power vested in congress to effect that purpose. Those acts, therefore, have not been legalized by reason of any congressional action.

But if wrong with respect to the effect of the action of congress, defendants earnestly urge that their acts are authorized by the legislation of the state of California, and are, therefore, lawful; and it will be necessary to consider this point. We have before given the statutory definition of a nuisance, and expressed the opinion that it is not open to doubt or discussion that the flowing of the mining debris in question down the Yuba into the Feather and other waters, and its deposit in the manner before stated, causes both an obstruction to "the free passage or use in the customary manner," of the rivers, bays, and navigable streams of the state, and also "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of both life and property."

It is not claimed that any statute of the state, in express terms, authorizes miners to fill up the channels of the waters of the state with debris to such an extent as to injure navigation, or to bury and destroy the lands of riparian proprietors. This right is only inferred from legislation recognizing and encouraging mining as in itself a lawful pursuit. As we have seen, to take away the character of nuisance from the acts complained of, they must have been done under the *express* authority of a statute: Civ. Code, sec. 3482; and it must be a valid statute. No authority to commit the nuisances complained of can be inferred from any statute of the state brought to our notice. The section of the statute which seems to be most relied on is subdivision 5, section 1238, of the code of civil procedure, which provides that, "subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * ‖

"5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines." This is stated by counsel to have been passed in compliance with the provision in the act of congress of 1866, now section 2338 of the revised statutes of the United States, already considered, authorizing the states and territories, "in absence of specific legislation by congress," to provide for certain easements on the public lands, and it was doubtless suggested by that act.

The state supreme court, in one case, held that mining is not a public use, in favor of which this right of eminent domain can be, constitutionally, exercised in the case of a private party. An elaborate argument has been made in favor of the constitutionality of the act, but we do not find it necessary to decide it; for the statute, whether constitutional or otherwise, does not authorize the use of the navigable waters of the state to the injury of navigation, or the discharge by miners of their debris upon the lands of riparian proprietors, without condemnation and payment, in the mode pointed out by the statute. Instead of *inferentially* authorizing the injuries complained of, the inference is directly the other way—that there is no authority to do an act which would work an injury to a public or private right, or, in other words, constitute a public or private nuisance, without first acquiring the right to use the property to be appropriated or injured, by purchase or condemnation of and payment for the property or right appropriated. It recognizes the constitutional right of every man to the undisturbed enjoyment of his property and all his legal rights, without let or hinderance, until his right has in some lawful mode been extinguished. Besides, it is by no means certain that the statute itself would authorize the condemnation of the property in gross of large communities like those affected by the nuisance complained of, and especially the public right of navigation common to the people of all the states. The other provision of the statute most confidently relied on, to show that the injuries complained of are lawful, is subdivision 8, in section 1 of the act of 1878, "to provide a system of irrigation, promote rapid drainage, and improve the navigation of the Sacramento and San Joaquin rivers," which reads as follows: "The state engineer shall also inquire into the relation which hydraulic mining bears to the navigation of the rivers, and to their carrying capacity; to inquire into the question of the flow of debris from the mines into the watercourses of the state; to ascertain the amount and value of agricultural lands and improvements which have been *covered up, or injured*, by the overflow, or deposit of debris coming from the hydraulic and other mines in the Sacramento valley; and to devise a plan whereby the *injuries caused thereby* can be *averted*, without interfering with the working of such mines."

This, like the action of congress before considered, does not purport to authorize the acts complained of, or recognize in any way their legality. It recognizes the results of the action of defendants, and others engaged in the same business, as constituting *injuries*, so serious in their character as to require the state to afford some remedy in addition to the civil remedies afforded by the law; and it sought to devise a plan whereby these injuries might "*be averted* without interfering with working the mines." It nowhere said, that these acts were lawful, but it expressly calls them by the proper legal name, "*injuries*," which, *ex vi termini*, imports that they are unlawful, or otherwise they would only be *damnum absque injuria*. An injury is "a wrong or tort:" Bouv. L. Dic. It nowhere provides or intimates that any plan devised should take away, or be a substitute for, the civil remedies already provided by the code in section 3491, as follows: "The remedies against a public nuisance are: 1. Indictment or information. 2. A civil action. 3. Abatement."

Section 3493: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." To repeal or limit the express provisions of the code defining nuisances,

and providing remedies for them, requires something more than an effort to "avert" the injuries by *additional* means. There must be "*express* authority of a statute," and a valid one, to take away the character of a nuisance from the acts which would otherwise necessarily be a nuisance in fact and in law. We find no such express authority, and none can reasonably be inferred or implied from any statute of the state, or from all the statutes brought to our notice taken together. The effort of the legislature in these statutes was to "avert," not to render lawful, these nuisances—to prevent the acts in question from producing a nuisance. These statutes concerning nuisances, under the constitution, can not thus be repealed by implication by other laws having no reference to the subject. Every law passed under the limitations imposed on the legislature by the state constitution must relate to a single subject, which must be expressed in its title.

Undoubtedly, mining is an important industry in the state of California, and the state may, very properly, take any lawful measures within its power to encourage it, to the full extent, that it can be carried on without injury to or the destruction of other industries or other rights, also important. It became patent to the most casual observer, that some plan must be devised by which hydraulic mining could be carried on without injury to the agricultural regions in the valleys, and without obstructing or destroying the use of the navigable waters of the state, or, in other words, without creating a grievous nuisance in the valleys below, or else that such mining must be stopped. There was no other alternative. It was therefore important to the interests of the state, if possible, to adopt the first alternative, and the legislation referred to was simply designed to authorize the devising and carrying out of some plan by means of which the business of mining could be successfully pursued without creating or further continuing these nuisances. Its manifest purpose was to "avert" or obviate, *not to authorize*, the nuisance—to devise and carry out a plan by which no nuisance would be created, so that all branches of industry might be harmoniously carried on together without injury to each other. This was a perfectly natural and legitimate object, and not at all inconsistent or incompatible with the idea that if, notwithstanding these efforts, mining should still continue to be carried on in such a way as to create or continue a nuisance, the statutes relating to nuisances and the remedies provided should still be applicable. This legislation is entirely consistent with the continuance of the laws and remedies relating to nuisances; and those laws can not be regarded as repealed, superseded, modified, or limited by it.

Numerous cases have been cited from the English chancery reports, largely in relation to the sewage of large cities, towns, or other organizations having the matter in charge, where these bodies have been authorized by acts of parliament to construct sewers and discharge their sewage into the streams, which when constructed created nuisances to lands below; and in all such cases it has been held that they took nothing by implication, but must be limited to the acts clearly authorized; and that if they could not accomplish the desired object by the acts expressly authorized without creating a nuisance, they would be restrained. Although parliament, being omnipotent in its legislative capacity, could authorize nuisances, or the taking of or injury to private property without compensation, it was always cautious not to do so, and the courts

were still more careful not to imply or infer authority to create nuisances not clearly given in terms by the act. The following are some of the cases referred to: Attorney General v. Colney Hatch Lunatic Asylum, 4 L. R., Ch. App. Cas., 153; Clowes v. Staffordshire Potteries Water Works Co., 8 Id. 125; Attorney General v. Birmingham, 4 Kay & J. 528; Attorney General v. Leeds Corporation, 5 Id. 583.

But if we are mistaken as to the purpose and effect of the state legislation, considered and relied on by defendants, the state had no constitutional power to authorize the acts complained of, and any statute designed to effect that object is void.

The old constitution of California provided, that "no person shall * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation:" Art. 1, sec. 8. And the fourteenth amendment to the constitution of the United States puts a similar limitation upon the powers of the states. Sections 13 and 14 of article 1 of the new constitution of California, 1879, continues these provisions—the latter inhibition being in the following language: "Private property shall not be taken *or damaged* for public use *without just compensation having been first made to or paid into court for the owner*," etc. And article 12, section 8, provides, that "the exercise of the police powers of the state shall never be *so abridged or construed as to permit corporations to conduct their business in such a manner as to infringe the rights of individuals or the general well-being of the state.*"

The defendants allege in their answers that they have taken and hel l adverse possession, for the purpose of discharging and depositing their debris, in common with all the other miners upon the rivers above, of one hundred and twenty-five acres of complainant's land, until they have acquired a title by adverse possession; and the evidence shows that twenty-five square miles or more of other private lands are in the same condition, and that, but for the levees built by the citizens of the city of Marysville, and the citizens of Yuba and Sutter counties, and the one built by the miners themselves, the whole surrounding country, for an indefinite distance, would necessarily have been, and that by future floods, breakage in the levees, and additional accumulation of these deposits they are hereafter liable to be, placed, to a greater or less extent, in a similar condition. It is not pretended that there has been any compensation paid, or that the owners of these lands have been deprived of them or of their use, or that they have been thus appropriated by the defendants for their own use by virtue of any legal proceedings of any kind, or by virtue of any authority other than their own will and pleasure, and the license claimed to have been impliedly given them by the legislation of congress, and of the state legislature, already considered. Now, is not this a depriving the owners of their lands—their property—or at least damaging their property, both without due process of law and without compensation? If so, then the legislation of the state of California, if any there be, intended and purported to make the acts complained of valid, are absolutely void, as being in direct contravention of both the constitutions of the United States and the state of California; and they can not make the acts of defendants lawful, or in any way affect the rights of the complainant.

That such acts of appropriation violate these provisions, is settled by the supreme court of the United States in Pumpelly v. Green Bay Com-

pany, 13 Wall. 181. This case arose out of the flooding of complainant's land, by means of a dam constructed for the purpose of improving the navigation of Fox river—manifestly a lawful public use, clearly within the power as well as the duty of the state, if performed in a lawful manner—under the authority of a statute of Wisconsin, the constitution of which state contained a provision similar to that of one of the provisions now under consideration. After a full discussion of the question, and examination of authorities relied on to sustain the validity of the act, Mr. Justice Miller, speaking for the court, says: "But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true, that, where real estate is actually invaded by superinduced additions *of water, earth, sand, or other material,* or by having any artificial structure placed on it, *so as to effectually destroy or impair its usefulness, it is a taking,* within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." See also Cooley on Torts, 569, and cases cited. And again, on page 182: "We do not think it necessary to consume time in proving, that when the United States *sells land by treaty, or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the state within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.*" Such use, therefore, as defendants make, or claim to make, of complainant's land, is a taking, *a fortiori*, a *damaging* of the property of complainant within the meaning of the several constitutional provisions, state and national, cited. The case of Eaton v. B. C. & M. R. R., 51 N. H. 510, is also a very strong case to the same effect, in which the court reviews the authorities, and discusses the question with remarkable ability.

Conceding, then, that such use of these lands for deposit of mining debris is a public use, still the legislature, under this constitutional provision, could not make it lawful without taking them upon due process of law, and upon full compensation first paid. If the use is private, merely, as complainant confidently insists, not without reason, and with authority to support the position, then they could not be taken at all without the consent of the owner; for there is no authority in the constitution or laws of the country to compel one man, unwillingly, to surrender his property for the use of another, either with or without compensation.

So also these defendants, or the principal ones, are corporations, and the business of these corporations is mining, and nothing more. They would, therefore, seem to fall within the inhibition of the provision; that the "police powers of the state shall never be so abridged, or construed, as to permit *corporations to conduct their business in such manner as to infringe the rights of individuals or the general well-being of the state.*" Do not these defendant corporations so conduct their business of mining as to infringe the rights of the complainant, and a great many other individuals, and even the well-being of the state? And if their acts, in such conduct of their business, are attempted to be authorized by the legislation of the state, are not the "police powers of the state so abridged, or construed," by such legislation as to permit the inhibited acts? If so, it must be void on this ground also. It may be

that this provision was aimed at infringements of rights of this very kind. If not, to what injuries can it be more appropriately applied?

Again: so far as any legislation is concerned that would attempt to authorize the filling up of the navigable rivers and bays of the state, to the destruction or material injury of their navigation, it must be void for want of power on other grounds. We have seen that the title to the soil under the navigable waters of the state, immediately connected with the ocean, and within the ebb and flow of the tides, is in the state: Pollard's Lessee v. Hagan, *supra*. In the case of fresh-water rivers, however, above the ebb and flow of the tides, not in a proprietary sense. In such waters the proprietary right to the soil under the water is, ordinarily, in private parties: Jones v. Soulard, 24 How. 65; Smith v. City of Rochester, 92 N. Y. 463; Chenango Bridge Co. v. Page et al., 83 N. Y. 185; but whether in the state in a proprietary sense or not, the title is, nevertheless, in the state, in a governmental sense, as a part of its sovereign domain—a part of its municipal sovereignty—held in trust for all, to protect, preserve, and improve for the purposes of navigation and the benefits of commerce, and not otherwise.

There are two senses in which the rights of the state are to be considered, one proprietary, and the other governmental: proprietary, as where the state owns an absolute fee in the land in the same manner and sense, with the same rights and powers, as an individual owns his land; and governmental, as where the title is held in trust for the use of the public, such as highways, navigable streams, etc. The former is alienable, *the latter inalienable*. If the state can be considered as holding a proprietary interest in the soil, under navigable fresh-water rivers, still, the alienation of such proprietary interest would, necessarily, be subject to the *inalienable* sovereign right of the state to control it for the proper public uses and trusts for which it is held in the interest of commerce, and of all the people: Smith v. City of Rochester, 92 N. Y. 477, 478. Says the court, by the chief justice, in that case, citing as authority Martin v. Waddell, 16 Pet. 367: "While a sovereign may convey its proprietary rights, *it can not alienate its control over navigable waters without* abdicating its sovereignty:" Id. 484. Again, quoting Judge Earl in Chenango Bridge Co. v. Page, 83 N. Y. 178, the court says: "The legislature, except under the power of eminent domain upon making compensation, can interfere with such streams only for the purpose of *regulating, preserving, and protecting the public easement. Further than this, it has no more power over fresh-water streams than over private property:*" Id. 485. If the legislature can not interfere with such streams for purposes other than those mentioned, it certainly can not authorize them to be filled up with debris from mines, or otherwise, to the destruction of the public easement—the right of navigation. The title in such cases, especially to navigable waters extending to the ocean, is held, not merely for the benefit of citizens of the state, but also for the uses of interstate and even foreign commerce; and the benefit of the people of all the states interested in commerce among the several states, and with foreign nations. Such is the doctrine established by the authorities.

The admission of California into the Union was "upon the express condition" provided in the act for admission, that "all the navigable waters within the said state shall be common highways, and forever free as well to the inhabitants of said state *as to the citizens of the United States*, without any tax, impost, or duty therefor:" 9 Stat. 452, 453. In

the Wheeling Bridge case, commenting upon a similar provision in the compact between Virginia and Kentucky, afterwards sanctioned by congress, the supreme court says: "And they expressly sanctioned the compact made by Virginia with Kentucky at the time of its admission into the Union, 'that the use and navigation of the river Ohio, so far as the territory of the proposed state or the territory that shall remain within the commonwealth lies thereon, shall be free and common to the citizens of the United States.' *Now an obstructed navigation can not be said to be free.* * * * This compact by the sanction of congress has *become a law of the Union.* * * * *No state law can hinder or obstruct the free use of a license granted under an act of congress* [a license to a vessel to navigate the waters of the United States]. Nor can any state violate the compact, *sanctioned as it has been*, by obstructing the navigation of the river:" 13 How. 565, 566.

The provision in the act of admission may not be valid as *a mere compact* between the United States and the new state; but it is valid as an act of congress passed by virtue of its constitutional power to regulate commerce among the states and with foreign nations, and its authority to establish post roads: Pollard's Lessee v. Hagan, 3 How. 224, 225, 229, 230. In the Wheeling Bridge case, as we have seen, the court says: "The compact, by the sanction of congress, *has become a law* of the Union:" 13 How. 566.

The conditions thus imposed upon California by the act of congress admitting her into the Union can not be lawfully violated by obstructing, much less destroying, the navigation of her rivers and bays for purposes having no relation to facilitating navigation or commerce. The power of congress to regulate commerce between the states would also, doubtless, enable it, by proper legislation, independent of these conditions imposed by the act of admission to prevent the state from destroying or obstructing, or authorizing the destruction or obstruction of, the capacity for navigation of her navigable waters. If California can lawfully authorize, and if she has authorized, the acts complained of, as is argued by defendants, then, as was said in regard to the United States, the whole navigable waters of the rivers and bays of the state may be filled up, and their navigability be utterly destroyed; and if they are not so filled, it will be because of a want of physical capacity, and not because it is unlawful to do it. But we are satisfied that neither congress nor the legislature of California has attempted to legalize those acts, and that neither has the constitutional power to do it. Neither can one, by supplementing the acts of the other, effect this purpose. Both are without power to do it; and each without power to add anything to the powers of the other. The acts complained of are therefore clearly unlawful; and the sending down and deposit of their debris in the rivers, navigable or otherwise, by the defendants, in the manner stated, to the injury of property owners and the public, constitutes both a public and private nuisance, by which complainant has heretofore sustained, he is now sustaining, and he is hereafter likely, even morally certain, sooner or later to sustain special injury.

Defendants next claim a right to do the acts complained of by prescription. Section 1007 of the civil code provides, that: "Occupying for the period prescribed by the code of civil procedure as sufficient to bar an action for the recovery of property, confers a title thereto, denominated a title by prescription, which is sufficient against all." It does

not define what acts shall constitute such occupancy, or under what precise circumstances the title by prescription would arise, or, in other words, does not define the term "prescription." The statute really does nothing but fix the time at which a title by prescription shall vest, which was not very definite under the common law; but leaves the circumstances which constitute prescription to be determined by the settled law of the land, as it stood before the code. This is all the code says, in terms, upon prescription. But at common law, no right could be acquired by prescription to commit, or continue, a *public* nuisance. In the words of Mr. Wood: "The law is that no length of time can prescribe for a public nuisance of any description:" Wood on Nuisance, 81, 30, 790–2. Or, as stated in Cooley on Torts, 613: "It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the state." The authorities to this effect are numerous and uniform. But even if it were not so, the express provisions of section 3490 of our civil code, "No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right," establishes the same rule, so that it is not open to question in this state. In this connection, after stating that a right can be acquired by prescription when a nuisance is *purely private*, and concerns *only* the one person, or the few who are injured, Judge Cooley observes: "There still remains the case of a public nuisance not complained of by the state, but by those to whom it works a peculiar injury; and whether the right to maintain it, as against such persons, can be gained by lapse of time, *may possibly* be open to some question;" but after considering the point, he announces his conclusions as follows: "On the whole, the better doctrine would seem to be that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either where the state or where individuals complain of them," citing a large number of cases wherein the doctrine is recognized, and stated, if the point was not necessarily involved or decided: Id. 613-14.

And "a uniform consensus of such judicial expressions of opinion," even though not absolutely necessary to the decision of the case, "especially where accepted by able and approved text-writers, and not contradicted by a single direct decision, is as high evidence of a doctrine or rule of law as can be found:" Santa Clara County v. S. P. R. Co., 18 Fed. Rep. 423, and 9 Sawy. Wood also states this to be the rule, citing the authorities: p. 791, 792. In Miller v. Hall, 9 Wend. 315, Sutherland, J., said: "Admitting that defendant's dam has been erected and maintained more than twenty years, and that during the whole of that period it has rendered the adjacent country unhealthy, such a length of time can be no defense to a proceeding on the part of the public to abate it, *or to an action by any individual for the special injury which he may have suffered from it*: 8 Cow. 152, 153; 3 Wend. 925." Among other cases, Wood cites Regina v. Brewster, 8 U. C. 208, where a large tract of country and a public highway had been flooded, and noxious gases issuing from it were producing disease. A prescriptive right to maintain the dam having been set up, the chief justice, in deciding the case, said: "It was urged at the trial that the dam had been erected for more than twenty years. For the purpose of establishing an easement affecting private rights of others this would be sufficient, generally speaking, but it is *not so when the consequences of this act are a public nuisance.*" And Rhodes v. Whitehead, 27 Tex. 304, in which it was held that no prescriptive right

could be acquired to maintain a public nuisance, and if a private party should sustain special injury by such public nuisance, it is a private nuisance also, and the party injured could maintain the action. "The reason is, that being a public offense it is unlawful in its inception and in its continuance, and being unlawful to the public in its aggregate capacity, it can never become lawful by any length of exercise against the individual members of the public." He then adds: "The doctrine of these cases [the last two cases cited], although reached without any very elaborate process of reasoning, and without any particular thought as to the result, nevertheless embodies the law as recognized in the courts of this country, and is supported by principle and authority: Wood on Nuisance, p. 792.

We have no doubt that the rule thus stated is correct, and we so hold. In the case of a mere private nuisance of the kind in question, by continuing it under the proper conditions recognized by the law for the prescribed period a right becomes vested by prescription and *thenceforth it is in itself lawful.* But in the case of a *public* nuisance, *it never becomes in itself lawful.* It is not *unlawful* as to the whole public, and *lawful* as to its constituents, or a part of its constituents. It is absolutely and wholly unlawful. The act being unlawful, a private party sustaining special damages from the nuisance—from the unlawful act—gains a *status* which enables him to maintain a private action for such injury. When a private person thus obtains a standing in court, by reason of his having suffered special damages, although he can only maintain his suit for an injunction on that ground, yet the court grants relief, not solely because the nuisance is private so far as he is concerned, but because it is public, and the relief will benefit the public. Such appears to be the doctrine of the supreme court as declared in M. & M. R. Co. v. Ward, 2 Black, 492. Says the court: "A bill in equity to abate a public nuisance, *filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery prosecuted on behalf of the crown* to abate or enjoin the nuisance as a preventive remedy. *The private party sues rather as a public prosecutor than on his own account;* and unless he shows that he has sustained and is still sustaining individual damage, he can not be heard. He seeks redress of a continuing trespass and wrong against himself, *and acts in behalf of all others who are or may be injured.*"

The present case affords a striking illustration of the hardship and wrong that would result to private parties if any other rule should prevail. In the case of such a wide-spread public nuisance, where it is unlawful and can not be prescribed against as to the injured public, why should any one private citizen—one of the constituents of that public—at the peril of losing his right by mere failure to sue, be compelled to take upon himself the burden and expense of a litigation which the public neglects to institute, and which would be as beneficial to the public as to himself, and as necessary to its well-being as to his own? "What is everybody's business is nobody's business," and time flies while one is waiting for another; or, in the language of Lord Mansfield, speaking upon the same point in a private action, Folkes v. Chadd, 3 Doug. 340: "The length of time is not a bar. It is a public nuisance which may increase every hour, and it is *nobody's business to prosecute.*" See also Hatch v. W. I. B. Co., 7 Saw. 147. In this particular case, a single individual, no matter how great his injury, might well shrink,

and would be very likely to shrink, alone and unaided, from undertaking so herculean a task as is required for the vindication of his rights; and, in fact, all of the thousands interested did shrink from the burden until an organized combination of private citizens, suffering special damages and fearing greater, residing in several counties, came to the support of individual members of their number, of whom complainant is one, and a representative one.

We think, and so hold, that no right by prescription, either as against the public, or complainant as one of the public, has been, or could be, vested in defendants that can defeat this suit.

If wrong upon the last point discussed, and a valid prescription may arise so as to cut off the right of action of a private party receiving special damage from a public nuisance; or considering the nuisance complained of as private merely, we think that no valid prescriptive right, as against the complainant, is satisfactorily shown to have attached. According to Greenleaf: "In order that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse; that is, under *claim of title, with knowledge and acquiescence of the owners of the land*, and uninterrupted; and the *burden of proving this is on the party claiming the easement.* If he leaves it doubtful whether the enjoyment was *adverse, known to the owner, and uninterrupted*, it is not conclusive in his favor:" 2 Greenl. Ev., sec. 594. The enjoyment must be not only adverse, but continuous, and without increase or change to the greater injury of the owner, for the entire period, to vest the right; and "knowledge" means, not only knowledge on the part of the owner of the act of occupation and enjoyment, and of the party occupying and enjoying, but also *knowledge that the party in fact claims the right of enjoyment adversely to him* of the estate thus claimed in the property. "There must have been such a use of the premises, and such damages, as will raise the presumption that the plaintiff would not have submitted to it unless the defendants had acquired a right so to use it:" Grigsby v. Clear Lake Water Works Co., 40 Cal. 406.

The definition of acquiescence, applicable to prescription, given by one of complainant's counsel, who has examined and analyzed the authorities with very great elaboration and ability, we think correct, and is as follows: "Acquiescence is conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect. Acquiescence must necessarily exist while the transaction is going on from which a right of action would otherwise arise, and its operation necessarily is to prevent a right of action from thus arising, and not to defeat the right after it has arisen. Mere delay, therefore—mere suffering time to elapse—without doing anything, is not acquiescence, although it may be evidence, and sometimes strong evidence, of acquiescence." This definition is substantially that found in 2 Pomeroy's Eq. Jur., sec. 965, as derived from the authorities there cited.

The value and probative force of *mere* delay—the suffering of time to elapse without bringing suit—as evidence to establish the fact of acquiescence, depends largely upon the circumstances and condition of things in view of which the delay occurs. For example: In the ordinary case of the flowing of a party's land by an adjoining or neighboring proprietor, where the parties are in daily and frequent personal intercourse, the quiet submission to the wrongful flooding for the period prescribed,

without objection or remonstrance, where the wrong and the wrong-doer are necessarily well known to the party injured, and where a personal remonstrance must naturally be expected, would furnish very persuasive evidence of acquiescence. But under other circumstances it might have very little probative force. In this case, the evidence indicates that in and prior to 1862, when the covering of the lands bordering on the Yuba first began, there were as many, at least, as ten thousand miners or more—defendants' witness, O'Brien, a witness well informed on the subject, says thirty thousand—at work on the Yuba and its tributaries, all discharging the debris resulting from their washings into these streams. And although hydraulic mining appliances were then of an inferior character, and the "Monitors" and "Little Giants" now in use had not developed their enormous excavating powers, the defendants claim that the greater number of miners at work upon the surface, where the material was lighter, more friable, and more easily dissolved and carried away, were nevertheless enabled to send a much larger amount into the streams than is possible now. The miners were then, and they now are, scattered over a region, and pursuing their mining vocations at various points in a territory as large as the smaller of our states, at a distance of from fifteen to sixty or seventy miles or more from the parties, or many of them, suffering injuries from their operations. The parties immediately suffering, past and present, and threatened with future injuries from the acts of defendants, are the inhabitants of four or five counties, engaged in mercantile, mechanical, manufacturing, and agricultural pursuits, at a great distance from the parties committing the nuisance, who reside in other counties. Long before the debris reaches the valley below, that coming from any particular mining operation becomes mingled in an indistinguishable mass with that coming from other mines independently and severally worked by other parties. No specific part of any injury can possibly be traced to any particular mine. The miners are generally nomadic in their habits, at least they were until recently; and when this nuisance began they were coming and going from day to day —an ever-changing body of trespassers.

In the first suit to restrain these nuisances which reached the supreme court of this state, and the only one in which the point has yet been decided by that court, it was held that parties working mines, severally, and independently of each other, but contributing to the nuisance, could not be joined as defendants, thus denying all practical legal remedy to parties injured by the nuisance: Keyes v. Little York G. W. & W. Co., 53 Cal. 724. Under such a ruling, certainly delay in bringing a suit should have little force as evidence of acquiescence. A suit against a single trespasser would be utterly useless to protect one's rights against prescription. Is every property holder along the Yuba, Feather, and Sacramento rivers bound to ascertain, or can he be presumed to know, every miner in the mountains who is contributing to the nuisance by which he is injured or threatened, and presumed to know that he does it under an adverse claim of right; and if he fail to ascertain the trespassers, and commence a suit against them all, separately within the period prescribed by the statute of limitations, is an acquiescence in the nuisance to be inferred as to every one not sued in such sense as to give effect to a prescriptive right? It would obviously be impossible to maintain one's rights under such a rule; and it would be preposterous to hold that such a rule exists. The law was never so

unreasonable and absurd as to require such vigilance, or such efforts to preserve one's vested rights from the wrongful aggressions of a large number of distant, individual, and concurrent, though not joint, trespassers, and especially if each must be sued separately, as must undoubtedly be the case in an action at law for trespass: 8 Saw. 628. The number of miners has gradually lessened, and the business, since the nuisance commenced, has finally been concentrated in fewer hands; but the difficulties suggested still exist. There has been a change, not in principle, but only in degree. It is true, that, technically speaking, this suit can only be maintained on account of the injuries already sustained and now being sustained by complainant himself, and those still threatened and imminent. But the case of this complainant is the case of every other property owner, individually, within the large territory affected, and the range of the effect and influence of the nuisance complained of. If he can not maintain this suit, then no other of these victims in common can. Although technically the suit is only his, both in fact and in substance, it is not his alone. It is a public suit, in which all who are injured are interested, and to the expense of which they contribute. It has been earnestly urged that the complainant pays but a small share of the expense; and that it is not his suit—that he is a mere instrument for procuring jurisdiction. The same may be said of any suit that any other party should bring, except, perhaps, as to the matter of jurisdiction, and as to that, it was the right of the parties to select a non-resident prosecutor if deemed more to their interest to do so. The testimony shows that the expenses of this suit are paid by the anti-debris association, composed of the citizens of probably four or five counties affected by the nuisance; as Yuba, Sutter, Yolo, Sacramento, and doubtless part of Placer, the counties themselves also contributing; and that the expenses of the defense are paid by the "Miners' Association," composed of citizens of, and parties interested in, the several mining counties affected.

It is, therefore, disguise it as we will, or technically call it what we may, and there can be no disputing the fact, a suit between the mining counties and valley counties interested in the great questions presented for decision. In view of the facts, is it not apparent that neither Woodruff nor any other one man, however large his property, could afford, unaided and alone, to enter into this litigation against the combined mining counties to redress his private grievances? Woodruff's interests involved are by no means insignificant, no matter how much may have been said to belittle them. His block of stores, built on one of the most eligible business locations in Marysville, at a cost of at least somewhere between forty and sixty thousand dollars; his nearly one thousand acres of farming land—among the best in the state—in Sutter county, called the Hock Farm, and his Eliza tract of over seven hundred acres on the opposite side of the river, in Yuba county, and upon which a little settlement, embracing business houses and a public regular steamboat landing, once existed, of which one hundred and twenty-five acres in the aggregate on the two tracts are conceded to have been already destroyed, certainly constitute an estate of no inconsiderable value. Yet it would manifestly, from what appears in this case, be better for him, pecuniarily, to see the whole absolutely destroyed than alone, unaided by others, to attempt to maintain this litigation. And if his interests are not sufficient to justify the contest, what other one man in the district could afford to make the effort? These facts are

referred to as legitimately bearing upon this question of the effect of mere delay as evidence of acquiescence. A man may well delay, or even decline, to seek redress for his wrongs from the necessity of the case, because he is conscious of an absolute inability to cope with the wrong-doer, or because he would suffer more in seeking a remedy than by succumbing to the wrong, and not because he acquiesces in the injury or in any sense recognizes the validity of the adverse claim. To succumb to an overpowering force, is not necessarily to acquiesce in the wrong inflicted by it. One may well submit from necessity to what he can not help without admitting, but still denying, the right set up by an adverse claimant. The mere delay, then, of Woodruff, or any other sufferer from the nuisance complained of, has very much less significance and probative force as evidence to establish acquiescence in the wrongs committed by defendants, within the meaning of that term as used in the law as an element in a title or right acquired by prescription, than a neglect to sue in the example first given. One may delay because he assents to and acquiesces in the adverse claim, while the delay by the other may well result from his inability to cope with the wrong-doers, while he denies their right and spurns their adverse claim.

The situation of complainant with reference to the expense and other obstacles referred to in the way of obtaining redress for the injuries suffered from the nuisance, and of every other party in a position to be similarly injured by it, was sufficiently discouraging and obvious to account for any delay that has accrued in bringing suit, without supposing that he or they acquiesced in any adverse claim that might have been made by defendants to an easement in their property and a right to commit the nuisance. There has been no evidence brought to our notice tending to show an assent to or acquiescence in any right claimed by defendants to the easements now set up as a defense, other than a *mere delay* to commence suit. Nor is there any evidence, other than the mere fact that defendants, in common with other miners, have continued to discharge their mining debris into the streams below their mines in the mountains, or that defendants ever, while the time for prescription is claimed to have been running, or even before litigation was actually moved, claimed adversely an easement in or any right to bury the lands of complainant and others with their debris. In our judgment, the mere fact that defendants, in common with hundreds or thousands of other miners in like situations, have poured their debris into the rivers fifty miles away, and that it has unavoidably, by the natural currents of the streams, been carried down, and found its way to, and been discharged upon, the property of complainant and others, to their great damage, is not sufficient evidence of an open, notorious, adverse claim to an easement in the lands to avail defendants; and that an adverse claim is not so distinctly and unmistakably brought to the knowledge of complainant and others injured by such means alone as to set the time for prescription running. We do not think, under the circumstances, that complainant and others similarly situated should be presumed to know that the parties committing the nuisance were doing it under a claim of right adverse to them, especially so, as there is really *no substantial or even plausible ground under the laws of the state upon which to base such a claim.* Such a claim would be purely arbitrary and tortious.

Besides the want of other evidence of an adverse claim, and of

knowledge of such claim brought home to complainant, there is evidence to the contrary. Within the last five years, as we have seen, the miners of their own motion spent eighty-five thousand dollars in building a levee eight miles in length along the line of high land on the south side of the river from the Hedges' grade to the foot-hills, of which sum defendants contributed eighty per cent., for the very purpose of confining their debris to the present bed of the river between the levees and preventing it from spreading over the adjacent country, including the Eliza tract, upon which it would necessarily flow on that side if the land were wholly unprotected. If the defendants then made an open, notorious, adverse claim of right against the complainant and others similarly situated, why incur this great expense to protect land which they had a right to cover? Was it from pure benevolence? Or were they not moved rather by a consciousness that they were committing a nuisance which, unless obviated, must sooner or later necessitate a suspension of their operations by an appeal to the courts for redress? Which is the more reasonable hypothesis?

So also the complainant, in connection with other property owners similarly situated, from the time when it became apparent that they must suffer from the accumulation of debris instead of allowing the miners to pour their debris upon other lands not yet destroyed or covered, constructed levees for the purpose of excluding it. And they have ever since from year to year taxed themselves upon their property to an amount equal to or even greater than the whole ordinary net incomes of such property. There was an earnest, continued effort to protect themselves by means other than the almost impracticable and hopeless task of stopping the work of so large a number of miners by legal process.

But this action and forbearance is not necessarily inconsistent with the idea of non-acquiescence in the claim of an easement now set up. The people injured, including complainant, had a right, if possible, to protect themselves by other, and in view of the circumstances to them apparently more practicable and advantageous, means than legal proceedings—means which should be compatible with a continuance of mining, and which would, therefore, be less injurious to the miners themselves. They also had a right to wait and see the effect of their efforts, without prejudice to their right to adopt proper legal remedies in the end if their other efforts made should not prove effective. It is a matter of public notoriety with which everybody in the state must be familiar, and to which we can not shut our eyes if we would (Sparrow v. Strong, 3 Wall. 97), that the people more immediately affected by mining debris have for many years—from the first—complained and protested against these injuries, and sought legislative interposition to aid in their protection in addition to their strenuous efforts to protect themselves. It is impossible to segregate this complainant and each individual miner from the large classes to which they belong, and treat them with reference to this question of acquiescence as isolated individuals—as though they alone were the interested parties. But the sufferers have not slept on their rights in other respects.

In addition to the drainage act already referred to, the state, at the instance and with the approbation at the time, doubtless, of all concerned, both in the valleys and the mines, expended several hundred thousand dollars, raised by a special tax under a statute afterwards adjudged unconstitutional by the courts, in further efforts by impound-

ing dams to prevent the nuisance complained of, and others of a similar character.

Failing to obviate the nuisance by any other means, the citizens of the valley were at last compelled to fall back upon their legal rights, and invoke relief from the courts. They thereupon, at a reasonably early period, commenced a number of suits at different times, as circumstances and the difficulties encountered developed a necessity for them, like the one under consideration, of a representative character, in various forms and in different courts—some in the name of the people, some in the names of counties and cities, and others in the names of private parties, and these suits were defended by the miners. Keyes v. Little York etc. Co. was commenced as long ago as January, 1877; removed to this court; remanded to the state court, the order remanding having been appealed to and affirmed by the supreme court: 96 U. S. 199; and finally tried by the state court, in which there was a decree for complainant. The decree obtained was reversed on appeal in 1879, without a decision on the merits, on the *technical ground of misjoinder of parties defendant:* 53 Cal. 724. In September, 1879, the city of Marysville commenced a suit in the district court of Yuba county, presided over by Judge Keyser, alleging the same state of facts as relied on in the present case, and asking similar relief, in which a preliminary injunction was granted. Afterwards the North Bloomfield G. M. & G. Co., a defendant in that suit and also in this, with others of the defendants therein, filed a petition for a writ of prohibition in the state supreme court, alleging that Judge Keyser was the owner of two lots in Yuba city, Sutter county, on the Feather river, just above the confluence of Feather and Yuba rivers; that "the channel of Feather river for a considerable distance above respondent's land was filled up by the sand and other sediment brought down by the Yuba river, so as to raise the bed of Feather river to the same height with the bed of the Yuba, and that the same causes which fill up the bed of the Yuba cause sand and sediment to be carried from the Yuba into Feather river and fill up the channel of the same opposite to and *upon the lands of respondent;*" that the respondent was therefore interested in the controversy and disqualified to act in the case. The supreme court so held in July, 1881, and issued the writ: 58 Cal. 321. The People v. Gold Run etc. Co. was commenced in July, 1881, to restrain similar nuisances on Bear river in Yuba county, and tried in 1882, resulting in a decree for injunction—a very able opinion having been delivered in the case by Judge Temple of Sonoma county, formerly of the supreme court of the state—from which decree an appeal is now pending in the supreme court of the state. A similar suit of Sutter County v. Miocene Mining Company was commenced in a state court in June, 1881; removed to this court, and remanded to the state court, where it is now supposed to be pending. Other suits, commenced at various times, are pending.

These facts, showing the early, continued, and persistent action of the people affected, both in a public and private capacity, by common efforts to secure common relief from a common nuisance, and the difficulties encountered, may properly be considered as bearing upon the question of acquiescence. In view of all the circumstances surrounding this case, there certainly was no want of anxious vigilance on the part of complainant and his co-sufferers in their attempts to guard against and protect themselves in some form, and for a considerable time in a form most favorable to the interests of the defendants themselves. Having failed

in their milder and more peaceful efforts, it would now be to the last degree inequitable to hold that they have lost their rights to all effective compulsory remedies by acquiescence and prescription, and that defendants by their long-continued trespasses have established a legal right in their lands to continue and augment the nuisance.

One of the counsel for defendants, in his very able printed argument, gives a definition of acquiescence from Rapalje and Lawrence's Law Dictionary, which he seems to regard as more favorable to defendants than that of complainant's counsel. It is as follows: "Acquiescence—Latin, *acquiesco*, to rest. Acquiescence is where a person, who knows he is entitled to impeach a transaction or *enforce a right*, neglects to do so for such a length of time that *under the circumstances of the case the other party may fairly infer that he has waived his right.*"

If we adopt this definition, we shall reach the same result. Is it possible to believe, from the facts disclosed by the record, that the complainant in this case has neglected to impeach the transaction in question, "for such a length of time that *under the circumstances of the case the other party may fairly infer that he has waived his right*"? It seems to us that "*the circumstances of the case*" suggest the negative as the only admissible, or even possible, answer.

In our judgment, there is no sufficient evidence of an open, unqualified, undisguised, adverse claim to the easement now claimed by defendants in complainant's land, brought to the knowledge of the complainant during the entire period while the time for prescription is claimed to have been running, but if there was any such adverse claim of right made and brought to complainant's knowledge, that then there is no such satisfactory evidence of any acquiescence in such claim of right on the part of complainant as is sufficient to give a title by prescription within the meaning of the established and recognized rule on that subject. Indeed, it is in the highest degree improbable, if not impossible, in the nature of things, that there should be such acquiescence. But if otherwise, the prescriptive right could, in any event, only extend to the seventy-five acres of the Eliza tract, the fifty acres of the Hock farm tract, and the other lands situate between the levees of the Yuba, already covered and destroyed. There could have been acquired no prescriptive right to extend the injury to other lands by continuing to send down other refuse matter from the mines and raising the level of the bed of the river, by deposits of debris between the levees, higher and higher from year to year, thereby constantly and surely increasing the danger of breaking the levees and discharging their argumented contents upon the surrounding country not yet destroyed. That an increase of these deposits, already elevated several feet above the level of the country outside the levees, must greatly enhance the danger, and in an increasing ratio, can not fail to be obvious to the most superficial and least-informed observer. These barriers, upon which the *present* and future safety of Marysville and the adjacent country depends, are even now, with the present level of the debris confined within the levees, frail indeed when compared with the forces of nature, liable at any time during our rainy season to be turned against them by any accidental obstruction to the currents of the flood. The temerity of those who trust their lives and fortunes to the protection afforded by these relatively feeble barriers during a flood, is well calculated to excite wonder.

The brief flood occasioned by the breaking of the English dam in June last, afforded a striking illustration of what is liable hereafter to occur. This enormous deposit of debris in the Yuba, at and near Marysville, and in the streams in the mountains above, is a continuing, ever-present, and so long as hydraulic mining is carried on as now pursued it will ever continue to be an alarming and ever-growing menace, a constantly augumenting nuisance, threatening further injuries to the property of complainant, as well as the lives and property of numerous other citizens similarly situated. Against the continuous and further augmentation of this nuisance, the complainant must certainly be entitled to legal protection.

Laches is also relied on to defeat the suit. This is a defense that appeals to the sound legal discretion of the court, and depends largely upon the circumstances under which the delay occurs. It rests upon the principle that a court of equity will only aid the vigilant. Under the conditions shown in discussing the defense of prescription, which need not be repeated, no court of equity, we think, would deny relief to the complainant on the sole ground of laches. Besides, the nuisance complained of is a continuing, ever-present, and ever-increasing one, and constantly and day by day affords new grounds for equitable relief. It is sought to restrain further threatened injuries to complainant's property—injuries liable to occur at any time, and quite certain to be inflicted sooner or later.

As to the seventy-five acres of the Eliza tract and fifty acres of the Hock farm covered by debris, and destroyed for agricultural purposes, the defendants specially deny title in complainant, and plead title in themselves in common with all other miners, under the statute of limitations. An adverse possession of land for five years confers a title in this state: Arrington v. Liscom, 34 Cal. 365; Cannon v. Stockmon, 36 Id. 585. But the code of civil procedure, in section 325, expressly provides, "for the purpose of constituting an adverse possession by a person claiming title, *not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:* 1. *Where it has been protected by a substantial inclosure*; 2. *Where it has been usually cultivated or improved.*"

These tracts of land were not "protected by a substantial inclosure," and were not "cultivated or improved" by defendants, and were neither possessed nor occupied at any time, or in any other manner, or to any other extent than as they were covered by debris thrown upon them by defendants in common with many other miners working independently of each other. Nor did defendants attempt to exercise any personal control or acts of ownership or dominion over them. In all other particulars, these lands were under the management and control of complainant. They are, therefore, not within the provisions of the statute of limitations for the purpose of divesting the title out of complainant, and vesting it in defendants. There was *no ouster* whatever. The defendants insist, however, that for their purposes an inclosure would be useless, and cultivation and improvement were out of the question; and they were not occupied for any such purposes. They claim a title, however, *under and by force of a statute*, and not otherwise. The statute conferring the right, therefore, must be the *measure* of that right; and it says for the purposes of acquiring that right nothing short of the conditions prescribed shall be sufficient; and in this case the prescribed conditions do not exist, nor is

it pretended that they do; consequently, the title has neither been vested in defendants and all other miners as claimed, nor divested out of complainant. There has never been a time when the complainant, if he had brought an action of ejectment to recover possession of these lands against defendants and all other miners, could have maintained it, for the reason that there has been no ouster within the meaning of the statute relied on. A denial of ouster, which would certainly have been made, would have defeated any action to recover possession, and thrown the costs upon complainant; for under the express terms of the statute there was no ouster, and none, therefore, could be proved. There can be no right in defendants of any kind in these lands, then, unless they have acquired an easement in them for the deposit of their debris by prescription; and the question of a prescriptive right to an easement arises, which has already been discussed and decided.

But as these two tracts of seventy-five and fifty acres present the strongest grounds for holding that defendants have acquired an easement as to them, although it is not necessary to a decision of the case based upon other injuries, past, present, and threatened in the future, these further observations upon acquiescence are appropriate. The complainant is but one out of many similarly situated with reference to injuries effected by these same mining operations. We have seen that an action of ejectment could not at any time have been maintained, for want of an ouster. The complainant could, therefore, not be required to bring an action of this kind, where there was no legal ground for it, for the mere purpose of expressing his dissent from a claim of right to cover his lands to their injury. But assuming that he could maintain an action of trespass for damages for the injury, in that case he would be compelled to sue every miner in the whole mining region on the waters of the Yuba individually, in a separate suit, as they clearly could not be joined in an action at law for the trespass, in order to complete protection of his property. Had he sued defendants, it would have been impossible to trace any specific portion of the injury to their acts, and only nominal damages could in any event be recovered. The law certainly is not so unreasonable as to require complainant to prosecute innumerable suits for trespass, which would result in nothing substantial, for the mere purpose of manifesting his non-acquiescence in the unlawful claims of these trespassers. A judgment without damages would not restrain future trespasses, and the proceeding must be repeated to prevent a loss of title by prescription, and so on *ad infinitum*. Besides, how is he to know who the hundreds, and perhaps thousands, of miners, scattered over the large territory fifty miles away, are, who are sending their debris down upon him, or know that each claims a legal right to use his particular land as a deposit for his refuse matter? The law does not require a vain thing to be done. A suit in equity to restrain further injuries, but not to recover damages for the past, might be brought, it is true; but it is unnecessary to repeat what we have already said on the subject of prescription and continuing nuisances.

The case under consideration is *sui generis*, nothing like it in the books having been brought to our notice, and the rules of law must be at least *reasonably*, if not *liberally*, applied to the peculiar facts of the case for the protection of the innocent owners of property against tortious encroachments, rather than for the encouragement of unlawful trespassers by enlarging their rights through their own tortious and unlawful acts.

But if any easement has been acquired as to these two tracts, there still remain other injuries for which the complainant is entitled to the same relief.

The next defense is, that the acts of defendants are authorized by the customs of miners, which have been recognized, confirmed, and legalized by the legislation, both of the state and of congress. This legislation will now be considered.

In 1851, the legislature of California, in the code of civil procedure, made the following provision: "In actions respecting 'mining claims,' proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, *when not in conflict with the constitution and laws of this state*, shall govern the decision of the action:" Stat. 1851, p. 149, sec. 621. This provision has been carried into the last code of civil procedure: Sec. 748. The act of congress of 1866 also provided that the mineral lands "of the public domain" shall be open to exploration and occupation, subject, also, to the *local* customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States:" 14 Stat. 251, sec. 1. And the act of 1872 further provided, that "the miners of each *mining district* may make regulations *not in conflict with the laws of the United States, or the state* or territory in which the district is situated, governing the *location, manner of recording, amount of work necessary to hold possession of a mining claim*," etc., both of which provisions have been carried into the revised statutes: R. S., secs. 2319, 2324.

The first observation suggested is, that none of these provisions, either state or national, have any relation at all to the subject-matter of this suit. They simply recognize and legalize customs and regulations by which miners' rights, as between themselves, upon the public lands may be secured, regulated, and protected. They relate to "mining claims" alone—to the manner of acquiring and protecting rights in them. They refer to the extent of the claim, the manner of taking up and holding it, the evidence of title, etc., as between themselves and as against each other, and in the state legislation, not as against the government or owner of the land. Much less does it attempt to give them rights as against private parties, vested with the fee of other lands not mining, and not even within the mining regions. It has no relation to lands owned in fee by private parties. The principle acted upon was, to regard the miners, as against everybody except the owner of the lands in which the mines were found, as the proprietors of limited portions of the mines on the public lands actually in their possession and occupation, and to prescribe rules for the acquisition, regulation, and protection of such limited rights. The principle acted upon is fully stated, with reference to other public lands, in Lamb v. Davenport, 1 Saw. 620; and this statement of the principle was approved by the supreme court of the United States in Starr v. Stark, 94 U. S. 487, note. The provision in no way interferes, or attempts to interfere, with the rights of the owner of the fee, even in these lands, much less in any other lands; nor does it authorize, or attempt to authorize, any custom, or usage, or regulation which shall encroach upon the rights of others owning agricultural lands in fee, situate in the valleys many miles distant. On the contrary, it is expressly provided, that "such customs, usages, or regulations shall govern" only "*when not in conflict with the laws of the state.*" A custom or usage at-

tempted to be established, whereby mining debris might be sent down to the valleys, devastating the lands of private owners, holding titles in fee from the Mexican government, as old as the title of the United States, without first acquiring the right to do so by purchase or other lawful means, upon compensation paid, would be in direct violation both of the laws and constitution of the state and of the constitution of the United States. Instead of being authorized by the statute, it would be in direct violation of the statute. It would also be in direct violation of the express provisions of the statutes defining nuisances already cited.

One of the earliest statutes passed by the first legislature of California adopted the common law as the rule of decision in this state: Stat. 1850, p. 219; and that statute has been in force ever since, except so far as modified by the civil code. *Sic utere tuo ut alienum non lædas*, is one of the fundamental maxims of the common law, more frequently cited and enforced, perhaps, than any other in the law. And this maxim is still continued in force in section 3514 of the civil code of California, where it is translated: "One must so use his own rights as not to infringe upon the rights of another." Any custom, or usage, which would attempt to authorize the acts complained of, would clearly violate this fundamental principle of the law. A case was cited where, in commenting upon some very *remote* consequences of an act, the judge observed that this rule was too indefinite to furnish a certain rule to be guided by in many cases; and it was insisted by counsel that it really had little significance or value; but this case does not lie so near the line of distinction as to be open to doubt as to its application. No possible refinement or legal hair-splitting can exclude it from the operation of the rule. It is obviously within the rule, and so far from the borders as to leave no possible ground for doubt as to its applicability.

The first section of both the old and new state constitutions provides, that "all men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property." These rights must necessarily include the right to enjoy, without let, hinderance, or obstruction by others, the property so acquired, possessed, and protected; and it is not competent for the legislature to authorize any encroachment upon the rights of one class of citizens by custom or usage adopted by those pursuing any particular class of industries. Again, as we have already seen by other constitutional provisions, it is provided, that "private property shall not be taken or damaged for public use without just compensation having been first paid," etc., and "no person shall be deprived of * * * property without due process of law," and the same inhibition is put upon the states by the amendments of the national constitution.

The customs and usages relied on would be in direct conflict with all these provisions, and consequently, if any such there are, they can not be valid. The customs recognized and validated by congress are only the same "*local*" customs before recognized by the state legislation, except that the acts of congress not only regulate these matters among miners as between themselves, but also give them some rights as against the United States in the public lands, but in no other lands. And the limitation expressly put upon these customs and usages is, that they shall not be "in conflict with the laws of the United States or the state * * * within which the district is situated." Thus congress is also careful not to give any countenance to the idea that private rights can

be encroached upon under the guise of the customs or usages of miners intended to be legalized. Again: these customs and usages recognized are "*local*" customs limited to the "bar or diggings" within which they are situate. They are not *general* customs, and such customs and usages as are set up in this particular are not within the legislation invoked. Besides, customs to be valid under the common law must be reasonable. Can a custom or usage which would allow the whole of the Sacramento and other valleys of California to be filled up and devastated, no matter how well improved or largely peopled, be reasonable? Such a custom would be valid if the custom relied on is valid. It is only a matter of degree, not of principle. The supreme court of California has never recognized the validity of any custom to mine in such a manner as to destroy or injure the property of others, even in the district or diggings where the local customs and usages of miners are sanctioned by the statutes. But the California reports are full of cases where the principle has been enforced in the mines that every one must so use his own property as not to injure another.

Said the supreme court in Hill v. Smith, 27 Cal. 482: "This notion [that the rules of the common law as to water rights have been modified in California] is without substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are to apply them are changed, and not the rules themselves. The maxim, *Sic utere tuo ut alienum non lædas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the *mining regions* of this state, as operative a test of the lawful use of waters as at any time in the past or in any other country." And in Richardson v. Kier, 34 Cal. 74, the court said: "He is bound to so use his ditch as not to injure his neighbor's land, irrespective of the question as to which has the older right or title, * * * and if through any fault or neglect of his in not properly managing and keeping in repair, the water does overflow or break through the banks of the ditch and injure the lands of others, *either by washing away the soil or covering the soil with sand, the law holds him responsible;*" and these are but examples of many others too numerous to mention and too familiar in this state to require citation. The supreme court of the United States recognizes the principle of the maxim also in Jamison v. Kirk. Said the court: "The position of the testator's ditch prevented this working, and thus deprived him of this value of the water and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another."

We are fully satisfied that the acts of defendants complained of are not authorized by any valid custom or usage, or by any valid law, statute or otherwise, of the state of California or of the United States; and that complainant is entitled to such relief as shall fully and amply protect him from any further injuries to his property and any further encroachments upon his rights.

What shall the remedy be? It would be difficult to appreciate too highly the importance of the mining interests. The fact is patent that immense sums of money have been and they now are employed in this branch of industry. The boldness with which capitalists, and especially these defendants, have invested large amounts of capital; the perfection to which those engaged in hydraulic mining have brought machines and

appliances for successful mining; the vast enterprises they have undertaken and successfully carried out; the energy, perseverance, great engineering and mining skill displayed in pursuing these enterprises, excite wonder and unbounded admiration.

In view of these undisputed, indisputable, and well-known facts, no one could possibly be more averse than we are to applying any remedy to the grievances complained of that must put an end to hydraulic mining, if any other can be devised admitting of its continuance, compatible with the safety and rights of the public, the complainant, and numerous others similarly situated, of whom he is a representative. We have, therefore, sought with painful anxiety some other remedy; but none has been suggested that appears to us to be at all adequate to the exigencies of the case, or at least none available in the present stage of the case. Two were suggested in Mendell's report:

1. The purchase of large tracts of low lands in the valleys, which are now or may be permanently covered with water, without material injury to navigation, or other property owners, and turning the entire Yuba river, with its debris, into them, using them as settling reservoirs.

2. The building of impounding dams at suitable points on the river to hold back the heavier portions of the debris.

The first seemed to be regarded as too expensive to be feasible. The second is the only one suggested and urged in this case, and much testimony has been taken as to the practicability and safety of the plan. As is usually the case, the views of different engineers and experts, distinguished in their profession, differ widely upon the points of practicability and safety. The larger number of witnesses called, and much the larger amount of testimony, so far as mere opinion goes, are doubtless in favor of the practicability, *if sufficient means are furnished.* But all the practical experiments heretofore made, at great expense, under the supervision of the state and of competent engineers, have been lamentable failures. The dams constructed were doubtless, in many particulars, defective. But what guaranty have the court, and those whose lives and property are at stake, that any future works of the kind will not also be defective? As at present advised, with some knowledge of the operations of the tremendous forces of nature, we can not undertake to say, upon the mere opinion of experts generally at variance, as in this case, however competent, that the scheme would be practicable and safe. We can not define in advance what works shall be sufficient, and authorize the continuance of the acts complained of upon the performance of any prescribed conditions.

In view of past experience, here and elsewhere, with the damming up of waters, and of the wide difference of opinion of competent engineers on the subject, it is clear that we should not be justified in an attempt to prescribe in advance any kind of a dam under which a large community should be compelled to live in dread of a perpetual, seriously alarming, and ever-present menace. Even the pure waters of Niagara, within the memory of man, have made a sensible impression upon their bed of compact rock, adapted to its purposes by an Almighty and Omniscient power. Portions of its solid walls from time to time yield to the force of the mighty flood, and are precipitated into the abyss below. Says the author of the article on Niagara Falls, in the New American Cyclopedia: "In the short period hardly reaching back into the last century, during which observations, other than those of passing trav-

elers, have been made and preserved, changes have taken place by the falling down of masses of rocks, the effect of which has been to cause a slight recession of the cataract, and extend the gorge to the same amount upward toward Lake Erie. Thus, in 1818 great fragments descended at the American fall, in 1828 at the Horseshoe fall, and since 1855 several others have materially changed the aspect of the falls:" Vol. xii., p. 418. When Father Hennepin first visited Niagara in 1678, there was a third fall formed on the Canada side by a huge rock, which divided and turned the current. At the time of the visit of the Swedish naturalist, Kalm, in 1750, the rock had fallen down and left the cataract, in respect to the number of falls, more nearly in its present condition. In 1842 Professor Hall made an exact scientific, trigonometrical, and geological survey of the falls, and from his survey and map, "a vivid and exact idea has been formed of the enormous mechanical powers which are at work here. * * * The falling water acts as a huge saw, cutting a channel in the rock at the rate of about one foot a year:" 3 Johnson's New Cyclopedia, 839.

These facts forcibly illustrate the tremendous power of the element against which the engineer must contend in his efforts to impound the mining debris. Yet it is proposed to erect a barrier in the narrows of the Yuba, upon a bed of debris now sixty feet deep, just out of the foothills, one hundred and fifty feet high—as high as Niagara—over which its waters, concentrated in a narrow gorge, charged at times to their full carrying capacity with heavy material, on occasions of great floods will pour in volumes equal, perhaps, or nearly so, to those pouring over an equal space at Niagara. It is said that this proposed dam will be a debris-dam, and less dangerous than a water-dam. But Niagara can not be said to be a water-dam in any other sense than the one proposed when filled, or nearly filled, with debris. The danger shown by the testimony will be, not so much from the pressure above as from the force and effects of the water charged with debris, sometimes with stones of greater or less dimensions, falling over and down the dam so great a distance. According to the testimony of Hamilton Smith, the very intelligent, competent, and reliable engineer who built the English dam, there were rocks in it of ten tons weight, not a vestige of which could be found after the breaking of the dam in June last. They must have either been carried by the floods down the stream, or crushed into fragments by the overpowering forces brought to bear upon them. And according to the testimony of another witness, who followed down the Yuba to observe the effects of the torrent resulting from the breaking of that dam, rocks of much larger dimensions, before existing in the bed of the river, had wholly disappeared. The facts stated show the enormous resisting power required to render an impounding dam perfectly safe. Engineers, as before stated, differ as to the practicability of building a safe dam at that or other indicated points. We can not presume to determine the possibilities of engineering skill in constructing these restraining dams, with "money enough" at command, where distinguished engineers differ in opinion upon the problem. It is enough for us to know that the matter rests in *mere opinion*, and that the opinions of men eminent in their profession are not in accord upon the question. It is obviously impossible that the court should determine in advance what dams may be built that will be sufficient, or prescribe any condi-

tions upon the fulfillment of which defendants should be permitted to continue the acts complained of.

According to the testimony of some intelligent witnesses, only about seventy per cent. of the debris would be retained by any dam, as all that the water is capable of carrying in suspension would pass over under any circumstances. This percentage of the enormous quantity yet to be mined would add a great deal to the amount now in the streams. A large amount, at all events, would necessarily pass over.

Dams, such as are proposed, properly constructed, and not carried too high, may well be safe, and extremely valuable in keeping back the debris now in the stream, and largely mitigating the injuries now existing and threatened, even though utterly inadequate to protect the valleys below, in case hydraulic mining is continued, and enormous quantities of debris be added to that already accumulated. But there are no dams now of any appreciable service in protecting the rights of complainant from further injury, either from the debris already in the streams or such further accumulations as may arise from a continuance of hydraulic mining as now pursued. There is therefore no alternative to granting an injunction.

A great deal has been said about the comparative public importance of the mining interests, and also the great loss and inconvenience to these defendants if their operations should be stopped by injunction. But these are considerations with which we have nothing to do. We are simply to determine whether the complainant's rights have been infringed, and, if so, afford him such relief as the law entitles him to receive, whatever the consequence or inconvenience to the wrong-doers or to the general public may be. To similar suggestions, in Attorney General v. Council of Birmingham, where the sewage of the city, having a population of two hundred and fifty thousand, was the nuisance complained of, the vice-chancellor said: "Now, with regard to the question of plaintiff's right to an injunction, it appears to me that, so far as this court is concerned, it is a matter of almost absolute indifference whether the decision affects a population of two hundred and fifty thousand, or a single individual carrying on a manufactory for his own benefit. * * * I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, *not to Birmingham only, but to all England:* that is not my function:" 4 Kay & J. 539; see also Stokes v. Bandury Board of Health, 1 R. L., Eq. Cas., 57. So in Attorney General v. Colney Hatch Lunatic Asylum, the lord chancellor observes: "It is said * * * unless the defendants are permitted to throw all their sewage upon their neighbors' lands, upon which they have no more right to throw it than into this court, they can not carry on the asylum [which contained two thousand two hundred patients]; and, therefore, they contend that they must be permitted to dispose of the whole of the sewage on their neighbors' lands. Surely, the mere statement of the proposition is quite sufficient to refute it. Nobody can suppose the law of England to be in that state. It is not to be supposed that, because we are told, as I was told in the case of Attorney General v. Birmingham, that three hundred thousand people will be very much inconvenienced if they are not allowed to use their neighbors' property without paying for it; that on that account they are to use their neighbors' property without paying for it. * * * This court has merely to decide what the law is as it exists, and to see that it

is duly administered; not to order anything done that is impossible, as in the illustration I have given, *but to take care, subject to that modification, that persons shall be restrained from exercising with a high hand powers which* they have no right in law to exercise:" 4 L. R., Ch. App. Cas., 155.

In these cases the acts causing the nuisance were urged as absolutely necessary to the safety of the people interested—to three hundred thousand people in the case of the city of Birmingham—but the defendants were plainly informed that it was not the duty of the court to point out how the nuisance should be avoided, but that, however necessary to the safety or convenience of those interested in the continuance, they must find a way to prevent the nuisances, or cease to perform the acts which occasioned them. Certainly, the law is not less favorable to the protection of the rights of every man, under the several express constitutional restrictions before referred to in this country, than it is in England, where there are no such limitations on the legislative power. And authority is not wanting to the same effect in our own reports. In Weaver v. Eureka Lake Co., 15 Cal. 274, the court said: "It is contended that, under the circumstances, the erection of the dam was justifiable and proper, and that the great value of the lakes as reservoirs is a sufficient justification for the injuries resulting to plaintiff. We are aware of no principle of law upon which such a position can be maintained. * * * A comparison of the value of conflicting rights would be a novel mode of determining their legal superiority." And in Wixon v. The Bear River etc. Company, 24 Cal. 373, the court said: "The four remaining instructions refused by the court are founded upon the theory that, in the mineral districts of this state, the rights of miners and persons owning ditches constructed for mining purposes, are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; thus annihilating the doctrine of priority in all cases where the contest is between a miner or ditch owner, and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it." But authority is not necessary on so plain a proposition. Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim, *De minimis non curat lex*, is applicable, but every substantial material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests, that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.

But if the comparison could be made in this instance, it would be impossible to say that the interests of the defendants, and of those engaged in the same pursuits, would be more important than those of complainant, and such as he represents in this contest. The direct contrary is maintained by complainant with great force and plausibility. But we have nothing to do with this question as to the comparative importance of the conflicting interests or the inconvenience to the defendants by the stoppage of their works, if they infringe the material substantial rights of

others. It is the province and imperative duty of the court to ascertain and enforce the legal rights of the complainant, no matter what the consequence to defendants may be. This duty no court could evade if it would.

Since the decision on the demurrer, in April last, the anti-debris association, their leading counsel, and the agent of complainant, doubtless acting under the advice of counsel, have used their influence with the secretary of war to induce him not to expend the appropriation of two hundred and fifty thousand dollars—made by congress for "the improvement and protection of the navigable channels of the Sacramento and Feather rivers," in the erection of a dam at the narrows of the Yuba, for impounding the debris of the mines; and the secretary of war has, hitherto, declined to so expend the appropriation. It is earnestly urged by defendants, as a last defense, that this action of complainant, and his associates in interest, in using their efforts to obstruct the erection of a dam, intended to obviate the evils complained of, should, in a court of equity, deprive them of any right to an injunction which they might otherwise have had. This action may have been extremely unwise, and we are inclined to think it was, so far, at least, as a dam at that point, of a proper construction and safe height, might afford protection against the debris now in the streams above, or mitigate the evils resulting from it—a protection that in any event is most sorely needed. But we are not prepared to say, in view of their opinion as to the safety of such dams, supported by the views of their engineers and experts, and their past experience in regard to them, that their opposition to the erection of a dam as a safe remedy against further accumulations of vast amounts of debris, that must, of necessity, result from a continuance of mining as now carried on, should deprive complainant of the more certain, safe, and effectual relief to which he and his associates consider themselves to be entitled under the law.

We do not perceive any good reason why the complainant and those in like situation should not endeavor to carry out their own views as to what their safety requires as well as defendants theirs. They, and not the defendants, are the ones to suffer from any defective means of protection that may be attempted to be carried out. We think this action constitutes no good ground for denying an injunction. But if action of this kind, under any circumstances, could constitute a good answer to an application for an injunction, some latitude, surely, would be allowed to those struggling, almost hopelessly, for existence against impending dangers. We can not deny an injunction on that ground.

After an examination of the great questions involved, as careful and thorough as we are capable of giving them, with a painfully anxious appreciation of the responsibilities resting upon us, and of the disastrous consequences to the defendants, we can come to no other conclusion than that complainant is entitled to a perpetual injunction. But as it is possible that some mode may be devised in the future for obviating the injuries, either one of those suggested, or some other, and successfully carried out, so as to be both safe and effective, a clause will be inserted in the decree giving leave on any future occasion, when some such plan has been successfully executed, to apply to the court for a modification or suspension of the injunction.

Let a decree be entered accordingly.

DEADY, D. J., concurring. I fully concur in the learned and able opinion of the circuit judge in both its reason and conclusion. It exhausts the subject, and leaves nothing to be added, either by way of statement, argument, illustration, or authority.

Under these circumstances, but for the magnitude of the subject and the great interest felt in the question, I would not deem it necessary to say more than this. And as it is, I shall only briefly state the conclusions I formed and set forth at the close of the argument, and after the personal examination of the mines, mining operations, waterways, and the adjacent country.

I am by no means unconcerned or indifferent to the effect of this decision upon the large capital invested in these mines. But it is a fundamental idea of civilized society, and particularly such as is based upon the common law, that no one shall use his property so as to injure the right of another—*Sic utere tuo ut alienum non lædas.* From this salutary rule no one is exempt—not even the public—and the defendants must submit to it. Without it the weak would be at the mercy of the strong, and might make right.

It is admitted by the pleadings and upon the argument of this case that the defendants, by means of the hydraulic mining carried on by them on the head-waters of the Yuba river, materially aid in producing the following results:

1. The water of that stream and Feather and Sacramento is fouled so as to be unfit for ordinary domestic purposes.

2. The beds of these rivers are continually being filled up with the debris from said mines so as to seriously impair the navigation thereof, and cause them to overflow their banks and injure and destroy large portions of the adjacent agricultural lands, by washing away the soil and improvements thereon, or covering the surface with said debris so as to render them wholly unfit for cultivation.

3. The property in the town of Marysville, at the junction of the Yuba and Feather rivers, is ever in danger of being overflowed and seriously damaged or destroyed by the floods so caused, to prevent which the owners thereof are and have been compelled to construct and maintain, at a large and continuing expense, levees around the greater portion of the town.

4. The fill in these rivers from the deposit of debris therein is materially and constantly increasing from year to year, and in the case of an unusually high water it may, and probably will, be greatly and suddenly increased, so that all the danger and injury resulting to the navigation of these rivers and the property adjacent thereto is constant, increasing, and will continue to increase with the continuance of the cause thereof—the hydraulic mining of the defendants as now practiced and carried on.

Undoubtedly the acts of the defendants constitute a public nuisance, and the plaintiff being specially injured thereby, both in his farm and city property, has an undoubted right to maintain this suit for relief; and in the consideration of the questions which arise in the case, he ought to be regarded, not as an isolated individual suffering from a particular wrong, but as the representative of his co-sufferers in the community from the same wrong of which he complains.

The principal defense or justification of this wrong rests on three points:

1. That the United States and the state have impliedly authorized the defendants, and all other hydraulic miners, to send their debris down these rivers regardless of the injurious consequences to the navigability or the adjacent property;

2. That the defendants have done the acts complained of for so long a time and under such circumstances as to acquire a prescriptive right to continue the same; and

3. That the suit is barred by the statute of limitations of the state: sections 319, 343, of the code of civil procedure.

In the exercise of its power to regulate commerce and establish post-roads, the United States may impair the navigability of a watercourse within a state; but it has no power, either as a land-owner or sovereign, to impair or obstruct the navigability of such water for the mere purpose of promoting or facilitating the working of mines upon the public lands, either by itself or its grantees.

The United States have not attempted nor intended to confer upon the defendants any right or privilege to foul or fill the waters in question, or to in any way injure the property of another or impair the use or enjoyment thereof as a means of working their mines or otherwise. The act of July 26, 1866, 13 Stat. 251, and the acts of July 9, 1870, 16 Stat. 217, and May 10, 1872, 17 Stat. 91, amendatory thereof, only purport to allow the "exploration" and "occupation" of the public mineral lands and to provide for their sale under certain circumstances, subject to the power of the state to make rules concerning "easements and drainage necessary to their complete development." But this latter clause does not confer any power over the subject upon the state which congress did not possess. Indeed, it is only a prudential declaration of what there ought never to have been any doubt about, that the sale by the United States to the purchaser did not prevent the state from exercising whatever police power it may of right have over the subject.

The state has not authorized the defendants to use these waters or the adjacent lands, for the purpose of depositing therein or thereon their mining debris, otherwise than by section 1238, subdivision 5 of the code of civil procedure, which provides that "dumping places for working mines" and "outlets natural or otherwise" for the flow of tailings may be taken under the right of eminent domain as for a public use.

The supreme court of the state has already decided that this subdivision 5 is unconstitutional when applied to a case of a single person seeking to condemn private property, as a dumping or flowing place for mining debris. And it is difficult to see on what ground a taking of property by any number of persons for such a purpose can be held to be a taking of private property for a public use. But be that as it may, this section does not authorize the defendants to use the plaintiff's land, or the easement appurtenant thereto, as a dumping ground or flowing place for the tailings from their mines until the same has been duly condemned for that purpose and compensation made to the owner.

By section 3 of the act admitting the state into the Union, 19 Stat. 452, it is declared, "that all the navigable waters within the state shall be common highways." If these words mean anything, the state is thereby restrained from obstructing or authorizing obstructions to the navigation of the Feather and Sacramento, which shall prevent their being used as common highways, according to their capacity and condition when the

state was admitted. See Hatch v. Wallamet Iron Bridge Co., 7 Saw. 127.

The defendants have no prescriptive right to do the acts complained of.

And, first, there is no such continuity of possession, occupation, or use between these defendants and the many persons who may have preceded them in the occupation or working of the mines in this region, and the commission of similar wrongful acts to the injury of the plaintiff, or his co-sufferers, so as to entitle them to claim the benefit of such acts or the time occupied by them in support of their plea of prescription. But as the rule is, that the use of an easement for such time as the statute makes an adverse possession a bar to the recovery of the possession of the premises establishes a prescriptive right thereto, this question is not material, as the defendants appear to have been in the use of the rivers and adjacent lands for the flow and deposit of their tailings for five years before the commencement of this suit. But this is a public nuisance. No one can acquire a right by prescription to commit a public nuisance as against the public; and I think the better opinion is, that an individual who sustains a special injury from such nuisance may maintain a suit for its abatement or an injunction to restrain its further commission without reference to the lapse of time.

But it is essential to a prescriptive right to an easement in or upon the property of another that the owner should *acquiesce* in the use, while five years' uninterrupted use of the waters of the Yuba and Feather by the defendants, as a place of flow and deposit for the debris of their mines, so as to fill the channels to a depth of no more than ten feet, might under some circumstances be sufficient evidence of an acquiescence in such use by the plaintiff, it is not evidence of his acquiescence in the use of such waters for that purpose, so as to fill their channels to a depth of eleven, twelve, or more feet. The difference of one foot in fill may make a very material difference in the result to the plaintiff, both as to the navigation of the rivers and the depth and extent of the consequent overflow and deposit on the adjacent lands.

In the case of a continuing and increasing trespass, it would be both illogical and unjust to infer an acquiescence in the latter and more injurious act, merely from an acquiescence, actual or presumed, in the earlier and less harmful one.

Now, the evidence in the case shows beyond a doubt that the fill of the rivers, and the consequent overflow and spread of the tailings, has increased year by year, for the past ten years. And if the defendants continue to work their mines as they have done, this increase may reasonably be expected to go on from year to year, requiring an additional outlay for the erection and elevation of levees each year, and causing greater risk and danger to the persons and property in their vicinity.

There is no direct evidence of acquiescence in this case; and there is really little or no reason in the circumstances for saying that the plaintiff or the community affected by the deposit of mining debris in these waters ever acquiesced in any proper sense of that term in the conduct or state of things which has finally resulted so injuriously to him and them. Rather, it may be said, that they have borne a burden—not so heavy or dangerous at first, but gradually growing more so, until it has become intolerable—which, owing to the state of things heretofore existing in California, they could not well avoid if they would.

But as the developments of later years, following the introduction

into the mines of those wonderful hydraulic engines, "The Monitor" and "Little Giant," throwing a stream of water upon the gravel and sand banks in some instances of nine inches in diameter, under a pressure of from two hundred to five hundred feet, have shown the serious character of the injury produced and threatened to be produced by this Titanic and unlimited washing of the mountains into the rivers and on to the adjacent lands, the agricultural and commercial interests and communities injuriously affected thereby have begun to make themselves heard where once the temporary convenience and individual will of the miner was the only law. Since then the persons suffering from this wrong have objected and protested against its continuance in many ways, until finally they have, in the person of this plaintiff, appealed to this court for the relief to which they are entitled.

There is no statute of limitations applicable to this suit. Section 319 of the code of civil procedure of California, cited by the defendants, is confined to actions involving the right to the actual possession of or the title to real property, and not a mere easement in the land of another. When, by lapse of time, accompanied by an undisturbed user, a party acquires an absolute right to such easement, he is said to be entitled by prescription.

On the argument, counsel for the defendants insisted that dams could be built on the Yuba, above the valley, as, for instance, at a place called "The Narrows," just above Smartsville, that would prevent the flow of debris from the mines and permanently detain them in the mountain courses of the river; and upon this assumption it was asked that if the court found that the defendants were committing a nuisance to the injury of the plaintiff, as alleged in the bill, it would, instead of enjoining them directly, require them to construct, or cause to be constructed, dams sufficient to impound their debris in the bed of the stream before it reaches the valley, and in the mean time allow them to operate their mines as at present. In other words, the court is asked to allow the defendants to continue the commission of the nuisance unrestrained until they can try the experiment of abating or preventing it by means of a dam.

In my judgment, this would be a most lame and impotent conclusion from the premises. If the defendants can devise and carry out some lawful plan for impounding their debris in the mountains, they are at liberty to do so, so far as the plaintiff is concerned, but the experiment ought not to be tried at the expense of the plaintiff or by the denial or postponement of the relief to which he is now entitled. The injunction which the plaintiff seeks will not prevent the defendants from building dams, if they are otherwise entitled to do so, or from ultimately working their mines if it is found that by such means it can be done without injury to the plaintiff.

Whether a dam can be constructed to stand the pressure to which it will necessarily be subject under these circumstances, and whether it will be of any material use in preventing the flow of the debris and the filling of the river below, are questions upon which I am not fully advised. But from the evidence in the case, and my observations of the premises, I am strongly impressed with the belief, that sufficient of the debris would still pass over the dam in suspension with the water to maintain and even increase the present fill of the river.

Besides, it is a very serious question in my mind whether any person

or community can or ought to be required to submit to the continuous peril of living under or below such a dam as this must necessarily be, if it is made high enough to impound the coarser material; and this merely for the convenience of another person or persons in the pursuit of his or their private business. It may be likened, at least, to living in the direct pathway of an impending avalanche.

I think the plaintiff is entitled to the relief asked, and concur in the decree ordered.

CIRCUIT COURT, DISTRICT OF OREGON.

MILLER *v.* TOBIN.

Filed December 10, 1883.

RECORD, WHAT CONSTITUTES, UNDER THE ACT OF 1875.—The term "record," as used in sections 3 and 7 of the act of 1875 (18 Stat. 470), held to include the testimony taken and on file in a cause at the time of filing a petition and bond for its removal from a state court.

JURISDICTION OF STATE COURT, WHEN IT CEASES.—Upon the filing of a petition and bond in due form and effect for the removal of a cause from a state court, whether in vacation or term time, in a case removable under the act of 1875, the jurisdiction of the state court ceases at once, and depositions taken thereafter before a referee theretofore appointed to take the testimony in the case, are no part of the record or proceedings therein.

RIGHT OF REMOVAL BY DEFENDANT NOT LOST BY INSUFFICIENT DENIALS IN ANSWER. When it appears from the case made by the complaint that it arises under an act of congress, the right of removal by the defendant is not lost by reason of insufficient denials in the answer.

TIME FOR FILING PETITION FOR REMOVAL.—A hearing on a demurrer to a complaint, and an order overruling the same and allowing the defendant to answer to the merits of the case, is not a "trial" within the meaning of that term as used in section 3 of the act of 1875, *supra;* but such "trial," whether it be an issue of fact or law, is one upon which a final disposition of the case is made.

"TRIAL" AND "HEARING."—"Trial" is a common-law term, to denote that step in the case by which the facts are ascertained, and is always final unless the matter is set aside for cause. "Hearing" is an equity term, and may denote the argument and consideration of a case at more than one stage of its progress; but when it results in an absolute disposition of the case it is called "final;" but the term "trial," as used in the act of 1875, *supra*, comprehends that step or proceeding in a cause at law or in equity, which results in a final judgment or decree, whether the "trial" be of an issue or question of law or fact.

SUIT in equity to compel a patentee of land to convey the same. The opinion states the facts.

N. B. Knight, for the plaintiff.

James F. Watson, for the defendant.

DEADY, J. This is a motion to remand this cause to the state court. A brief statement of the pleadings and proceedings therein is necessary to a correct understanding of the points made by and on the argument of it.

On April 6, 1883, the plaintiff commenced suit in equity in the circuit court of the state for the county of Klamath, to compel the defendant to convey the legal title and deliver the possession to him of a certain tract of land containing one hundred and sixty and sixty-six one hundredths acres, and situate in said county; the same being parts of sections 17, 18, and 19 of township 39 south, and of range 9 east of the Wallamet meridian, upon substantially the following allegations of fact:

That said land is swamp and overflowed, and on January 15, 1872, the agents of the state, in pursuance of the act of October 26, 1870, to provide for the selection and sale of the swamp and overflowed lands granted to the state by the act of March 12, 1860, selected it, as such, and gave notice thereof to the United States surveyor general and local land office; and in September of the same year sold the premises to the plaintiff, who then paid them twenty percentum of the purchase price thereof; and on July 5th, said agents, upon proof that the plaintiff had reclaimed said land, and the payment of the balance of the purchase money, made a conveyance of the same to him.

That by the last survey of said township, made in 1872, and approved in April, 1873, said land was returned as "public land;" and on May 3, 1873, the defendant duly claimed the same, in the proper land office, as a pre-emption, and on April 24, 1875, made proof in said office of his compliance with the laws of the United States as a settler thereon under the pre-emption act, and on October 6, 1875, a patent was issued to him therefor; and that the defendant well knew the land in question was swamp and overflowed, and that his proof of compliance with the pre-emption act was false and fraudulent.

On April 24, 1883, the defendant demurred to the complaint because it did not state facts sufficient to constitute a cause of action, with three special assignments, to the effect that the suit was barred by the lapse of time, and a fourth to the effect that the sale to the plaintiff was valid, under the proviso to section 1 of the act of March 12, 1860, by which the United States reserved the right to dispose of any land within the purview of said act, to a settler under the pre-emption act, at any time before the title thereto is confirmed to the state; and on May 22d the same was overruled, with leave to the defendant to answer to the merits.

On May 23d the defendant answered the complaint, denying the material allegations therein, except that of the sale by the plaintiff, and alleging that the plaintiff's proof of reclamation was false and fraudulent, and that he never did anything to drain the land or make it any more fit for cultivation than it was on March 10, 1860, and that the land is "wetter" now than it was then; that the defendant has had ten acres of land under the plow, on which he raised "wheat, rye, barley, oats, potatoes, and cabbage," besides five acres in timothy, and that none of the remainder of said land has ever been cultivated, either in "grass, cereals, or vegetables;" and that he has put improvements thereon of the value of one thousand and seventy dollars, consisting of one mile of fence, a cabin, corral, barn, and bridge.

On May 23d, so much of the defendant's answer as alleged the failure of the plaintiff to reclaim this land and the false and fraudulent character of his proof thereabout, was stricken out on motion of the plaintiff.

On the same day a replication was filed in the case, in which the defendant is styled "Collahan," commencing: "The *defendant*, for replication to the defendant's answer," etc. Opposite, in the margin, the clerk or copyist has volunteered this statement: "Error in the name of the defendant." However, the matter is not material now, as the replication only denies that the defendant acted in good faith, and that his improvements were worth more than four hundred and twenty dollars.

On May 24th, the state court made an order, "by consent of all parties," referring the case to its clerk as a referee to take the testimony therein.

On July 31st, and in vacation, the defendant filed a petition and bond in due form and effect for the removal of the cause to this court, upon the ground that it arose under a law of the United States, namely, the act of March 12, 1860, aforesaid.

On August 3d the referee caused notice to be served on the parties that he would proceed to take the testimony in the case on the eighth inst.

On August 23d the defendant filed a motion to remove the cause to this court, based upon the petition and bond aforesaid, and on August 27th, the first day of that term, the plaintiff filed a motion for judgment on the pleadings, which the court took no action upon, but made an order removing the cause, and directed the clerk to "make out a transcript of all the pleadings, motions, and orders" of the court and deliver the same to the defendant. On the same day the referee reported that he had taken the testimony in the case on the eighth and twenty-third of August, "both parties having rested" on the latter day, and submitted the same to the court.

In his certificate to the transcript, dated September 12th, the clerk states that it is a copy of all "the original pleadings, motions, and orders" in said cause, together with the original petition and bond for removal—"excepting the testimony in said cause, which now remains full and complete in my office, for the reason that the defendant refuses to pay for a transcript of said testimony."

The motion to remand was filed on October 25th, and is based on the following grounds:

1. The defendant has not filed in this court a copy of the record as required by law.

2. That this court has no jurisdiction of the parties or subject-matter, because all the material allegations of the complaint are admitted by the answer, and therefore there is no issue in the case involving the construction of an act of congress, as alleged in the petition for removal.

On November 1st the defendant filed a motion for leave to file a transcript of said testimony. This motion was argued and submitted with the motion to remand on November 10th.

The first ground of the motion to remand involves the interpretation of the word "record" as used in the judiciary act of 1875.

By section 3 (18 Stat. 471) of this act, the party applying for the removal of a cause must give a bond conditioned that he will enter in the circuit court on the first day of its next session "a copy of the *record* in such suit;" and in section 7, further time is given in a certain contingency for filing "said copy of *record* in said circuit court."

At common law the term does not include depositions or other evidence used in the trial of a case, unless they are made a part of the record by a bill of exceptions.

At one time the memorial of the pleadings and proceedings of the court of chancery, when exercising equity jurisdiction, was not thought to have the dignity and effect of a record, nor was the court considered a court of record, as its power to fine and imprison was denied: 2 Bac. Abr. 392, n. d.; 4 Inst. 84. But in the progress of time and the growth of the equity jurisdiction of the court, the equality of the same in this particular with the common-law courts has been tacitly conceded or declared by statute: Story's Eq. Jur., sec. 547.

The statutes concerning writs of error and appeals use the term in apparently the same sense, and so as not to include the testimony merely

on file in the case. By section 997 of the revised statutes, it is simply provided that there shall be returned with a writ of error an "authenticated transcript of the record;" while by section 698, it is provided in appeals in cases in equity that there shall be transmitted to the appellate court "a transcript of the record" and also "copies of the proofs."

In the case of a removal under section 12 of the act of 1789 (1 Stat. 79), the application had to be made at the time of the defendant's appearance, and copies of the "process" against him were required to be filed in the circuit court, which included the declaration or other paper by which the suit was commenced in the state court: Martin v. Kanouse, 1 Blatch. 149.

But in a removal under the act of 1865, and the amendment thereto of 1867 (14 Stat. 306, 558; R. S., sec. 639), the application may be made at any time before trial or final hearing of the cause, and the party causing the removal is required to file in the circuit court "copies of the process against him and of all pleading, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner."

Considering the nature of the provisions on this subject in the acts prior to that of 1875, and the apparent purpose and intent of all of them to provide for the removal of a cause as it may stand in the state court when the petition for such removal is filed, my opinion is, that the term "record," as here used, ought to be held to include the process, pleadings, depositions, etc., as set forth in detail, in the act of 1866, on file in the cause at the time of removal. What has been duly or regularly done in the cause up to that time is a part of it, and ought not to be separated from it on a removal for trial in the circuit court.

Technically speaking, a deposition may not be a part of the "record," even in a suit in equity; but it is a part of the cause upon which its correct determination may depend, and for this purpose ought to be considered a part of the "record."

But it is contended by the counsel for the defendant that even upon this construction of the statute, the depositions in question are no part of this record, because: 1. The jurisdiction of the state court ceased upon the filing of the petition for removal on July 31st, while the depositions were not taken until between the eighth and twenty-third of August; and, 2. That even if its jurisdiction did not cease until August 27th, the first day of the term next following the filing of the petition, when it made the order for removal, still, although it appears from the file marks of the clerk that the report of the referee was filed on that day, it does not appear that it was filed before the order of removal was made.

It is suggested by counsel for the defendant that the clerk of the state court, who was also the referee in the case, is desirous of having it appear that these depositions are a part of this record, so that he may receive the fees for taking and copying them.

In the order of removal, the court directs the clerk to make a transcript or copy of the record, containing "all the pleadings, motions, and orders," but is silent as to testimony. In the certificate of the clerk to the transcript, some pains are taken to show that it does not contain the testimony in the case, which, it is therein stated, "now [September 12th] *remains*" in the clerk's office, but when it was *filed* therein, if ever, is not stated.

But it is not material what the fact is in this particular. The jurisdiction of the state court ceased on the filing of the petition and bond, and

the power and authority of the referee under the order of reference then came to an end also. The subsequent order of removal was not the cause of the court's losing its jurisdiction. At most, that was only a convenient mode of manifesting its acceptance of the petition and bond, as required by section 3 of the act of 1875, and took effect by relation from the date of filing the same.

In Osgood v. Chicago etc. Co., 6 Biss. 344, Judge Drummond held that a petition and bond filed in vacation, for removal of a cause, had the like effect as one filed in term time, and that upon the filing of the same, the jurisdiction of the state court ceased. And in Railway Co. v. Mississippi, 102 U. S. 141, Mr. Justice Harlan, speaking for the court, said: "It [the state court] was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal." To the same effect is the ruling in Kern v. Huidekoper, 103 Id. 492; Railway Co. v. Koontz, 104 Id. 14; and Steamship Co. v. Tugman, 106 Id. 122.

And it matters not that the parties appear to have gone before the referee and engaged in taking this testimony in pursuance of a notice from him to that effect, after the presentation of the petition and bond. This may have been done, so far as the defendant is concerned, for divers reasons; and having been required by the referee to appear, he was entitled to do so, if he thought best, and lost no right by so doing. His action in this respect can not have the effect to restore the jurisdiction of the state court: Railway Co. v. Koontz, 104 U. S. 15; Insurance Co. v. Dunn, 19 Wall. 222.

The second ground of the motion is a novel one.

This case, it is admitted, arises under an act of congress. Both the claim of the plaintiff and the defense of the defendant, apart from that of the lapse of time, so arise—the former under the swamp-land act of March 12, 1860 (12 Stat. 3), and the latter under the pre-emption act. The case made by the plaintiff is clearly one of national jurisdiction, and removable to this court by either party under the first clause of section 2 of the act of 1875. But, admitting this, the plaintiff contends that the defendant, by the use of a conjunctive or literal denial in his answer, as that the land is not swamp *and* overflowed, or that the defendant's proof of compliance with the pre-emption act was not false *and* fraudulent, has impliedly admitted that the land is either swamp or overflowed, and that the proof is either false or fraudulent, and therefore has not denied that the land is either swamp or overflowed, or the proof false or fraudulent, but only that the former is not both swamp *and* overflowed, and the latter false *and* fraudulent; and that thereby he has admitted the plaintiff's case, and therefore there is no issue in the pleadings involving the construction of an act of congress, and therefore there is no case for removal—citing Scoville v. Barney, 4 Or. 288; Moser v. Jenkins, 5 Id. 447; Kuhland v. Sedgwick, 17 Cal. 123; Woodworth v. Knowlton, 22 Id. 164.

But I think it is a mistake to say that the right of removal in this case depends upon the nature of the issues or defense made by the defendant's answer. As soon as the suit was commenced, and before there was any defense made in the case, or it was known there would be any, the right of removal attached, and continued until the time for filing the petition for removal expired.

It may be that after a failure to answer, which in effect confesses the plaintiff's cause of action, or an answer which expressly confesses it.

the right of removal is gone, there being no longer any dispute or contention between the parties. The admission takes the place of a "trial," and a petition for removal must precede the one as well as the other. But so long as the answer does not expressly admit the plaintiff's cause of action, but makes or attempts to make a defense thereto, however unskillfully stated or insufficient in law, the right of removal is not prejudiced thereby. Nor do I think that the allegation that this land is "swamp and overflowed" should be classed, for the purpose of denial, in the same category with a simple allegation as to time or amount or of the commission of an act unlawfully or with a particular intent, in which case a mere literal denial of the allegation is not deemed sufficient to controvert it.

Besides, the phrase "swamp and overflowed," as defined by section 2 of the Arkansas swamp-land act of 1850, is merely the equivalent of the phrase "wet and unfit for cultivation," and therefore land which is too "wet" for cultivation is "swamp and overflowed," whether the water flows over it or stands upon it. In this sense the adjectives "swamp" and "overflowed," taken together, qualify the noun "land" in but one particular—express but one fact concerning it—that is, it is too wet for cultivation, and this may be traversed by a literal denial.

As what is false is not necessarily fraudulent, particularly as to the person who may use the falsehood without being aware of its falsity, the adjectives "false" and "fraudulent" may express different qualities of the noun "proof," and therefore a literal denial of the allegation that the defendant's proof of compliance with the pre-emption act was "false and fraudulent," is not well controverted by the literal denial thereof in his answer.

But admitting that these denials are insufficient, and that the plaintiff is entitled to a judgment on the pleadings or a decree on the bill and answer, still the defendant was entitled to remove the cause into this court, and have that question, as well as any other that may arise in it, determined here.

A motion was made by the plaintiff in the state court for a judgment on the pleadings, after the filing of the petition for removal, but the court does not appear to have taken any notice of it, for the reason, presumably, that its jurisdiction over the case, except perhaps to give direction to the clerk for the delivery of the copy of the record, was gone.

Again, the defendant may ask leave to amend his answer in this particular, if it is thought material, and no court would refuse such an application, if made before the trial or motion for judgment was decided.

Besides, upon an application for judgment on the pleadings or a hearing of the cause on bill and answer, the question will arise as to whether the United States, by the proviso to section 1 of the act of 1860, did not reserve to itself the right to dispose of any swamp and overflowed land in Oregon, under any law theretofore enacted—as the pre-emption law—at any time before a patent was issued therefor to the state, as provided in section 2 of the Arkansas act of 1850; and whether the condition of this land, as to being swamp and overflowed or not, has not been conclusively determined against the plaintiff by the department of the interior in receiving and allowing the application of the defendant to enter the same under the pre-emption act, and the issue of a patent thereon to him: Cahn v. Barnes, 7 Saw. 52.

On the argument, counsel for the plaintiff made another point that is

not in the motion; namely, that the application for removal of the cause having been made after the hearing on the demurrer to the complaint, and the order overruling the same, was not made before the "trial" of the cause, and therefore came too late.

It may be admitted that a hearing and determination of a cause upon a demurrer to the complaint is a "trial" of the same within the meaning of that term as used in section 3 of the act of 1875. But if upon the hearing of the demurrer the same is overruled, but instead of the court's giving judgment upon the complaint for the plaintiff, it makes an order allowing the defendant to answer or plead to the merits, I do not think there has been a "trial" of the cause, within the meaning of the act, so as to preclude the right of either party to apply for a removal of the same. The "trial" contemplated by the act is a final one, in which the cause, as far as the judgment of the state court is concerned, is ended. In the act of 1866, *supra*, the language used is "trial or final hearing," and in that of 1867, *supra*, it is "final hearing or trial." In the revised statutes (sec. 639, subs. 2 and 3) the language of the first act is used. But I regard the difference between them as one merely of collocation of words and not sense. "Trial" is a common-law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided. It was also formerly applied to the hearing on a demurrer, as the trial of an issue of law. It is always final unless the verdict or result is set aside for cause. "Hearing" is an equity term, and is properly applied to the argument and consideration of a case at the several stages of its orderly progress, but when applied to that upon which the case is absolutely determined—disposed of—it is qualified by the word "final."

In Insurance Co. v. Dunn, 19 Wall. 224, it was held under the act of 1867, that where, by the local law, the defendant, after a verdict against him, was absolutely entitled to a "second trial," on giving bond to abide the judgment of the court, and he did so, he might thereafter remove the cause to the circuit court.

In delivering the opinion of the court, Mr. Justice Swayne said: "It [the statute] was intended to permit the removal at any time before a hearing or trial, final in the cause as it stood, when the application for the transfer was made."

The act of 1875 simply uses the word "trial"—providing that the petition for removal of a cause shall be filed "before the trial thereof," whether it is an action at law or a suit in equity—and should be construed as only applicable to that step or proceeding in the progress of the case which results in a final disposition of it. And so, in my judgment, when a cause is submitted to a jury and no verdict is given, or the one given is set aside, or when a cause is heard upon a demurrer and no final judgment or decree is given thereon, but leave is given to amend or answer over, as the case may be, there is no "trial" within the meaning of the act, and therefore, at any time before a trial of an issue of fact or law which results in a final disposition of the case, and during the term at which such trial may be had, a party entitled to remove the same may file his petition and bond therefor with effect.

See also the cases of Yulee v. Vose, 99 U. S. 544; Removal Cases, 100 Id. 473; Hewett v. Phelps, 105 Id. 395.

The motion to remand is denied, and also the motion to file the testimony taken before the referee after the petition and bond for removal were filed.

WEST v. HOME INSURANCE CO. ET AL.

Filed December 12, 1883.

VERIFICATION OF ANSWER BY FOREIGN INSURANCE COMPANY.—A foreign insurance company that has appointed an agent here upon whom process may be served for it, as provided in sections 7 and 8 of the foreign corporation act (Or. Laws, 617), is not absent from the state, so that any agent or attorney thereof may verify its answer to a complaint, but such answer must be verified by the agent appointed under the statute to stand for the corporation, or by some other agent or attorney who has personal knowledge of the facts involved in the allegations therein.

VERIFICATION BY AN AGENT HAVING KNOWLEDGE OF THE FACTS.—Where an agent verifies an answer on the ground that the allegations thereof are within his personal knowledge, for the purpose of this verification, the allegations in the answer are to be taken as part of his statement, and it must appear therefrom that the truth or falsity of such allegations are within his personal knowledge.

WHERE AN ANSWER CONTROVERTS SUNDRY ALLEGATIONS IN THE COMPLAINT by simply denying any knowledge or information thereof sufficient to form a belief, and such answer is verified by an agent of the defendant who states in the verification that the facts contained in the answer are within his knowledge, it does not appear that such agent was authorized to verify the same, because of his personal knowledge of the material allegations therein, but the contrary.

PERSONAL KNOWLEDGE OF AN ALLEGATION IN AN ANSWER, within the purview of section 79, is a personal knowledge of its truth or falsity; and if the allegation is a negative one, this necessarily includes a knowledge of the truth or falsity of the allegation denied.

ACTION to recover insurance. The opinion states the facts.

Julius Moreland, for the plaintiff.

Ellis G. Hughes, for the defendants.

DEADY, J. This action is brought by the plaintiff to recover from the defendants the sum of three thousand dollars, the loss sustained by the burning of a store and stock of goods therein, at West Port, Oregon, on December 25, 1882, and while the same were jointly insured for that sum by the defendants.

The action was commenced in the state circuit court for this county on June 28, 1883. On August 9th, the cause was removed here by the defendants—they being citizens of New York and Connecticut respectively, and the plaintiff of Oregon.

On October 20th the defendants answered the complaint, and the plaintiff moves to strike out the same for want of a proper verification.

It appears from the complaint that in 1874 John West, David West (the plaintiff), and C. A. McGuire were partners in business at West Port, under the firm name of John West & Co., and that they continued so until 1878, when the business passed into the hands of John West, and was by him carried on under the old firm name until 1881, when he disposed of it to the plaintiff, who continued it on his account until December 25, 1882. During this time Allen & Lewis, of Portland, were the agents of John West & Co. and the plaintiff, and annually procured insurance on their store and merchandise at West Port, from the defendants, by ordering a renewal of the policy in a given sum and paying the premium therefor, and that on January 25, 1882, he directed a renewal of such policy in the name of John West & Co., in the sum of five hundred dollars on the store and two thousand five hundred dollars on the merchandise, and on December 25th thereafter the property was destroyed by fire; and that the store was then and had been owned by John West,

and the merchandise by the plaintiff, and on May 9th the former assigned his interest in the policy to the plaintiff.

It also appears from the complaint that the defendants, being foreign corporations, have each duly appointed Mr. Henry Failing their agent and attorney, upon whom service of summons may be made in this county, as provided and required in such cases by sections 7 and 8 of the foreign corporation act: Or. Laws, p. 617.

The answer is verified by E. Oldendorf, the local agent of the defendants at Portland, who states therein that he makes the affidavit because he "knows the facts" contained in the answer of his "own knowledge;" and that none of the "officers" of the defendants are within the state.

The answer contains several defenses to the action, called therein "separate and further answers and defenses," in which the facts alleged are stated unqualifiedly. Besides these, the answer contains denials of any knowledge or information sufficient to form a belief as to whether the firm of John West & Co. was constituted as alleged, or the plaintiff purchased the business and carried it on, and the last insurance procured in the firm name was procured and paid for by him, or the store was owned by John West and the merchandise by the plaintiff, or the same was destroyed by fire, or the plaintiff damaged thereby, or John West assigned his interest in the policy to the plaintiff as alleged; and adds thereunto "and, therefore, they deny the same."

Section 79 of the code of civil procedure requires that an answer shall be verified by the party, his agent or attorney, to the effect that "he believes it to be true." The verification must be made by the affidavit of the party; but if he is absent or incapable of making it, his agent or attorney may make it; and such agent or attorney may make it in any case, "if all the material allegations" of the answer are within his "personal knowledge." In the case of a corporation, the verification may be made by any officer thereof, upon whom service of a summons might be made.

For the purpose of this question, I do not think the defendants can be regarded as absent from the state. They are here by their agent or attorney appointed under the act, to stand for and represent them in the courts, in all proceedings therein against them. Without this statute agent they can not exist here, and with or by means of him they are for the purpose of this litigation within this jurisdiction. As he is the only officer or agent upon whom service can be made for the defendants in this state, it follows that he is the only one who can verify their answer, unless it be an agent to whom all the material allegations are known. An answer may be verified by such an agent in any case.

But the agent who makes this verification does not appear to have this knowledge. The answer denies that the defendants have any knowledge or information sufficient to form a belief of most of the allegations of the complaint, some of which are certainly material, and all of them are presumably so, or they would not have been denied.

The agent states, in his verification, in effect, that he has personal knowledge of the "facts contained in the answer," but he does not say that all the material allegations therein are within his personal knowledge.

Of course the affiant may know that he does not know whether the allegations thus denied are true or not. Beyond this his knowledge is not shown to extend. And if this is sufficient to enable an agent to verify an answer, in place of the party, it will never be difficult to find and often

convenient to have one who can deny the allegations of an adversary's pleading on the ground of ignorance of the subject-matter, and thereby put him to the labor and expense of proving what would otherwise be admitted.

Strictly speaking, the answer is the allegation of the defendants, and the verification is the affidavit of the agent making it. But in effect, and for the purpose of verification, I think the answer must be considered as the allegation of the agent. And it must appear therefrom that the material allegations of the latter are within his personal knowledge.

Now, an allegation within the personal knowledge of the party making it is one whereof he knows the truth or falsity. And if this allegation is a negative one, it is necessarily implied that he knows the truth or falsity of the allegation denied. For instance, if the answer to the allegation of the plaintiff concerning the destruction by fire of the insured property and his loss thereby contain merely a denial of any knowledge or information thereof sufficient to form a belief, and the agent who verifies it says the facts contained in the answer are within his personal knowledge, this, taken together, is in effect an admission that the agent has no knowledge of the subject of the allegation or the facts involved in it, and therefore is not qualified to make the verification.

On the other hand, if the averment in the verification as to the agent's knowledge is considered sufficient to authorize him to verify the answer, then the answer is so far manifestly false and sham, because the averment therein is, that he has no knowledge or information on the subject.

Giving section 79 a practical construction, so as to secure the end for which it was enacted, to prevent parties from putting in issue and contesting facts which *they* can not affirm or deny on oath, I think that when a defendant seeks to have his answer verified by the oath of a third person, on the ground that the matter is within the personal knowledge of the latter, there can be no traverse of an allegation in the complaint by a mere denial of any knowledge or information thereof.

In the nature of things, that form of denial must be allowed where the answer is verified by the party. He has no choice, and can only admit or deny directly so far as his knowledge or belief extends, but when an agent volunteers or is selected to verify an answer on the ground of his knowledge of the facts, it must appear from the answer as verified that he has such knowledge. But if the answer merely denies any knowledge or information of the allegation sought to be controverted, and the verification only states that the facts contained in the answer are within the agent's knowledge, this amounts to an admission that he has no knowledge of the matter, and therefore is not qualified to make the affidavit. The party himself could in any case answer that far, and it may be further.

The motion to strike out is allowed, and if asked, it would have been allowed on the further ground that it was filed by the clerk contrary to rule 5 of this court, in this, that it contains both "erasures" and "interlineations."

Wells, Fargo & Co. *v.* Oregon and California Railway Co.

Filed December 24, 1883.

Duty of Railway Company to Express Companies doing Business on its Road—Must Furnish Equal Facilities to All.—The defendant was enjoined by this court to continue to furnish the plaintiff such express facilities on its road as it had been furnishing under an agreement between the parties, one provision of which is to the effect that the defendant will carry for the plaintiff, not exceeding eight thousand pounds of "freight and express matter," over the road daily, on a fast train, for the sum of one thousand dollars per month, but the plaintiff must not deliver any such "freight" or "matter" at less than a stipulated price per pound; thereafter the defendant commenced to furnish express facilities to the Northern Pacific Express Company, upon the same terms and conditions, as it alleges, that it furnished them to the plaintiff, but allowed said Northern Pacific express to deliver freight at a lower rate than the plaintiff was permitted to do, and thereupon the latter commenced to deliver freight for the same rates as said Northern Pacific, whereupon the defendant, conceiving itself aggrieved thereby, moved the court to modify the injunction so as to prevent the plaintiff from carrying any freight or express matter at the reduced rates, or to permit the defendant to increase the compensation to be paid it by the plaintiff so as to prevent the same.

Held: 1. That the defendant has no right to discriminate between the express companies, but must furnish equal facilities to both.

2. That although the plaintiff is in effect required by the decree to deliver this eight thousand pounds of matter, or any portion of it, at not less than the prescribed rates, still if the defendant permits the Northern Pacific to deliver any portion of the like eight thousand pounds carried for it at less than such rates, this is necessarily a permission to the plaintiff to do the same.

3. *Semble*, that it is the duty of the defendant to use reasonable diligence to ascertain if either company is violating the condition upon which the facilities were granted to it, to the prejudice of the other, and if so, to exclude it from the same; and certainly, where the failure to keep such condition is brought to its knowledge by the injured company, or otherwise, unless it does interfere effectively, it will be presumed, in favor of the latter, to have waived such condition as to both.

Express Facilities.—Ferriage on the railway ferry of the defendant, if not absolutely an express facility, to which the plaintiff is entitled, becomes so when furnished to the Northern Pacific by the defendant.

Motion to modify an injunction. The opinion states the facts.

Cyrus A. Dolph and *Rufus Mallory*, for the defendant.

M. W. Fechheimer, for the plaintiff.

Deady, J. On December 11, 1882, the defendant was enjoined and required by a decree of this court, given in this case, to furnish the plaintiff the express facilities on and over its lines of railway that it was then and had been doing, and upon the same terms.

On November 16, 1883, the defendant filed a motion for the modification of said decree, on the petition of the Oregon and Transcontinental Company, verified by the affidavit of the manager of said railway, Mr. R. Koehler, from which it appears that said company is a corporation formed under the laws of Oregon, and that since the date of said decree it has become the lessee of the defendant's lines of railway, and acquired all its "rights and interests" in and to "the transportation business thereof," and particularly under a certain contract made between the plaintiff and defendant on October 14, 1876, concerning the transportation of express matter by the latter for the former, by which the cost of said transportation and the rates to be charged the public by the plaintiff were fixed, which contract was still in force at the date of said decree; that the plaintiff is now "wrongfully and fraudulently taking advantage of said injunction," and has reduced its rate of charges for "carrying the matter confided to it" over the defendant's road below that fixed by

said contract, and below the "regular charges" of the lessee for transporting ordinary freight over the same, thereby increasing the business done by the plaintiff to the injury of the "general freighting business" of the lessee; that the plaintiff is transporting over said road as "express matter" large quantities of merchandise not properly belonging to the business of carriers by express, for no other reason than that the charges are less than the regular charges for freight.

The petition concludes with a prayer for the modification of the injunction, so "as to compel the plaintiff to limit its business to a proper and legitimate express business," and to charge such rates for the carriage of goods as are provided in said contract; and to enable the defendant, "by fair and proper charges, to protect itself from injury by the wrongful acts of the plaintiff."

On November 23d, the plaintiff filed an answer to the petition, verified by the affidavit of its superintendent, Mr. Dudley Evans, by which it first denies in detail, but generally with a negative pregnant, all the allegations of the petition, and then admits and alleges that on October 14, 1876, it made a contract with the defendant for the transportation of its express matter over the railway of the defendant, as shown by a copy thereof annexed to said answer, from which, among other things, it appears that the plaintiff, in consideration of the payment by it to the defendant of one thousand dollars per month, was entitled to carry in a car set apart for its use, on each passenger train, eight thousand pounds of "express matter and freight," for which it was to charge, on all lots of less than one hundred pounds, "not less than double first-class railway freights," and for lots of greater weight, not less than one and a half times such rates, or the rates specified in a schedule therein, for all the stations between the then termini of the road—Portland and Roseburg—and in case "the freight" offered by the plaintiff for carriage should exceed eight thousand pounds in weight, the defendant was bound to carry the same, and the plaintiff to pay therefor at the rate of one and a half the first-class rates then charged by the defendant.

The contract also contains provisions to the following effect:

1. That neither the defendants nor its employees shall carry express matter on a passenger train; 2. That the defendant will not, as I construe the ambiguous language of the provision, contract with any other express company or association for "better facilities than are granted" to the plaintiff; and, 3. That the contract shall go into effect on November 1, 1876, and continue in force for one year, and from year to year thereafter, unless notice is given by *one of both parties*, at least one month previous to the end of the contract year, of a withdrawal therefrom.

The answer also alleges that the Northern Pacific Express Company is a corporation largely owned and controlled by the same persons who control the defendant corporation and the Oregon and Transcontinental Company; that for the past three or four months said express company has been, and still is, doing an express business on the defendant's railway, and that it is afforded thereon more and better facilities at cheaper rates than the plaintiff; that said express company is permitted to carry "freight and express matter" at rates much less than the regular railway rates, and that it has threatened and still threatens to carry "freight and express matter" for ten cents per hundred pounds less than the plaintiff may charge for the same service; and that said Oregon and

Transcontinental and express companies are by such means attempting to injure and destroy the business of the plaintiff.

The answer also contains an allegation to the effect that the plaintiff has never carried on any one train over eight thousand pounds of matter, nor on an average over three thousand pounds.

On the same day the defendant filed a reply, verified by the affidavit of said manager, to the effect that by the agreement with the Northern Pacific Express Company, it is to have the same facilities and upon the same terms as the plaintiff, and not otherwise, and that if said express company has carried "freight and express matter" over the road at less than the prescribed rates, it has been done without such manager's knowledge or consent, and in violation of the terms of the contract.

On the argument it was conceded that the Oregon and Transcontinental Company, not being a party to this suit, could not be directly heard in this matter, but although no direct attempt was made to prove that it had become the lessee of the road as alleged, yet the fact was tacitly admitted.

On the hearing the plaintiff read five affidavits, including one of its superintendent, from the latter of which it appears that the plaintiff is carrying and intends to carry freight and express matter at as low rates as the Northern Pacific Express Company, but not lower; and that within one week before the filing of this motion he informed the manager of the defendant's road that said express company was carrying freight at thirty per centum below first-class railway rates. From the other of these affidavits, none of which are contradicted in any particular, it satisfactorily appears that the Northern Pacific express is carrying between Roseburg, Oakland and Eugene and Portland for at least fifty per centum less, on an average, than the rates specified in the contract of October 14, 1876. And upon the whole case it appears that the plaintiff intends and is endeavoring to carry at as low rates as the Northern Pacific for the purpose of preserving its business, and not otherwise.

Before proceeding to the consideration of the particular question arising upon this motion, it may be well to glance at the origin of this controversy.

This suit was commenced on December 11, 1882, when an order was made that the defendant show cause why it should not be enjoined as prayed in the bill, and that in the mean time it be so restrained.

On March 19, 1883, after full argument, a preliminary injunction was allowed: 8 Saw. 600. This injunction is still in force, the case having since been heard on a demurrer to the bill, which was overruled by Mr. Justice Field.

It also appears that before the commencement of the suit that the defendant gave the plaintiff notice that it could not have any express facilities on its road after that year, as it intended to do the express business itself.

And first, my impression is, that the contract of October 14, 1876, is no longer in force, *proprio vigore*, between the parties. "One of both parties," meaning, I suppose, either party, could terminate and annul the contract at the end of any year, by giving notice of its intention to withdraw from it, and, as the defendant appears to have given such notice, it follows that the compact, as such, is at an end.

The relations between the plaintiff and defendant and their reciprocal obligations are now prescribed and measured by the decree of this court.

In making this decree, it adopted, for the time being, as a convenient and just definition and enumeration of proper express facilities and the terms and conditions upon which they should be furnished, the state of things or relations and obligations then existing between the parties. And this, of course, had the effect to prolong the provisions of this contract, applicable to the subject-matter, under which the parties had been acting for six years, and continue them in force as a part of the decree of the court.

And second, in canvassing the motives and acts of the parties, it must be borne in mind that the defendant desired and intended to withdraw all express facilities from the plaintiff for the purpose of taking the business exclusively into its own hands, and that although it was prevented from excluding the plaintiff from its road and has not directly undertaken to conduct the business itself, yet it is furnishing facilities to a company that is necessarily a rival of the defendants, and appears to be closely allied, if not identical in interest, with itself.

Upon the case made, there does not appear to be any ground for the complaint that the defendant is carrying more matter or of a different character from that it is entitled to; while it does appear from admission of counsel that the defendant is carrying the Northern Pacific wagons on its railway ferry across the Wallamet river at this place free of charge, while it compels the plaintiff to pay for a like service at the regular rates. Whether this ferriage is an absolute express facility, may be a question; but I am quite sure that if the defendant furnishes it to the Northern Pacific free of charge, it must do the same for the plaintiff. It can not discriminate against either, but must treat both alike.

In the nature of things, there can be no absolute and prescribed definition of "express matter." Like the phrase "express facilities," its scope and meaning may be modified by circumstances. And so long as the express company pays the railway company an agreed sum for so much space in a car, or weight carried therein, or one and a half times first-class railway rates for whatever it carries over its road, there is no need of any definition. It defines itself, and includes everything that the express company can get or afford to carry on those terms. And if it carries all the freight and express matter that goes over the road, it works no injury to the defendant, but a benefit.

Under the arrangement between the plaintiff and defendant, the former is entitled to carry eight thousand pounds of either "freight" or "express matter," if there is any difference between them, once a day each way, over the road of the latter, upon the payment of one thousand dollars a month, and as much more as it may desire upon the payment therefor at the rate of one and a half first-class railway rates. But, so far at least as the eight thousand pounds is concerned, the plaintiff is bound to charge the public the enhanced rates prescribed in the agreement. This condition was intended for the benefit of the defendant, and the observance of it might work to its advantage in this way: If eight thousand pounds of freight is offered on a given occasion, and only one thousand of it would bear carriage at express rates, the defendant would carry the other seven thousand pounds at railway rates, upon a slow train, and get the same compensation from the express company as if the latter had carried the whole of it.

But as to the freight carried by the plaintiff in excess of eight thousand pounds, and for which it must pay, not a lump sum, but one and a half

times first-class railway rates, it can make no difference to the defendant how light are the charges of the plaintiff nor how much freight it may carry.

But the plaintiff, in carrying any portion of the eight thousand pounds for less than the stipulated rates, is violating the contract or terms upon which it is entitled to the facilities it enjoys, unless the defendant by its conduct has waived this condition of the contract or furnished the plaintiff with an excuse or justification for not keeping it.

By the law of this case, until otherwise established by the supreme court, the defendant is bound to furnish the express company with reasonable facilities for the conduct of its business, and if there is more than one company doing business over its road, it must furnish equal facilities to all. To deal fairly and justly in this respect, and according to its obligation, the defendant must serve the express companies equally, and neither directly nor indirectly favor one or hinder the other. Whatever terms or favors it extends to one it must extend to the other, because the other becomes thereby entitled to them. No discrimination can be allowed; but equality of service, conditions, and compensation is the fundamental rule governing the business or transaction.

But, says the counsel for the defendant, we have made the same terms with these express companies; and if the Northern Pacific is delivering freight at less than the stipulated rates, we are not aware of it, and if we were, we are not responsible to the plaintiff for it. If the plaintiff is injured by the conduct of the Northern Pacific in this respect, it must seek a remedy against that company.

A grosser misconception of the relations and rights of these parties could hardly have been expressed in so few words.

These express companies are strangers to each other. They are each dealing with the defendant, and their relations are with it, and not one another. Whatever facilities or favors the defendant extends or permits to one, it must extend or permit upon the same terms to the other. It is therefore bound, I think, to exercise reasonable diligence to ascertain whether either of them is violating the contract or condition under or on which it is doing business on the road, to the prejudice of the other—as by delivering freight at less than the stipulated or prescribed rates; and if so, to take the proper measures to prevent a continuance or repetition of such conduct.

Certainly, if it is brought to the knowledge of defendant that the Northern Pacific is cutting rates, it would be its duty to exclude the latter from its road, unless it intends to permit the plaintiff to do the same thing. And in such cases, if it takes no steps to prevent the Northern Pacific from carrying for less than the established rates, the inference must be that the defendant permits it to do so, and therefore it ought not to be heard to object if the plaintiff does the same. And if the defendant was ignorant of the conduct of the Northern Pacific, because it was willfully blind to it, or did not care to know the fact, the same consequence would follow.

The defendant has ascertained that the plaintiff is delivering freight below the stipulated rates, and doubtless might as easily and readily have found that in so doing it was merely following of necessity the example of the Northern Pacific.

Indeed, the attention of the manager of the defendant was directly called to the fact that this company was cutting rates, by the superin-

tendent of the plaintiff, before this proceeding was commenced. But nothing was done about it, and the defendant seems to have acted upon the theory that it could evade the injunction by permitting a company, which is either in fact itself or its close ally in interest, to carry for one half the rates the plaintiff is required to charge, and thereby destroy the latter's business, and drive it off the road.

But the law is not so vain a thing as this; and it will look below the surface of such a subterfuge and protect the plaintiff in the right to compete for business over the road within the limits which the defendant allows or permits to the Northern Pacific.

The defendant is not entitled, on the case made, to any modification of the injunction or interference of the court.

This conclusion is fully sustained by the rulings in the following cases: Dinsmore v. The Louisville etc. R'y Co., and Southern Express Co. v. Nashville etc. R'y Co., 2 Fed. Rep. 465; Southern Express Co. v. Louisville etc. Co., 4 Id. 481; Texas Express Co. v. Texas etc. R'y Co., and Same v. International etc. R'y Co., 6 Id. 427; Southern Express Co. v. Memphis etc., 8 Id. 799.

The motion is disallowed at the costs of the defendant.

COTTIER ET AL. *v.* STIMSON ET AL.

Filed December 28, 1883.

VERIFICATION OF PLEADINGS.—Under section 914 of the revised statutes the pleadings in an action for the infringement of a patent must be verified as provided in section 79 of the Oregon code of civil procedure.

DOUBLE PLEAS OR DEFENSES.—Both at common law and under the code special pleas or defenses may be pleaded with the general issue or a denial of the allegations of the complaint.

DEFENSES TO AN ACTION FOR INFRINGEMENT.—The five matters which may be given in evidence upon notice under the general issue, as provided in section 4920 of the revised statutes, as defenses to an action for the infringement of a patent, may be pleaded specially with the general issue, and other defenses thereto may be pleaded specially either with or without the general issue and such notice.

SPECIAL PLEAS CRITICISED.—*Quære:* Is it sufficient to allege in a special plea that the thing patented was not marked with the word "patented," without also alleging that the defendant was not otherwise notified of the infringement? and is not a plea that the thing patented was not an invention when produced by the patentee a mere repetition of the special matter that said patentee was not the original and first inventor thereof? But a defense that an invention is not useful must be specially pleaded.

ACTION for an infringement of a patent. The opinion states the facts.

C. P. Heald, for the plaintiffs.

D. P. Kennedy, for the defendants.

DEADY, J. This is an action "on the case," brought by the plaintiffs under section 4919 of the revised statutes, to recover damages from the defendants for the infringement of a patent for an improved method of ventilating water-closets, numbered 171,926.

The defendants plead the general issue—"not guilty"—and give notice of the special matters which they expect to prove thereunder, on the trial, as provided in section 4920 of the revised statutes, as follows: That said invention was not novel when produced by the patentee, and he is not the original inventor thereof, for that, a like apparatus was

previously patented to Jared Holt, on February 10, 1874; and for that, a like apparatus or system was previously described, or known and used, specifying six instances where and when and by whom it was described or known and used.

The answer also contains three special pleas, to the effect: 1. The plaintiffs have never marked their invention with the word "patented," together with the date of the patent; 2. The apparatus covered by the patent "was not an invention when produced" by the patentee; 3. The said invention and system of ventilation "was not useful" when produced by the patenteee, or at any time.

The plaintiffs move to strike out the special pleas, for the reason they are not verified as provided in section 79 of the Oregon code of civil procedure; and because they are improperly pleaded with the general issue, and are "surplusage and frivolous."

This motion is based upon the assumption, that under section 914 of the revised statutes, the pleadings in this action, beyond the general issue and notice allowed by section 4920 of the revised statutes, are governed by the local law. Said section 914, it being section 5 of the act of June 1, 1872, 17 Stat. 197, provides, that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes" in the courts of the state.

In Nudd v. Burrows, 91 U. S. 441, it was held by the supreme court that this provision did not apply to "the personal conduct of the judge in the discharge of his separate functions;" but, in delivering the opinion of the court, Mr. Justice Swayne said that the purpose of the enactment "was to bring about uniformity in the law of procedure in the federal and state courts of the same locality," which had become discordant by reason of the adoption of the code in many of the latter, while "the common-law pleadings, forms, and practice were adhered to" in the former. To the same effect, see Indianapolis etc. R'y Co. v. Horst, 93 U. S. 299.

To give the enactment full effect, according to this suggestion, it would repeal sections 59 and 60 of the patent act of July 8, 1870, 16 Stat. 207–8, R. S., secs. 4919–20, authorizing the action for infringement to be "on the case," and the defense thereto to be made by the plea of "not guilty" and notice of special matter. But the provision must be further construed as not affecting other provisions in prior acts of congress concerning procedure in the national courts. And this is put beyond question, so far as such provisions have been carried into the revised statutes and re-enacted by congress along with said section 5 of the act of 1872: R. S., sec. 914. They are now one act, and must be construed together as statutes in *pari materia*.

But still it is manifest that congress intended by the enactment of section 914, *supra*, to require uniformity in the procedure in the national and state court "as near as may be."

But this uniformity "may not be" when it is otherwise provided by an act of congress, or where, as was said in Indianapolis etc. Railway Company v. Horst, *supra*, 301, some "subordinate provision" in the state statute is rejected by the judges of the national courts, because it "would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals."

Allowing then that the defendant, in an action "on the case," which is essentially the same as an action under the code, may plead the general issue and give notice of the special matter, ought not his plea to be verified according to the local law? The law of congress is silent upon the point, and there is nothing in the local law requiring the verification of a pleading by the oath of the party which is calculated either to "unwisely incumber the administration of the law," or "to defeat the ends of justice," but the contrary.

The verification of pleadings, by which the contention between litigants is narrowed to the minimum, is calculated to promote the ends of justice, by constraining the parties to limit their controversy to such matters as they can respectively affirm and deny on oath. I think the local law requiring it is within the purview of the act of congress, and that therefore the pleadings in this action ought to be verified—not only the special pleas, which are in addition to the general issue allowed by section 4920, *supra*, but the latter also.

The right to plead the general issue and give notice of the special matters affecting the validity of the patent, instead of pleading them specially, is a privilege of which the defendant may avail himself at his option. He may still plead the fact or matter specially without giving any other notice of it: Evans v. Eaton, 3 Wheat. 503.

But the five matters which may be thus given in evidence under the general issue are not the only defenses to an action for infringement. Walker, in his late work on Patents, section 440, enumerates twenty-seven of them. These, except such as are based upon a fact of which the court will take judicial notice, as that the matter covered by the patent is not patentable, or is not an invention, may be the subject of a special plea, and with the exception of such defenses and the five above referred to, must be specially pleaded, both at common law and under the code of Oregon: Wilder v. Gayler, 1 Blatch. 598; Curtis on Pat., secs. 357, 358; Walker on Pat., sec. 442; C. C. P., sec. 72.

The objection that these special pleas are wrongly pleaded with the general issue is not well taken, either at common law or under the code.

At common law the defendant might plead with the general issue any special plea that did not require a different mode of trial—that concluded to the country—except that of tender; and this was excepted from the rule because it was an admission of the cause of action: Gould's Plead., c. 8, sec. 27. And under the code a defendant may, besides controverting the allegations of the complaint by denying them, which is in substance and effect the general issue, plead as many defenses as he may have. But he must state them separately, and each is in effect a special plea: C. C. P., tit. 9, c. 10.

My conclusion is, that the proceedings in an action for infringement, both of the plaintiff and defendant, except as otherwise specially provided by the act of congress, are governed by and must conform to the local law.

The special pleas not being verified as required by that law, the motion to strike them out is allowed: C. C. P., sec. 81; and if it had included the general issue, it would have been allowed as to that also. And this conclusion renders it unnecessary to decide whether the pleas are frivolous or not.

The first one, which is founded on section 38 of the patent act of 1870, R. S., sec. 4900, does not allege that the defendant was not notified of

the infringement otherwise than by the word "patented" being affixed to the patented article. The second one appears to be a mere repetition of the special matter of which notice is already given under the general issue—that the patentee was not the original and first inventor of the thing patented. This is sufficient cause for striking it out: Read v. Miller, 2 Biss. 16. But the third one seems to be founded on a good defense, which is not previously stated: Walker on Pat., sec. 448.

SUPREME COURT OF CALIFORNIA.

ESTATE OF BURTON.

Department Two. Filed January 5, 1884.

APPEAL FROM AN ORDER SETTING APART A HOMESTEAD TO A WIDOW, out of the estate of her deceased husband, must be taken within sixty days after such order was made.

SUPERIOR COURT SITTING AS A COURT OF PROBATE HAS NO JURISDICTION to try the title to real estate as between adverse claimants, although for the purpose of selecting a homestead it may examine into the title to a given parcel of land mentioned in the inventory.

APPEAL from an order of the superior court for San Diego county, setting apart a homestead to the widow of H. S. Burton, deceased, and from an order refusing the appellants a new trial. The appellants objected to the allowance of said homestead, on the ground that they were the owners of the land sought to be set apart, and offered evidence to show title in themselves. The court overruled the objections and excluded such evidence. The further facts appear in the opinion.

Leach & Parker, for the appellants.

A. B. Hotchkiss and *Conklin & Hunsaker*, for the respondents.

MYRICK, J. The appeal in this case is from an order setting apart a homestead, and from an order refusing a new trial. The order setting apart the homestead was made and entered June 27, 1883; the notice of appeal was served September 18, 1883—more than sixty days after the order was made: C. C. P., sec. 1715; Estate of Harland, 1 West Coast Reporter, 49; the appeal from this order is therefore dismissed.

As to the appeal from the order denying motion for new trial. It would, doubtless, be competent for a court sitting in probate to examine into the title to a given parcel of the real estate mentioned in the inventory, as a basis for the exercise of its discretion in selecting one parcel or the other as a homestead; but for the purpose of adjudicating upon the title, as between adverse claimants, it has no jurisdiction. It determines, merely, that the parcel named is selected from the estate of the deceased (whatever his interest therein may have been), and who are the persons entitled to the benefit of the homestead selection. How far the title claimed by the contestants in this case depended for its validity upon title derived by Mrs. Burton since her husband's death, and how far it depended upon her interest in the estate of her husband as heir or survivor, was not for the probate court to determine. Title to real estate can not be tried in such proceeding.

Order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

PLUMMER *v.* BROWN.

Department Two. Filed January 7, 1884.

GRANTEES OF A DEFENDANT IN THE SUBJECT-MATTER OF AN ACTION ARE HIS "LEGAL REPRESENTATIVES," as that phrase is used in section 473 of the code of civil procedure, and as such are entitled to represent him and defend said action in his name.

SUCH LEGAL REPRESENTATIVES OF A DEFENDANT ARE ENTITLED TO RELIEF from a default taken against their grantor, upon such terms as appear just to the court.

APPEAL from an order of the superior court of Los Angeles county, setting aside a judgment by default. This action was brought against the defendant Brown, and judgment by default was made and entered against him. Thereafter Martha Brown and C. E. Thom, alleging themselves to be the grantees of the defendant in the land in controversy, moved the court to set aside such judgment, and for permission to defend the action in his name. This motion was granted, and from the order granting the same plaintiff appealed. The further facts appear in the opinion.

Edwin Baxter and *Will D. Gould*, for the appellant.

Bicknell & White and *Thorne & Stephens*, for the respondents.

The COURT. We think that Martha Brown and Thom, after acquiring the entire interest of the defendant in the subject-matter of this action, were his "legal representatives" within the meaning of the phrase as used in section 473, code of civil procedure. "An assignee or grantee is a legal representative of the assignor or grantor in regard to the thing assigned or granted:" G. G. R. R. & B. Co. v. Bryan, 8 Smed. & M. 275. They certainly had acquired the right to represent him. The transfer of his interest to them entitled them to have the action continued in his name, or the court might allow them to be substituted for him: C. C. P., sec. 385. "To represent a person is to stand in his place, to act his part, exercise his right, or take his share:" Abb. Law Dict.

Being the legal representatives of the defendant, the court was authorized, upon such terms as might be just, to relieve them from a default taken against him, through their mistake, inadvertence, surprise, or excusable neglect.

After transferring his entire interest in the subject of the controversy, the defendant was only nominally a party to the action. The real parties in interest were his grantees. The entry of his default affected them, not him.

It is the duty of all courts to construe the provisions of the code "liberally with a view to effect its objects and to promote justice:" C. C. P., sec. 4. And being satisfied that the moving parties were, upon the showing made by them, entitled to the relief granted, the order of the court below is affirmed.

IN RE ROBB.

Filed January 10, 1884.

CUSTODIAN OF A PRISONER HELD UNDER AUTHORITY OF A WARRANT FOR HIS ARREST, issued by the governor of California, upon the requisition of the governor of another state, may be compelled, upon the application of the prisoner for a writ of *habeas corpus*, to produce the body of such prisoner before a court of the state in which he is detained, so that the cause of his imprisonment and detention can be inquired into; and upon a failure so to do such custodian is guilty of contempt.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

Alfred Clarke, for the petitioner.

Sullivan and *Fitzmaurice, contra.*

MORRISON, C. J. On the twentieth day of November, 1883, the governor of this state issued a warrant for the arrest of one C. H. Bailey, reciting therein that "whereas it has been represented to me by the governor of the state of Oregon that C. H. Bailey stands charged with the crime of embezzlement committed in the county of Clatsop, in said state, and that he has fled from the justice of that state and has taken refuge in the state of California; and the said governor of the state of Oregon having, in pursuance of the constitution and laws of the United States, demanded of me that I should cause the said C. H. Bailey to be arrested and delivered to W. L. Robb; and whereas the said representation and demand are accompanied by a certified copy of an information, etc., you are therefore required to arrest," etc.

In pursuance of the command of the foregoing warrant of arrest, the alleged fugitive from justice was arrested by the chief of police of the city and county of San Francisco, and was delivered by him to the petitioner, to be taken back to the state of Oregon for trial. While Bailey was in the custody of the petitioner Robb, under and by virtue of the authority above stated, he (Bailey) applied to the superior court of the city and county of San Francisco for a writ of *habeas corpus;* stating in his petition, among other things, that he is "unlawfully imprisoned, detained, confined, and restrained of his liberty by one W. L. Robb, at the old city hall, in the city and county of San Francisco; that the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consits in this, to wit, that petitioner is held under a warrant of arrest, a copy of which is hereto annexed and made a part hereof. That said warrant is issued without authority of law and against the law, in this, that the provisions of the act of congress have not been complied with in this, that no copy of an indictment found or affidavit made before a magistrate charging petitioner with any crime has been produced to the governor of California," etc.

On this petition a writ of *habeas corpus* was issued by the superior court of the city and county of San Francisco, on the twenty-first day of November, 1883, directed to W. L. Robb, commanding him to have the body of Charles H. Bailey, "by you imprisoned and detained, as it is said, together with the time and cause of such detention and imprisonment, etc., before T. K. Wilson, judge of the superior court in and for the city and county of San Francisco," at the time and place therein mentioned. The petitioner Robb refused to produce the body of Bailey in accordance with the command of the writ, and in return thereto, stated that he held him under the laws of the United States, and therefore ought not to produce the prisoner. Robb also appends to his return, and makes a part thereof, copies of the papers under which his authority to hold the prisoner is asserted.

On the coming in of the foregoing return, and on the refusal of Robb to have the body of Bailey before the court as commanded by the writ, the superior court adjudged Robb guilty of a contempt of court, and imprisoned him therefor. It is this imprisonment of which he complains, and from which he seeks to be released by this writ of *habeas corpus* granted him by this court, and which is now the subject of consideration.

It is no part of our duty to decide whether the authority under which Robb holds the prisoner Bailey is sufficient or not. Neither is it incumbent on us to decide whether Bailey is held under the authority of the United States, and if so, how far it is competent for the court below to inquire into the legality of the proceedings under which he is held. Whether an affidavit or indictment must accompany the requisition or not; whether the recitals in the governor's warrant of arrest are conclusive, or simply *prima facie* evidence of the facts they recite—all these are matters for the consideration of the court issuing the writ and before whom the prisoner is to be brought. The only inquiry in this case relates to the power of the court below to compel *the production of the body* of the prisoner before it, so that the cause of his imprisonment and detention can be inquired into, and on this point we have no doubt.

It was not the duty of the court issuing the writ, nor was it obliged, to accept as true the return of the party. It was within the jurisdiction of the court, at least, to inquire into the facts of the case and the alleged cause of detention, and to this end it was proper that the prisoner should be brought into the presence of the court, in obedience to the command of the writ, whereupon the prisoner would have had a right to traverse the return: People ex rel. v. Donohue, 84 N. Y. 438; People v. Brady, 56 Id. 182; Norris v. Newton, 5 McLean, 99; State v. Schleman, 4 Harr. (Del.) 577. This the petitioner refused to do, and by such refusal was guilty of a contempt of court.

Writ dismissed and prisoner remanded.

MYRICK, SHARPSTEIN, THORNTON, MCKEE, and MCKINSTRY, JJ., concurred.

LUNING v. WISE.

Filed January 10, 1884.

(THORNTON, J., dissenting.) PRESENTMENT OF A PROMISSORY NOTE for payment to a joint maker thereof is not excused, if, at the time of the execution and maturity of the note, such maker resided in a state other than that in which payment should be made.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts appear in the following dissenting opinion, and in the opinion of the majority of the court reported in 1 West Coast Reporter, 138.

Tully R. Wise, in propria persona, for the appellant.

Sidney V. Smith & Son, for the respondent.

THORNTON, J., dissenting. I respectfully dissent from the judgment of the court in this case. The decision of the court below in this case is as follows:

"1. That on the twenty-fourth day of March, 1879, Edward W. Jones and Thomas H. Holt executed and delivered to the defendant their promissory note, which is set forth in the complaint; and that on said day defendant, for a valuable consideration, indorsed and delivered said note to plaintiff, who ever since then has been and is now the legal holder and owner thereof.

"2. That no part of said note or of the interest thereon has been paid.

"3. That on the twenty-third day of April, 1879, plaintiff presented

said note to Thomas H. Holt, in the city and county of San Francisco, state of California, and demanded payment of said note, and interest thereon, then due from said Holt, individually, and as the attorney in fact for said Edward W. Jones; and that said Holt, for himself and as such attorney in fact, then refused to pay said note, or the interest or any part thereof.

"4. That thereupon, on said last-mentioned day, the plaintiff caused said note to be protested for non-payment thereof, of which presentment and demand and refusal and protest the defendant on said day had full notice.

"5. That said Holt had full power and authority to execute and deliver said note for and on behalf of said Jones, but that said Holt did not have authority from said Jones to pay said note when it was presented for payment to said Holt as aforesaid.

"6. That said Jones, neither at the date of said note nor at any time since, had or has had any place of business or residence in this state; and at the time of the execution of said note, and of said demand, was not in this state, but resided and had his place of business in the state of Kentucky.

"7. That the interest on said note from its date, at the rate specified therein, amounts now to the sum of one hundred and thirty-two dollars and twenty-five cents, in gold coin of the United States. And from the foregoing facts the court finds the following to be its conclusion of law: 'That the plaintiff is entitled to judgment against the defendant for the sum of six hundred and seven dollars and twenty-five cents, in said gold coin, and it is so ordered.'"

Judgment was entered in accordance with the conclusion of law.

1. The consideration of the indorsement, by Wise to Luning, of the note sued on may be presumed: C. C., sec. 3104. There was no evidence to rebut this presumption, and the court therefore did not fall into error in holding that the indorsement aforementioned was supported by a consideration.

2. The defendant moved for a nonsuit, on the ground that no demand was shown upon Jones, the maker of the note.

One of the grounds on which the defendant moved for a new trial was, that the evidence was insufficient to justify the decision, in that it does not show that the note sued on was ever presented to, and demand made of, Edward W. Jones, nor that defendant ever had any notice of it. It appears from the statement that Jones, the co-maker with Holt of the note in suit, was, when the note was executed, and ever since has been, a resident of Paris, county of Bourbon, and state of Kentucky, and that his place of business was there; that during the period above mentioned he was in the place above named in Kentucky, and had no place of business in the city and county of San Francisco. It also appears by the statement that Luning, when he took the note, was informed of the facts above detailed as to the residence and place of business of Jones.

The foregoing appeared in the opening of plaintiff's case, with other facts sufficient to maintain the action, unless the facts just above specially detailed establish the contrary. The finding on the subject of Jones' place of residence and business is quoted above.

To bind the indorser there must be a presentment of the note to the maker and demand of payment at the time of its maturity, or as soon after as practicable in the use of reasonable diligence. This is the general rule, but circumstances may excuse it.

The question here presented for decision is whether, as Jones, one of the makers of the note was a non-resident of the state, as above set forth, and had no place of business in the state of California when the note was executed and fell due, it was necessary to make presentment to him in Kentucky of the note and demand payment to bind the indorser, defendant here; or was he excused from making such presentment, etc., by reason of the non-residence of Jones? On this question the cases are in conflict. There are two cases on this point in the Maryland reports: Ricketts v. Pendleton, 14 Md. 330, and Selden v. Washington, 17 Id. 379. The first case relates to a promissory note, and holds that when the makers of a note do not reside within the state, and have no place of business within the state, no demand upon them is necessary. It is ruled in this case that the mere fact of residence of the maker in a state other than that in which the holder resides excuses him from making presentment and demand of payment. In this case the makers were non-residents at the time the note was executed and when it matured. In the case last cited from Maryland, under like circumstances, the same ruling was made, following Ricketts v. Pendleton.

Hepburn v. Toledano, 5 Mart. (La.) 316, is also another case on the point under consideration, in which it is held that if the maker resides in another country, the indorsers can not be presumed to know his residence, and all that the law requires of the holder is due diligence at the place where the note is drawn. But it does not appear distinctly from the report of the case whether the maker was a non-resident at the time the note was executed. It does appear that when the note fell due the maker, who executed the note in Louisiana, was a resident of Kentucky. If the maker was, at the time the note was made, a resident of Louisiana, and before it matured removed to Kentucky, the holder need not follow him to make presentment and demand: Anderson v. Drake, 14 Johns. 114; Taylor v. Snyder, 3 Denio, 151, 156; see remarks on p. 156 as to Hepburn v. Toledano.

The cases in New York are directly opposed to the Maryland cases above referred to. The case earliest decided was Taylor v. Snyder, *supra*. In this case the note was made by Mr. Snyder, payable to the order of defendant, no place of payment being mentioned, and was dated at Troy, October 15, 1839. It appeared that the maker was, when the note was dated and when it fell due, a resident of Apalachicola, state of Florida. The holder at the time the note fell due knew that the maker resided at Apalachicola. When the note matured, plaintiff caused it to be presented for payment to the defendant at his store in Troy, which was refused. Notice of dishonor was then given to defendant. The circuit judge held that the plaintiff was not entitled to recover. The supreme court sustained the ruling of the court below. The court, per Beardsley, J., as to the point under discussion, said: "Where a promissory note is not made payable at any particular place, the general rule of law is, that in order to charge the indorser, payment must be demanded of the maker personally, or at his dwelling-house or other place of abode, or at his counting-house or place of business. But although such is the general rule, yet under various circumstances a demand in any form or manner may be dispensed with. It is a question of diligence, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder."

The learned judge then proceeds to give four instances where the demand is excused. They are: 1. Where the maker has absconded; 2. Where the maker is a seaman on a voyage, having no domicile in the state; 3. Where the maker has no known residence or place at which the note can be presented for payment; and, 4. Where a note is made by a resident of the state, who, before it is payable, removes from the state and takes up a permanent residence elsewhere. In this last case the holder need not follow him to make the demand; but it is sufficient to present the note for payment at the maker's former place of residence. In the instances just mentioned, reasonable diligence does not require a demand on the maker personally. The circumstances detailed excuse it.

It is well to advert to the observations made in the opinion as to these exceptions. "These exceptions to the general rule," said the court, "it will be seen, all rest on peculiar reasons. In the one the maker has absconded; in another, he is temporarily absent, and has no domicile or place of business within the state; in a third, his residence, if any he has, can not be ascertained; while in the fourth, he has removed out of the state and taken up his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note; and it is this new and changed condition of the maker, and that only, by which the indorser stands committed without a regular demand."

The court then proceeds to inquire, whether another exception should be added and extended to a case where no change in the condition of the parties from that which existed when the note was made had taken place: "Where the maker, when the note was made and indorsed, had a known residence in another state, and which remained unchanged at the maturity of the note." The court holds that such exception is not justified by any rule of law, and disallows it. The conclusion is fortified by the following course of reasoning: "The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser, that if the note is duly demanded of the maker and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another state, and which is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee voluntarily consents to take such an order, and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake, or misapprehension of fact, at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another state. He knows that by law, unless the intervention of a state line makes a difference, the maker must be sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence; the facts of the case are precisely as they were when the order was drawn. Why, in such a case, should the state line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties; let it then be fairly observed and performed by them." The court concludes that the introduction of a state line has no possible bear-

ing on the question, and, on the ground that no demand on the maker was made, sustains the ruling of the court below that the plaintiff should not recover.

I have quoted freely from this case, for the reason that the question is more fully dicussed in it than in any other I could find. Taylor v. Snyder was decided in 1846. Gilmore v. Spies, 1 Barb. 158, in which a like ruling as in Taylor v. Snyder was made, was decided in 1847. In this case the maker resided out of the United States, and in Matamoras, Mexico, when the note was made and when it fell due. A demand was nevertheless held necessary. This case was taken by writ of error to the court of appeals, where the judgment of the supreme court was affirmed: Spies v. Gilmore, 1 Comst. 321, decided in 1848. Gardiner, J., dissented, on the ground that the maker resided in a foreign country. He thought that "the necessity of a personal demand should be confined to cases where the maker resides within the states or territories of the Union." He approved Taylor v. Snyder, as did all the justices. Bronson, J., and Jewett, C. J., delivered opinions in favor of affirmance. Attention is called to some remarks of these distinguished jurists. Said Bronson, J.: "The only excuse which has been offered for not making demand is that it would have been inconvenient to go or send to Matamoras for that purpose. It is often inconvenient to present the note for payment when the maker and holder both reside in the same state; and yet when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting the demand. And this is so, however wide asunder the maker and the holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New York, or got an indorsement with a waiver of demand. He has no right to change the contract which the indorser made for the purpose of promoting his own convenience."

Jewett, C. J., observed: "I can not assent to the truth of the position assumed, that because the maker and indorser of a promissory note, at the time of the making and indorsing, reside in another state or foreign country, the indorser may be held liable without any demand being made on the maker; especially when such residence was known to the holder at the time the note was made and has not been changed before the maturity of it. And in this there is no injustice. For it is but reasonable to conclude that each party contracted upon the supposition that the holder should make a demand of payment on the maker, at maturity, at the place of his residence, and, if not paid, give notice to the indorser, or else a *place* as well as a time of payment would be stipulated for in the note itself. To hold that a demand and a notice can be dispensed with on the ground that the maker and indorser resided in a foreign country at the time of the making and maturity of the note, would, in my judgment, be nothing short of judicially changing the terms and legal effect of the contract between these parties:" See Packard v. Lyon, 5 Duer, 82.

The cases in Massachusetts, in the main, are in accord with the New York cases above cited.

Smith v. Philbrick, 10 Gray, 252, was decided in 1857. It appears from the report of the case that the maker was a resident of Port Lavacca, state of Texas, where he had his only place of business, and that the note was made at Boston, where the maker was on a temporary visit. The court held that, as there was no evidence that the plaintiff, or any of the

subsequent holders of the note, knew where the maker's residence was, that he made all proper inquiries as to such residence at Boston, the place of its date, which was the proper place of inquiry, and that he had used the diligence in this regard that the law required, the plaintiff was therefore excused from presentment at Port Lavacca. It is said in the opinion that if the holder had known, at the maturity of the note, the place of the maker's residence, it might, *perhaps*, have been incumbent on him to have forwarded the note to Port Lavacca for presentment, or to have used all due diligence to have done so.

Bank of Orleans v. Whittemore, 12 Gray, 496, was decided in 1860. This case approves Taylor v. Snyder and Spies v. Gilmore, and the judgment agrees with the conclusions reached in those cases. In the opinion, the rule is thus stated by Metcalf, J.: "Where the maker of a note, where it is made and indorsed, has a known residence out of the state, which residence remains unchanged at the maturity of the note, demand must be made on him, or due diligence used for that purpose, and notice of non-payment given to the indorser before the indorser can be charged." In this case the note was executed in Boston, and the maker resided at that time, and when the note fell due, at Newbern, North Carolina. The fact of his residence was known to plaintiff's agent when he purchased the note for the plaintiff, and hence held known to the plaintiff: See also Burrows v. Haunegan, 1 McLean, 208, decided in 1838, and reaching the same conclusions as Taylor v. Snyder.

On the authority of the cases above cited from Maryland and Louisiana, Judge Story, in his work on Promissory Notes, section 236, says: "It seems also, that if the maker of a promissory note resides and has his domicile in one state, and actually dates and makes and delivers a promissory note in another state, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker can not personally, upon reasonable inquiries, be found within the state, and has no known place of business there."

It is clear from the guarded language used by the learned jurist just above quoted, that he did not give to the rule stated the full sanction of his judgment: See Story on Prom. Notes, 6th ed., sec. 236, and cases cited in note 3, sec. 264, Id.

I think the better rule is that laid down in Taylor v. Snyder and Spies v. Gilmore. It is more in accordance with the analogies of the law, and the principles controlling the duty of the holder of a negotiable note in regard to presentment to and demand of the maker at maturity. It is also in accord with the rule prescribed in section 3131 of the civil code, requiring the presentment for payment to be made to the maker at his place of business or residence, unless where such place of business or residence can not with reasonable diligence be ascertained: C. C., subd. 6, sec. 3131. There is no exception in this section, where a maker resides in an other state, in case the residence or place of business in such state can by reasonable diligence be ascertained. The indorser, when he puts his name on a note, when the maker is a resident and has his place of business in another state at the time of the making of the note, and when it matures, contracts that before he shall be bound, presentment and demand shall be made to the maker personally or at his place of business or residence, unless the holder is ignorant of such residence or place of business, and can not, by reasonable diligence, ascertain where they are. To hold otherwise would be to make a contract for the indorser other

than that which he has agreed to. I am of opinion that presentment and demand was requisite in this case to charge the defendant.

It may be said that there are here two makers living far apart, and inasmuch as presentment and demand must be made on the day that the note falls due, that the law can not be complied with in this particular, and therefore if presentment and demand of both makers are required, the indorser can not be held, because under the circumstanees the holder can not make such presentment and demand on the day of maturity. But the law does not require that which is impossible. The presentment and demand must under such circumstances be made to one maker on the day of maturity, and to the other within such a period as reasonable diligence under all the circumstances demands. I find no decision on this point, but such seems to be the view of able and learned writers in regard to it: See Story on Prom. Notes, sec. 239; 1 Parsons on Notes & Bills, 363, note *w*; 1 Daniel on Neg. Insts., sec. 595. The presentment to the co-maker Holt, and demand on him, was not equivalent to presentment to and demand of Jones, as the former was not the authorized agent of Jones for any such purpose; nor does it appear, if Holt had such authority, that the indorser who had not agreed to it would be bound by it. The difficulty might be avoided when the note is made, by requiring the indorser to waive presentment and demand, or the note might be made payable at a particular place.

In this case, on the opening evidence for the plaintiff, it appeared that the holder, when he took the note, was informed of the residence of Jones, the maker, in Kentucky. There was no evidence of presentment or demand on him, and consequently the defendant can not be held liable. The nonsuit should therefore have been granted.

The findings of fact do not support the judgment, as the court does not find any presentment and demand of the maker Jones, and no circumstances which excuse such presentment and demand are found.

It follows from the foregoing that the judgment and order should be reversed, and the cause remanded for a new trial.

BAYLEY *v.* MUEHE.

Filed January 11, 1884.

(THORNTON J., dissenting.) HEIRS OF A DECEASED MORTGAGOR SHOULD BE MADE PARTIES in an action against his executor or administrator to foreclose the mortgage.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The facts of this case are stated in the opinion delivered in Department One reported in 11 Pac. C. L. J. 408. The opinion of the majority of the court is reported in 1 West Coast Reporter, 125.

F. J. Castlehun, for the appellant.

Stetson & Houghton, for the respondent.

THORNTON J., dissenting. I dissent. It has been held in this state, at least since Beckett v. Selover, 7 Cal. 215, was decided, that under the system of law prevailing with us the real and personal estate of a person dying intestate vests in the heir, subject to the lien of the administrator for the payment of debts and expenses of administration. I

know of no statute and no decision changing the rule as above stated, viz., that the title vests in the heir. Legislation subsequent to this decision may have changed the right of an administrator from a lien, though I am not prepared to say that the administrator's right as to real estate is not now a lien coupled with a right of possession for the purposes of administration. I do not think the title to the realty ever vests in the administrator under our system now, or ever did. In order to make a valid decree of foreclosure and sale, the parties holding the title to the estate mortgaged must be made parties to the action or the decree is void against them: See Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, Id. 559.

This was held where the mortgagor, before the action for foreclosure was commenced, had conveyed the mortgaged premises to a third person. The purchaser not having been made a party, the decree was held invalid as to him, and subject to collateral attack. I can see no difference under our system between a person deriving title from the mortgagor by his own act, or by operation of law. Nor can I see that the sections of the statute cited in the opinion of the majority affect the question. Because the title descends to the heir subject to the payment of debts, certainly can not change the rule. The title is still in the heir, and he has a right to be before the court to see that it is not improperly divested. The right to bring actions, given to the administrator by the statute, may co-exist with this right in the heir. It is not necessary for the administrator to have a title to the real or personal property in order to maintain actions under the statute for the recovery of real or personal property, or for the possession thereof. It does seem to me, that to hold that the heirs are not necessary parties in such a case as the one under discussion, is to divest a person of his title without his being heard or having his day in court, and to deny him *due process of law*—a proceeding violative both of the state and federal constitutions.

SUPREME COURT OF COLORADO.

TUCKER, Sheriff etc., *v.* PARKS, Assignee etc.

Filed December 4, 1883.

ATTORNEY AT LAW IS NOT DISQUALIFIED FROM ACTING AS AN ASSIGNEE of an insolvent firm, and a clause in the assignment to him, to the effect that he shall be paid "a reasonable compensation or commission for his services," can not be construed so as to entitle him to counsel fees, and thus render the assignment fraudulent as to the assignor's creditors.

COMPLAINT IN AN ACTION OF REPLEVIN UNDER THE CODE MUST AVER the value of the property taken, and the amount of damages sustained by its detention. The truth of such allegations is admitted by a failure to deny the same, and evidence thereof is inadmissible on the part of the defendant.

DAMAGES WHICH ARE NOT THE USUAL AND NATURAL CONSEQUENCES of the wrongful act complained of can not be recovered unless specially pleaded.

IN AN ACTION OF REPLEVIN, INTEREST ON THE VALUE OF THE PROPERTY, from the time of the wrongful taking until the time of the trial, may be recovered as general damages.

ADMISSION OF AN ALLEGATION OF DAMAGES admits only that the plaintiff has sustained such damages as were consequential upon the facts alleged.

DEFENDANT IN AN ACTION OF REPLEVIN CAN NOT ATTACK THE PLAINTIFF'S TITLE on the ground that it was obtained through fraud, unless such fraud be specially pleaded.

ERRORS ASSIGNED FOR REFUSING TO GIVE CERTAIN INSTRUCTIONS ASKED FOR, and in the form of the judgment, can not be considered by the appellate court unless the transcript contain all of the instructions given and a copy of the judgment.

OBJECTIONS TO A COMPLAINT OTHER THAN THAT IT DOES NOT STATE FACTS SUFFICIENT to constitute a cause of action, must be made in the court below, to entitle them to consideration in the appellate court.

APPEAL from a judgment of the district court of Lake county, entered in favor of the plaintiff. The opinion states the facts.

R. D. Thompson, for the appellant.

Markham & Patterson, for the appellee.

BECK, C. J. The objection to the introduction in evidence of the articles of assignment was not well taken. It was that the assignee was an attorney at law, and that the instrument provided for the payment to him of counsel fees. The fact that Parks was an attorney at law did not disqualify him from acting as the assignee of an insolvent firm. In the case cited in support of the objection, Nichols v. McEwen, 17 N. Y. 22, the assignment provided for the payment of "a reasonable counsel fee" in addition to the "expenses, costs, charges, and commissions" of executing the assignment, and for that reason was held void. The court regarded the attempt to charge an already deficient fund with a counsel fee, in addition to the regular commission authorized by the statute, as indicating a fraudulent intent in the whole transaction.

The language of this instrument is different, however, and does not, we think, attempt to charge the insolvent estate with counsel fees. It is as follows: "That said assignee shall first pay and disburse all the just and reasonable expenses, charges, costs, and commissions attending the due execution of these presents, and the carrying into effect the trusts thereby created, together with a reasonable compensation or commission for his own services."

No allusion is made to either professional services or to professional fees. All that the instrument authorizes the assignee to pay to himself for his own services is a reasonable compensation or commission. This provision discloses no fraudulent intent, since the assignee, whether lawyer or not, would be entitled to a reasonable compensation or commission for the services specified, which is all that is provided.

The most important questions presented by this record arise upon the pleadings, and upon the rulings and instructions relating to the subject of the recovery. The complaint avers that the value of the goods seized upon the writs of attachment is seven thousand nine hundred and forty-six dollars and twenty cents, and that the plaintiff's damages for the detention are one thousand dollars. Neither of these allegations is denied by the answer of the defendant.

The plaintiff closed his testimony on the trial without offering proof in support of either averment, whereupon defendant moved for a nonsuit, upon the ground that the plaintiff had proved no value to the property sought to be replevied.

This motion was denied by the court, on the theory that defendant's failure to controvert, in his answer to the complaint, the allegations of value and damages, admitted the same to be true as stated.

Defendant then offered evidence to show the value of the goods, their condition, and the amount realized by their sale under the attachment proceedings, which offer was likewise denied.

The court instructed the jury that the value of the goods in contro-

versy was admitted by the pleadings to be seven thousand nine hundred and forty-six dollars and twenty cents, and the damages were likewise admitted to be one thousand dollars. A verdict for the plaintiff was returned accordingly.

Counsel for the defendant insist that the court erred in denying the motion for nonsuit, in rejecting the defendant's testimony on the subject of value, and in the instruction referred to.

The correctness of the above rulings depends upon the construction to be given certain sections of our code of civil procedure, which we will proceed to consider.

Section 57 provides that "the answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant's answer."

Section 72 says: "Every material allegation of the complaint or answer not controverted by the answer or replication thereto shall for the purpose of the action be taken as true."

On behalf of the appellant, who was defendant below, it is insisted that the averments of the complaint on the subject of *value* and *damages* are not "material allegations," and that a failure to deny them does not admit them to be true. That to entitle the plaintiff to recover in this action, it was essential for him to prove the value of the goods and the amount of damages sustained. In support of this position, we are cited to the following cases: Newman v. Otto, 4 Sandf. 668; Sopris v. Webster, 1 Col. 507; Connors v. Meir, 2 E. D. Smith, 314; Jenkins v. Steark, 19 Wis. 136.

The doctrine of these cases is shown by the following citations from Newman v. Otto: "No allegation can be deemed material unless an issue taken upon it will decide the cause so far as relates to the particular cause of action to which the allegation refers." "In an action sounding in damages, the defendant, by not denying the allegations as to damages and as to their amount, does not admit them. The plaintiff must prove the amount thereof, or he will only be entitled to nominal damages; so in trover, a failure to deny the allegations as to the value of the property does not admit the value as alleged in the complaint."

The case of Connors v. Meir, *supra*, was an action in the nature of trover for illegally detaining plaintiff's watch, alleged to be of the value of twenty dollars. In considering the section of the New York code which provides that material allegations of the complaint not denied by the answer shall be taken as true for the purposes of the action, the court say that the provision is but the re-enactment of a rule as old as the principles of pleading, that every allegation in a pleading was always taken as true if not denied, and that it was in this sense that the term "*material allegation*" was used in the code. It means an allegation without proof of which the plaintiff must fail in his action.

They also say that, before the code, the averment of value in such action was matter of form and could not be made the subject of an issue; that its omission was cured by pleading to the merits; that it need not be proved as laid; and even a plea of justification did not admit it.

It was only necessary to prove an illegal detention of the plaintiff's property to maintain the action. In Jenkins v. Steark, *supra*, the supreme court of Wisconsin held, that before the code in that state it was not necessary for the defendant in trover, trespass, or replevin to deny

either the averment of *value* or damages, and that the code had not altered the practice in this respect.

Sopris v. Webster arose under the common-law practice, which prevailed in the territory of Colorado before the enactment of the civil code, and is to the same effect.

The foregoing adjudications (and many more of the same tenor might have been cited) are based upon the principles and forms of pleading as they existed at common law. All, save Sopris v. Webster, which was prior to the passage of the code, construe the code provision under consideration as not including allegations of *value* or *damages* in actions of this character. They held that the effect of a failure to deny such allegations is the same under code practice as under the old system. This is to be accounted for in part for the reason assigned in Newman v. Otto, *supra*, that the codes referred to had not defined the meaning of the term "*material allegations*," as employed therein. Its former technical signification was therefore naturally continued by the courts.

Our code, however, defines the term, and effect must be given the definition in construing the act. The definition is as follows: "Sec. 73. A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient."

Another section authorizes matters not essential to the claim or defense to be stricken from the pleadings on motion: Laws 1879, p. 215, sec. 1. Let us see now what the plaintiff is required to state in this class of actions, and what relief he is entitled to under proper allegations. When he seeks the recovery of *money* or *damages*, the amount of his claim must be stated in the complaint: C. C., sec. 50.

The plaintiff always seeks this kind of relief in replevin when the property has not been delivered to him, as in the case at bar. In such case, the jury is required, by section 182, to find the value of the property, and to assess the plaintiff's damages, if any are claimed in the complaint. To complete the remedy, section 207 authorizes judgment in the alternative for possession of the property, or in case a delivery can not be had, for the value of the property, and damages for the detention.

This is the relief demanded in the present action. Both the value of the merchandise taken and the amount of damages alleged to have been sustained by their detention were stated in the complaint, the same being the allegations which appellant says were immaterial, and could not be admitted by a failure to deny them in the answer. Testing their materiality by the rule furnished by the code, the inquiry is, Were those allegations essential to the plaintiff's claim, and could they be stricken from his complaint without leaving it insufficient?

The record shows that the goods were sold by the defendant by virtue of the attachment proceedings; hence they could not be returned.

The plaintiff, then, could have no relief in this action save by a verdict and judgment authorizing the collection of their value in money, and damages. But, as we have seen, he would not be entitled to such a judgment had the aforesaid allegations been omitted from his complaint. These considerations demonstrate their materiality under our practice, and it follows that the failure of the defendant to deny them admitted them to be true.

It is a familiar rule, that evidence can not be given of facts not alleged in the pleadings, and that neither admissions nor stipulations can make

a case broader than it is by allegation. A party can have no relief beyond what the averments of his pleadings entitle him: Harston's Pr. 152; Hicks v. Murray, 43 Cal. 522.

The fact that the law-makers who framed the codes of Iowa and Kansas, both of which are similar to our own on this subject, deemed it necessary to limit the operation of the rule under consideration, indicates their apprehension that without such limitation it would include allegations of value and damage. In Iowa the qualification is: "But an allegation of value or amount of damage shall not be deemed true by a failure to controvert it:" Iowa Code, 1873, p. 456, sec. 2712.

In Kansas it is: "Allegations of value or amount of damage shall not be considered as true by failure to controvert them; but this shall not apply to the amount claimed in actions on contract, expressed or implied, for the recovery of money only: Gen. Stat. 1868, p. 653, sec. 128.

In California, on the contrary, where code provisions upon this point similar to our own exist, they appear to be construed to have the same effect which we have herein given to corresponding sections of our code: Tully v. Harloe, 35 Cal. 302.

For the reasons assigned, we are of opinion that the value of the property was admitted by the pleadings, and that the evidence offered was inadmissible. Referring now to the extent of the recovery, we remark that damage may be *general* or *special;* and that an averment simply specifying the amount claimed, as in this complaint, is sufficient for the recovery of general damages; it is insufficient to warrant the recovery of special damages. When it is sought to recover such damages as are not the usual and natural consequence of the wrongful act complained of, the rule is that they must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise on the trial: Wells on Replevin, 311; Dickenson v. Boyle, 17 Pick. 78; Stevenson v. Smith, 28 Cal. 103; Brown v. Cummings, 7 Allen, 507.

In this case there is no averment that would authorize the recovery of special damages. There is only the general allegation of damages in the sum of one thousand dollars. It is evident that this amount of damages was not a natural consequence of the act complained of.

The goods were to be exposed to sale. The presumption is, that they would not have sold for more than their value, which sum is recovered in this action. The only damage, therefore, which appears to be the natural and necessary consequence of the taking, is that resulting from their detention. This sum or amount must be ascertained by the rule adopted in this state, which rule is sanctioned by numerous authorities. It is to compute interest on the value of the property from the time of the wrongful taking to the time of trial: Machette v. Wauless, 2 Col. 170; Hanner v. Bartels, Id. 514; Sedgwick's Leading Cases on Meas. Dam. 556, 557.

The record shows that the goods were taken January 10, 1880, and that the cause was tried January 20, 1881. Interest at the rate of ten per centum per annum on seven thousand nine hundred and forty-six dollars and twenty cents for the above interval was all that the plaintiff was entitled to.

If other items of damage were sustained, they were not recoverable because not alleged. The admission of the allegation of damages was only an admission that the plaintiff had sustained such damages as were

consequential upon the facts alleged: Stevenson v. Smith, 28 Cal. 103. The instruction given upon this point was erroneous.

Another error assigned, involving a question of pleading, is that the court rejected the offer of the defendant to prove that, a short time prior to the assignment, the assignors fraudulently and without consideration transferred a portion of the same stock of goods to one Wineright, who afterwards employed the assignors to sell them at auction; and that Parks, the assignee, with all this knowledge before him, took no steps to assert the rights of the creditors to these goods, but employed Wineright to assist him in invoicing the stock.

This proof would have been admissible under proper pleadings, but there was no issue in the case to which it was responsive.

The complaint alleged ownership and right to possession. These were proper averments: Dambruan v. White, 48 Cal. 452. The answer denied such ownership and right of possession, alleged ownership in Freudenfeld and Jelanko (the assignors), and the taking of the goods by the defendant, as sheriff, by virtue of certain writs of attachment against said owners.

Neither fraud nor any other matter in avoidance of plaintiff's title was set up in the answer. The plaintiff proved his title and right to possession, by producing in evidence the deed of assignment. Defendant then attempted to avoid the deed by proof of circumstances tending to show that it was given in fraud of the rights of creditors, and void for that reason. This testimony was not admissible. Fraud must be specially pleaded in an answer as well as in a complaint. There were no facts stated in the answer apprising the plaintiff that his title would be assailed in this manner.

In Gray v. Earl, 13 Iowa, 188, it was held that before a defendant in replevin could attack the plaintiff's right of possession on the ground that it was obtained through fraud, such fraud must be specially pleaded: See also Dyson v. Ream, 8 Id. 51; Capuro v. Builders' Ins. Co., 39 Cal. 123; Lefler v. Field, 52 N. Y. 622; Bliss on Code Pleadings, secs. 211, 339.

The error assigned for refusal to give certain instructions prayed by defendant can not be considered, for the reason that the transcript does not purport to give all the instructions given on behalf of either party, and the appellant admits that other instructions were given. We are not advised that the refused instructions contain any correct proposition of law applicable to the case, which was not given to the jury. For the same reason, we can not consider the objection to the form of the judgment.

Its form is not before us, having been omitted from the transcript. The verdict was sufficient to authorize a judgment in the alternative for the possession of the property, or the value thereof, in case a delivery could not be had as authorized by section 207 of the code. In the absence of any facts showing the contrary, the necessary intendment is that the action of the court below was correct.

The objection to the complaint that it does not state facts sufficient to constitute a cause of action in replevin, is not well taken.

We deem the complaint sufficient, so far as this objection is concerned. Other objections thereto, if they exist, should have been made in the court below to entitle them to notice here: Fassett v. Mulock, 5 Col. 466. The cause is reversed and remanded for a new trial.

Reversed.

RICHARDSON *v.* BRICKER.

Filed December 4, 1883.

PARTY IS ESTOPPED FROM TAKING ADVANTAGE OF AN ERROR IN THE ORDER of the introduction of evidence, for which he is himself responsible.

DEBT BARRED BY THE STATUTE OF LIMITATIONS CAN ONLY BE RECOVERED UPON PROOF of a new promise sufficient to revive the debt.

CONTRACT CREATED BY A CONDITIONAL PROMISE TO PAY A DEBT BARRED by the statute of limitations can not be enforced, except upon the performance or happening of such condition, and the burden of proving the same rests upon the plaintiff.

NEW PROMISE TO PAY SUCH DEBT "WHEN ABLE" IS CONDITIONAL, and must be construed as referring to financial ability. Such ability is not a matter left to the debtor's discretion or judgment, but is a question of fact for the jury, who may find that it existed at the very time the conditional promise was made.

WHETHER A GENERAL ADMISSION OF INDEBTEDNESS IS SUFFICIENT to remove the bar of the statute of limitations is questionable, unless it be unmistakably shown to relate to the particular demand sued for, or unless, from the nature of such debt, or the particular circumstances connected therewith, a legal presumption fairly arises that it was referred to.

APPEAL from a judgment of the county court of Gunnison county, entered in favor of the plaintiff. The opinion states the facts.

Thomas, McDougal & Thomas, and *M. Benedict*, for the appellant.

No appearance for the appellee.

HELM, J. We will not determine whether in an action of this kind, without written pleadings, it is error at the trial to allow proof in rebuttal of a new promise after defendant has offered the statute of limitations in bar of the action.

It appears from the record, though not from the abstract thereof, that plaintiff attempted to introduce evidence of the new promise in chief, but that defendant objected, and the court ruled it out.

We think that defendant is estopped from taking advantage of an error, if such it be, in the order of proofs for which he is himself responsible. Nearly eleven years passed between the maturity of the note and the commencement of suit thereon; plaintiff's action was therefore barred by our statute of limitations, and he could only recover upon proof of a new promise sufficient in law to revive the debt or give him a new right of action therefor. For this purpose but one witness was sworn. His testimony is somewhat ambiguous. He says in one breath that there was an unconditional promise to pay at a specified time, and in the next he admits that defendant promised to pay "when he got the money, or sold his coal land, or became able, or turned in some stock."

But upon a careful consideration of his entire testimony, we think if it establishes anything it is that the new promise was to pay when able, or to pay on the thirtieth of the current month, provided a sale of some coal land was effected.

No evidence whatever was offered by plaintiff to show that at the commencement of the action defendant was able to pay the note, or that he had sold his coal land. The suit is upon the contract created by the new promise, and therefore, if such new promise be conditional, the plaintiff is not entitled to recover except upon the performance or happening of such condition, and the burden of proving the same rests upon him: 2 Greenl. Ev., sec. 440, and note; Wood on Lim. of Actions, sec. 78, and notes.

If the new promise in this case was to pay the note upon the sale of coal lands, it clearly devolved upon plaintiff to prove such sale; so also, if the new promise was to pay when able, we think it was plaintiff's duty to establish defendant's ability to do so. Upon this question, however, there is some conflict of authority. In Illinois, Connecticut, Vermont, and New Hampshire, it is held that promise to pay, "when able," "as soon as possible," "when I can," "as soon as he could," were not conditional.

It is said that these phrases, following a promise, are too uncertain to constitute a condition: Horner et al. v. Starkey, 27 Ill. 13; Cummings v. Gassett, 19 Vt. 310; Norton v. Shepard, 48 Conn. 142; First Cong. Soc. v. Miller, 15 N. H. 522.

But we think the weight of authority, as well as the better reason, supports the position that the promise to pay "when able" is conditional; of course the expression must be construed as referring to financial ability.

In this case the statutory bar had attached before the alleged new promises were made.

The debtor was under no legal obligation whatever to pay the debt. While the indebtedness itself was not canceled, it could never be collected by judicial proceedings, if he saw fit to invoke the statute. Whatever promise he made was entirely voluntary; and authorities universally recognize his right to impose any condition which he might deem proper.

By agreeing to pay when able, he practically declared that he would not bind himself unless he then had, or should thereafter acquire, the means to do so; and it is difficult to understand how it can truthfully or logically be said that his promise was absolute and unconditional; the very language used indicates an intention not to renew the liability except upon the conditions above mentioned.

It may be hard for the creditor to prove the debtor's financial ability, yet it is not more difficult for him to do this than to prove a great many other conditions which might legally be imposed. This is not a matter left to the debtor's discretion and judgment; his ability to pay is a question of fact for the jury, and that body might find that he was able to do so at the very time he made the conditional promise.

The law regards the creditor as culpable for not enforcing his demand within the statutory period; and the leading authorities are now decidedly against removing the bar of the statute and relieving him from the result of such negligence, except upon clear proof of a new promise, and the performance or fulfillment of the conditions, if any, attached thereto. See generally upon this subject 2 Greenl. Ev., sec. 440, and note, *supra;* Wood on Lim. of Actions, sec. 78; Mattocks v. Chadwick, 71 Me. 314; Tompkins v. Brown, 1 Denio, 248; Bidwell v. Rogers, 10 Allen, 438; Laforge v. Jayne, 9 Pa. St. 410; Sedgwick v. Gerding, 55 Ga. 264.

No effort whatever was made to connect the letter offered in evidence by plaintiff with the particular debt upon which the action was brought. The letter itself does not refer to such indebtedness, except by a strained implication. Considered alone, it entirely fails to establish such a clear and explicit acknowledgment of indebtedness as the law required to constitute a new promise. It is not necessarily the acknowledgment of any debt whatever; for aught that appears therein, the money promised upon the sale of the property may have been a loan to plaintiff. It is

questionable whether a general admission of indebtedness, however clear, is sufficient if it be not shown unmistakably to relate to the particular demand sued for; unless from the nature of the debt in controversy, or the particular circumstances connected therewith, a legal presumption fairly arises that such debt was referred to: Wood on Lim. of Actions, p. 105, and note 2; Miller v. Baschore, 83 Pa. St. 356.

But there is no question as to the insufficiency of such a doubtful and equivocal recognition of *any* indebtedness whatever, as is contained in the letter under consideration.

The court erred in finding upon the evidence adduced that defendant made a new promise to pay the debt in controversy sufficient to avert the statutory bar.

The judgment resting upon such finding must be reversed and the cause remanded.

Reversed and remanded.

WEBBER *v.* HARTMAN.

Filed December 4, 1883.

NO ONE BUT A HOUSEHOLDER CAN TAKE UP AN ESTRAY ANIMAL under the Colorado statute, and he only when it is found in the vicinity of his residence.

WHETHER THE TAKING UP OF AN ESTRAY ANIMAL BY AN EMPLOYEE OF A HOUSEHOLDER, without his knowledge or direction, can be subsequently ratified by him, *quære.*

TAKER-UP OF AN ESTRAY ANIMAL FORFEITS ALL CLAIM TO COMPENSATION, and can not defeat an action for the possession of the property brought by the owner, if the taking up was originally unlawful, or if it has subsequently became unlawful by an abuse of the authority vested in him by statute.

TAKER-UP OF ESTRAY HORSES CAN NOT USE THEM FOR THE PURPOSE OF GENERAL LIVERY, and if he does so, such use is tortious, and the taker-up forfeits his claim to compensation.

ERROR to the district court of Arapahoe county. The opinion states the facts.

A. W. Brazee, for the plaintiff in error.

E. B. Sleeth, and *Benedict & Phelps,* for the defendant in error.

BECK, C. J. Chancellor Kent defines *estrays* as "cattle whose owner is unknown:" 2 Kent's Com. 359. Blackstone says: "Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner thereof; in which case the law gives them to the king, as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein:" 1 Bla. Com. 297.

Our statute provides, that "no person shall take up an estray animal except in the county where he resides and is a householder, nor unless the same be found in the vicinity of his residence:" Gen. Laws, 1877, sec. 2565.

It is extremely doubtful whether the estray law of this state was ever intended to embrace a case of mere temporary straying a short distance from the residence of the owner, and without fault or negligence on his part. It is much more probable that its framers designed it to apply to cases of lost animals—those roaming around the country apparently without owners.

Where horses and cattle are free commoners, and in the absence of statue or ordinance prohibiting them from running at large even in the

street and highways, it would seem to be an unwarrantable application of the estray law to take up such animals on first sight, without other evidence that they are estrays than the single fact that they have approached the residence of a householder, and that he happens not to know who their owner is.

The horse and mare sought to be replevied in this action were the driving team of the plaintiff in error, who is a resident of North Denver. They escaped from his lot, into which he had turned them, and two days afterward came to the livery stable of defendant in error Hartman, in the same city, situated on the corner of Halladay and Twelfth streets, and distant from the residence of the owner about a mile and a half. Upon the same morning of their appearance at the stable they were driven into defendant's corral, adjoining the stable, and thereafter detained by him as estrays.

But for their seizure, it is probable they would either have returned home, or been found by the owner, who was in pursuit of them, and who not only searched through the different divisions of the city for them, but through the entire neighborhood and surrounding country as well.

If, however, it be conceded that these animals were astrays within the meaning of the statute, it then becomes a grave question whether they were lawfully taken up and detained as such. No one but a householder is authorized to take up an estray animal, and he only when it is found in the vicinity, as we have seen. These animals were taken up in Mr. Hartman's absence, and without his knowledge or direction, by the employees in his livery stable.

He says he returned to the stable about ten o'clock the same morning, and finding the horses in the corral, inquired how they came there. He testifies that this was the first time he ever saw them. On learning the facts, he continued to detain them, and had them posted and recorded as estrays. There is no evidence that the men who took them up and put them into the corral were persons authorized by statute to take up estray animals, nor is the defense based upon this ground, but upon the subsequent ratification of the act by Hartman, who was a qualified person.

The counsel for plaintiff in error contends that the statute must be strictly construed as to all its requirements—*that the taking up* is a material step in the proceedings, which can only be performed by a duly authorized person, and if done without authority, or by one not authorized by statute, the act is incapable of ratification.

Upon this proposition the counsel cites numerous authorities to the effect that in summary proceedings of this character the law must be strictly followed in all its details. Counsel for defendants in error, on the other hand, treat this point as trivial, and insist that the subsequent ratification by Hartman, after learning the circumstances from his men, was equivalent to an original taking by himself.

Upon examination of authorities, we find that such eminent jurists as Judges Cooley and Christiancy consider the point as a substantial one.

Newson v. Hart, 14 Mich. 235, is a case very similar to this so far as this feature is involved. The statute under which this case arose authorizes "any resident freeholder of any township to take up any stray horses by him found going at large." A horse was taken up by a minor son of a freeholder, without his previous knowledge or consent, but the act was afterwards fully ratified by the father, so far as it was capable of ratification,

and the subsequent proceedings under the statutes were conducted by the father in his own name. The ruling of the court was, that the act of the son was a trespass and could only be confirmed by the father, as such, so as to make him originally liable as a trespasser. The reasoning is, that the restriction of the power to a certain class of persons was designed as a safeguard against its abuse, and for the protection of the rights of the owners of these animals; that the power given must be strictly pursued; and that none of the safeguards thrown around its exercise can be disregarded. The courts say: "Other classes of persons might as a general rule be not only less able to respond for an abuse of the power, but less careful to inquire into the circumstances before exercising it, less discreet in making seizures, and more disposed to exercise the power under circumstances which would not call for its exercise, than freeholders against whom the same power might be exercised by their neighbors. In this view of the statute, every owner is entitled before his property shall be 'taken up' to have the benefit of the knowledge and information of the freeholder, and to the exercise of his personal discretion and judgment upon the circumstances of the case, and his personal decision thereon. * * * The father had no right to substitute the information, judgment, and discretion of the son for his own. The son was a mere trespasser; his act was illegal and void, and the subsequent ratification confirmed it only *as such*, as a void and illegal act upon which no right to the property can be founded."

The application of the above doctrine to this case would not only divest Hartman of any right of possession or claim to compensation, but would make him a trespasser from the beginning. But we do not base our decision in this case upon either of the two points above mentioned. There is another point in the case that we consider fatal to the judgment below, which is, that soon after the seizure of these horses as estrays, they were put to work by Hartman and used by him in his business as livery horses up to the day of trial, a period of about two years.

The excuse for this treatment as given by said defendant is, that they had to be kept twelve months before they could be sold under the estray law, and being kept in the stable, they were put to work so as to make them earn their feed; that Hall, his co-defendant, purchased them at the sale, and after that they were used as his horses.

It is not pretended here that any title passed by virtue of this sale, but it is strongly contended that defendants are entitled to the possession of the horses until the costs, charges, and fees prescribed by sections 2565 and 2566 are paid by the plaintiff, notwithstanding the fact that the sale was void.

This was the view taken by the district court; and in accordance with the instructions given on the trial, the jury found the ownership in the plaintiff, and the right to possession in the defendants.

This would be correct if it could be said that the original taking up was lawful, and that there has been since no abuse of the authority granted by the statute. It is well settled that a subsequent abuse of the authority will relate back to the seizure, and render the whole proceeding void from the beginning. If the taking up was unlawful, or if it has subsequently become unlawful, the taking up forfeits all claim to compensation and can not defend an action for possession of the property on this ground. The rule is stated in Bacon's Abr., p. 451: "When the law has given an authority, it seems reasonable that the law should, in

order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make everything done void, and leave the abuser in the same situation as if he had done everything without authority." Defendant Hartman says the horses were put to work so as to make them earn their feed; his counsel argue that they were gently exercised for the benefit of their health, while the livery-stable men and drivers say they were driven to hacks and worked the same as the other livery horses at the stable. Defendant's counsel make the further point, that the driving about publicly of estray horses is an advantage to the owner, in affording better opportunities for the discovery of the animals, when it is done fairly and with no intention to deceive, as in this case.

It would be a sufficient answer to this proposition to say the law is otherwise; but as to the driving being an advantage to the owner in this case, we may add, the fact is otherwise.

One of these animals is a bay gelding, without brand or any distinguishing marks, except that the owner says he had a long, bushy tail when he went away. The other animal is a sorrel mare, having white marks by which she could easily be identified. Now the manner of using them prior to the attempted sale was such as to render their identification difficult and improbable. The horses were not driven together, but with other animals, the horse being driven in the day-time and the mare in the night-time.

When found by the owner shortly after the sale, the horse had a short tail, and the owner swears that the bushy part of the tail was cut square off. The witnesses for the defense, however, swear that the hair was not cut off after he came to the stable, but that the horse may have worn it off somewhat, as horses usually do when driven to buggies or hacks. Admitting this to be so, the appearance of the horse would be changed; and being driven in livery with a mate pretty closely resembling him in general appearance, it is doubtful whether the owner would have recognized him if he had seen him on the street.

The finding of the jury referred to by counsel, that Hartman acted in good faith in respect to the whole transaction, does not alter the facts of the case as they were shown to exist upon the trial. The question involved is not a question of good faith, but a question of law; and considering it as such, we can not regard the using of these horses in the manner described by the witnesses otherwise than as a gross abuse of the authority given by statute, nor do we think that the supposed necessity or the supposed benefits assigned therefor afford any justification whatever. The statute never contemplated the stabling and grain-feeding of estray stock, as is evident, not only from the expressions employed about *herding* and *ranching*, but from the rate of compensation allowed the taker-up. It provides that after filing a certain notice it shall be lawful for the taker-up to *herd and take charge of such stock*: Gen. Laws, sec. 2565.

The next section allows him fifty cents per month for *ranching* "the said stock."

The argument that the continuous working of estray horses in livery as in this case may be justified on the ground of necessity, assigning as such necessity that the animals require exercise to preserve them from injury, or a necessity to cut down the expenses of keeping them; or to place it upon the ground of a benefit to the owner as affording better

opportunities for recognition, is not only illusory and absurd, but is in contravention of legal principles.

The law from the earliest times has regarded the using of estrays or distrained animals as a tort, save only when the use was necessary to their preservation, as in the case of milch-cows.

Blackstone says: "When impounded the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it has been held that the distrainor is not at liberty to work or use a distrained beast:" 3 Bla. Com. *13.

The case of Oxley v. Watts, 1 T. R. 12, cited by counsel for plaintiff in error, was an action of trespass for taking a horse, tried before Lord Mansfield. The defendant justified taking the horse as an estray.

It seems that the original taking was admitted to be lawful, but the court held that the subsequent using made the defendant a trespasser *ab initio*.

In Sackridge v. McDonald, 10 Johns. 252, it was held to be such an abuse of the power of distraining animals, *damage feasant*, to impound them before the damages were assessed, as to render the original seizure a trespass. The opinion was delivered by Kent, C. J., who, in discussing the principle of carrying back an abuse of authority to the original taking, says: "This was the settled rule of the common law, and it has been constantly and uniformly acknowledged by the courts; and the distinction is between an entry, authority, or license given to one by law and by the party. If the authority be abused, the law, in the first case, adjudges by the subsequent act, *quo animo*, the original entry was made, and makes the party a trespasser *ab initio;* but not so in the latter case, because the party can not, for any subsequent cause, punish that which was done by his own authority."

The case of Barrett v. Lightfoot, 1 Mon. 241, was an action of trespass for illegally riding and killing a stray horse. The defense was that the defendant took up the animal as an estray under the statute, and previously to the ten days allowed by law to post him as such, caused him to be used in a case of necessity to send for a physician. Upon demurrer the plea was held bad, and the ruling was sustained upon writ of error.

The question presented for decision was, conceding it to be in general illegal to use an estray before posting, whether this case, by reason of the necessity that existed for the use, formed an exception.

The court was not called upon to decide whether the rule was different after posting, but the reasoning of the court and the authorities cited make no distinction.

The first proposition announced is, that if Barrett acted under the authority of law in taking up the horse, any subsequent abuse of that authority makes him a trespasser *ab initio*. Barrett relied upon a case in Cro. Jac. 148, as authority for using the horse, from which case the court quotes the following paragraph: "It is not lawful for any to use it in any manner unless in case of necessity and for the benefit of the owner, as to milk milch-kine, because otherwise they would be spoiled; and so of the like. But to use a stray horse by riding or drawing is tortious, although it were alleged that the common course is to use stray horses with withes about their necks."

Upon the above citation the court comment thus: "It will at once be

admitted that the case in Croke goes as well to establish the principle that strays can not in the general be used, as that there may exist such a necessity for using them as to form an exception to the general principle, and render the use lawful. But to have that effect the necessity must, we apprehend, be of a different sort to that which is alleged in the plea of Barrett. The illustration made by the court in the case cited shows the sense in which the expression "necessity" was intended by them, and proves conclusively that strays can not lawfully be used by the taker-up, unless to use them be necessary to preserve them from injury, and for the benefit of the rightful owner.

There being, therefore, no such necessity for using the horse by Barrett alleged in his plea, the use was illegal, and an abuse of the authority of law, and as such the demurrer to the plea was correctly sustained.

The cases of Nelson v. Merriam, 4 Pick. 249, and Adams v. Adams, 13 Pick. 384, recognize the same doctrine of the forgoing authorities, and all are in accord with the ruling that the using of estrays, save as to the exceptions mentioned, is tortious, and that the taker-up forfeits his claim for compensation.

These views being in conflict with the theory upon which the cause was tried, and with the instructions of the court below, the judgment will be reversed and the cause remanded for further proceedings, etc.

Reversed.

MORELL *v.* FERRIER.

Filed December 4, 1883.

DEBT BARRED BY THE STATUTE OF LIMITATIONS WILL BE REVIVED by a letter from the debtor to his creditor containing an unequivocal acknowledgment of the indebtedness, and a clearly implied promise to pay the same.

SUFFICIENCY OF A PROMISE TO TAKE SUCH DEBT OUT OF THE BAR OF THE STATUTE is a question of law for the court, while the question whether such promise refers to the debt sought to be recovered is generally to be determined by the jury.

BURDEN OF PROOF IS ON THE DEFENDANT TO SHOW THAT AN ACKNOWLEDGMENT of indebtedness by him did not relate to the demand in suit, but to an entirely distinct debt.

ERROR to the district court of Fremont county. The opinion states the facts.

John D. Freeman and *Stuart Bros.*, for the plaintiff in error.

Macan & Cox, for the defendant in error.

STONE, J. Plaintiff brought suit November 22, 1881, against the defendant upon a promissory note of which the following is a copy:

"$2,500. January 1, 1866.

"Three years after date we promise to pay to the order of Mrs. Anna Maria Morell twenty-five hundred dollars at the office of Tweed & Sibley, No. 40 Walnut street, Cincinnati. Value received.

"SAM. T. FERRIER.
"GEO. E. FERRIER.
"THOMAS FERRIER."

The complaint averred that the note was given for money loaned by plaintiff to defendants; that there was a verbal agreement for interest at ten per cent. per annum from date until paid, and that the accruing interest thereon had been paid up to April 1, 1871.

Defendant pleaded: 1. The general issue; 2. That the cause of action accrued without the state; and, 3. The statute of limitations.

To the plea of the statute of limitations the plaintiff replied, setting up a new promise in writing, which was contained in a letter from the defendant to the plaintiff, of which letter the following is a copy:

"DELPHI, IND., Nov. 24, 1876.

"MRS. A. M. MORRILL, Cincinnati, Ohio.

"I received a letter from you a few days ago about your money. I had written Uncle Tweed some time ago about it, and supposed he had written to you. I sold one of my farms some time ago, and will have money coming in in February, when I expect to pay you all. Until then, I do not see how I can pay you, as times are very close here and money is hard to get. Our crops have not been good for two years, consequently I have but little to make money out of until my notes come due.

"I am sorry I have not been able to pay your interest as it came due, but will pay you interest on what is unpaid, so as to make it all right.

"Please leave the note with Mr. Sibley, and let him figure it all up; send me the amount, and if nothing happens I will send him draft for it in February. Very respect.,

"SAM. T. FERRIER."

The cause was submitted to the court for trial without the intervention of a jury, upon the pleadings, the note, and the letter, without other evidence, and upon consideration thereof the court found for the defendant, and rendered judgment accordingly.

The only question for us to consider is the sufficiency of this letter as evidence tending to prove the new promise relied upon to take the case out of the bar of the statute of limitations. The letter contains an unequivocal acknowledgment of an indebtedness from defendant to plaintiff, and a clearly implied promise to pay. As to its reference to the particular indebtedness, evidenced by the promissory note in suit, we think this is sufficiently indicated *prima facie*.

The note is made payable at the office of Tweed & Sibley, and the defendant in his letter refers to "Uncle Tweed" in connection with this indebtedness, and also refers to "Mr. Sibley," requesting the plaintiff to "leave *the note* with Mr. Sibley and let him figure it all up, send me the amount, and if nothing happens I will send him draft for it in February." The sentence including the foregoing refers to the interest which defendant regrets not having paid in full, but promises to pay; and the figuring which he requests Mr. Sibley to do evidently refers to computing the interest so as to ascertain the amount of principal and interest due on the note, which is made payable at Tweed & Sibley's, and for which defendant promises to send a draft to Mr. Sibley. Whether the promise, its identity with the debt being assumed or established, is sufficient to take the case out of the bar of the statute, is a question of law for the court. Whether the words of acknowledgment or promise, when not expressly referring to the debt sought to be recovered, are to be deemed as referring to such debt, is usually a question of fact for the jury: Whitney v. Bigelow, 4 Pick. 110.

In Martin v. Broach, 6 Ga. 21, it was held that where there is no dispute as to the facts which go to prove the acknowledgment or new promise, the question is one of law for the court, but where there is any dispute the question is a mixed one of law and fact for the jury. Moreover, it is laid down as a general rule that where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit,

and the burden is upon the defendant to show that it related to another debt, either wholly or in part: Wood on Lim. of Actions, p. 162; Angell on Lim. of Actions, sec. 238; 2 Greenl. Ev., sec. 441; Carr's Adm'r v. Hurlbut's Adm'x, 41 Mo. 264; Whitney v. Bigelow, 4 Pick. 119; Cook v. Martin, 29 Conn. 63.

If this rule be a sound one in general application, it certainly would apply with peculiar force in a case where but one item of indebtedness is in suit, and where one matter of indebtedness only is referred to in the acknowledgment or new promise. But we regard it as scarcely necessary to invoke the aid of this rule in the present case; the facts appear undisputed. This letter of defendant to plaintiff appears to fairly establish identity between the indebtedness it refers to and the note in suit; while the acknowledgment of the indebtedness and the new promise to pay the same are certainly sufficient in law to overcome the plea in bar.

We therefore think that upon the pleadings and evidence before the court the finding and judgment should have been for the plaintiff.

The judgment will be reversed and the cause remanded for a new trial.

Judgment reversed.

JONES ET AL. *v.* NATHROP, Adm'x, etc.

Filed December 4, 1883.

ACTION ON AN IMPLIED CONTRACT FOR THE USE AND OCCUPATION of a saw-mill lies against a vendee who has been in possession under a written contract for the sale of the same, the conditions of which he has failed to perform.

NEITHER PROBABLE PROFITS NOR PROSPECTIVE OF SPECULATIVE DAMAGES CAN BE RECOVERED in an action for the breach of a contract for the sale of milling machinery.

IN THE ABSENCE OF THE EVIDENCE INTRODUCED ON THE TRIAL, an appellate court will not reverse a judgment for the plaintiff, much less in amount than that sued for, on the ground that the jury failed to allow such proper amount of the defendant's counter-claim as the evidence warranted.

ERROR to the district court of Saguache county. The opinion states the facts.

George P. Uhl, for the plaintiff in error.

A. S. Weston, for the defendant in error.

STONE, J. The plaintiffs in error were sued in the court below for the sum of two thousand dollars, claimed for the use of a steam saw-mill from December, 1880, to June, 1881.

In their answer they admit the use for the time charged, but deny indebtedness therefor. They then allege that there was a written agreement for the sale to them of the saw-mill, and also a shingle-mill, with stipulated terms of payment. They also charge false and fraudulent representations respecting the machinery, and further aver that no shingle-mill was delivered to them, and that Nathrop at the time of the sale did not have a shingle-mill. By way of cross-complaint, they allege that Nathrop wrongfully took away the mill from them, and they claim damages for loss of profits which they would have made on lumber in the sum of five thousand dollars; for the wrongful removal of the saw-mill, one thousand dollars; and for loss of shingle timber cut but not used, one thousand dollars; and for loss of profits on shingles which they would have made if they had been furnished the shingle-mill as agreed, the fur-

ther sum of one thousand five hundred dollars; total, eight thousand five hundred dollars.

The claims of five thousand dollars and fifteen hundred dollars, for loss of profits on lumber and shingles, were demurred to. The demurrer was confessed as to the lumber claim and overruled as to the claim for profits on shingles.

There was a replication admitting the written agreement of sale, but alleging that it contained a condition that the machinery was not to be moved out of the county of Chaffee without the consent of Nathrop, and avers that plaintiffs in error did remove the saw-mill out of the said county, and that thereupon said Nathrop took possession of the same, as by the terms of said agreement he had full power and lawful authority to do.

The replication there denies the alleged false and fraudulent representations; denies the wrongful retaining of the mill; denies any damage by reason of such retaining; and denies any damage for loss of shingle timber. The cause was tried by a jury, who found a verdict for defendant in error, Nathrop, of one hundred and eighty dollars, and judgment was rendered accordingly.

The grounds of reversal are: 1. That suit was brought on an implied contract, and the defense pleads a written contract; hence there was no good cause of action, since there can not be both an implied and an express contract for the same cause of action at the same time. 2. That the cross-claims of fifteen hundred dollars for shingle profit and one thousand dollars for shingle timber were uncontroverted, and hence the plaintiffs in error were entitled to a judgment, notwithstanding the verdict. The suit was brought upon an implied liability and promise to pay for the use of the saw-mill; the right to recover did not rest on a written agreement for sale of the mill.

The latter, while set up as a defense to the action, presented no valid defense. On the contrary, as set out in the pleadings, it was evidence merely of an agreement to sell the machinery upon certain terms therein specified, without any provision respecting the use in case the sale should not be completed.

The sale was not to be complete until the last payment was made, upon which there was to be a bill of sale executed and delivered.

This agreement, moreover, provided that the mill should not be taken out of the county of Chaffee; and in case of a violation of this condition, Nathrop should have the right to retake possession of the mill as his own property.

This condition having been violated, as admitted by the pleadings, Nathrop having retaken the property, sued for the use, since the plaintiffs in error, although admitting the use for the time claimed against them, had paid nothing on account of either the sale or the use of the mill.

As to the second ground of reversal, that the items of one thousand five hundred dollars damages claimed for loss of profit on shingles, and one thousand dollars for value of shingle timber, were uncontroverted by the pleadings, and that therefore plaintiffs in error were entitled to a judgment for two thousand five hundred dollars *non obtante vere dicto*, we think the point not sustained, since the record shows that these items do not "stand uncontroverted" as argued. The replication expressly denies the item for loss of shingle timber. As to the item for loss of profit on shingles, the demurrer to this item as pleaded should have been

sustained. The averment was, in effect, that if plaintiff below had delivered to defendants a shingle-mill as he agreed to, said defendants would have made a large quantity of shingles, which they might have marketed at a profit, and that, as they aver, they have "sustained a loss of one thousand five hundred dollars as profit on the shingles which they would have made if plaintiff had furnished said shingle-mill." These damages as alleged are too remote, and merely speculative. Damages for breach of a contract can only be recovered when they are averred and proved as the natural, direct, and certain result of the breach, excluding probable profits and prospective or speculative damages.

To determine the application of the rule is often a perplexing question, but the rule itself is too well settled to require a citation of the numerous and familiar authorities in its support. Sedg. on Meas. of Dam., 72, 76, and note. One of the numerous illustrations of the application of the doctrine is that cited by Mr. Sedgwick in the note *supra*. Where one had agreed to furnish a steam-engine by a certain day to drive a planing and sawing mill, and through his default the mill was at a stand-still for a time for want of the engine after the stipulated day, it was held by the supreme court of New York, that a fair price for the use of the engine and machinery during the time lost should be allowed, but the claim for loss of net profits, calculated from the amount of lumber the mill might have cut and planed, allowing usual prices for the work over running expenses and wear and tear, should be rejected as too uncertain. See the leading American case of Griffen v. Colver, 16 N. Y. 489, for a full discussion of the subject, and where the rule is concisely stated, that "profits which would have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not."

In the case before us there is no such averment as shows the alleged damages to be the natural, certain, and proximate result of the conduct of the party sought to be charged. Nor is there any averment that plaintiffs in error ever demanded the shingle-mill after the alleged agreement to deliver it, and hence the admitted acceptance and use of the saw-mill alone may properly give a presumption that there was an acceptance by plaintiffs in error of the part performance of the agreement, and a waiver of the non-delivery of the shingle-mill.

At all events, the case having been submitted to a jury upon the issues made by the pleadings, and upon evidence which is not brought up here by the record, we can not say that the jury, in rendering a verdict for defendant in error of one hundred and eighty dollars instead of the two thousand dollars sued for, did not allow such proper amount of the counter-claim of plaintiffs in error as the evidence warranted; and the judgment will not be disturbed.

Judgment affirmed.

OVERLAND MAIL ETC. CO. *v.* CARROLL.

Filed December 4, 1883.

EXPRESS COMPANIES ARE SUBJECT TO THE SAME LIABILITIES as other common carriers, in the absence of special contract to the contrary with the shipper, and may be liable at the same time both as carriers and forwarders.

COMMON CARRIERS MAY LIMIT THEIR LIABILITY BY SPECIAL CONTRACT, but can not, for reasons of public policy, relieve themselves from liability for the actual value of the goods shipped, provided they have notice of such value, when loss or injury is occasioned thereto by the negligence of themselves or their employees.

SHIPPER, BY ACCEPTING WITHOUT OBJECTION A RECEIPT GIVEN HIM BY AN EXPRESS COMPANY, with knowledge of its contents, ratifies and is bound by all the conditions thereof, except those as to which no kind of a contract would, under the circumstances, be binding upon him.

EXPRESS COMPANY IS LIABLE FOR LOSS RESULTING FROM THE FAILURE of its agent to seal a valuable package, if it were their custom so to do, or for negligence in receiving such package unsealed, and afterwards shipping it in such condition, if it were their custom not to receive such packages until sealed by the shipper. Nor can it escape from liability for such loss on the ground that it may have occurred on one of their connecting lines.

CONFLICTING CHARGE TO THE JURY, IF NOT PREJUDICIAL TO THE BEATEN PARTY, is not ground for a new trial.

CLAUSE IN A CONTRACT OF SHIPMENT, THAT THE CARRIER WOULD "NOT BE HELD LIABLE for any loss or damage except as forwarders only," must be construed most strongly against the company; and while acting as a carrier in transporting goods, although relieved from liability save only as a forwarder, it must use reasonable skill, prudence, and industry in protecting and preserving such goods, and is liable for loss occasioned by not so doing.

APPEAL from a judgment of the district court of Hinsdale county, entered in favor of the plaintiff. The opinion states the facts

G. A. Richmond, for the appellant.

Markham, Patterson & Thomas, for the appellee.

HELM, J. In December, 1880, Carroll, plaintiff in the court below, delivered to defendant's agent at Lake City a package properly addressed to be carried by express to the city of Dubuque in the state of Iowa; he deposited the sum of three dollars to cover charges for the entire transfer, and received the following receipt, which was upon a printed blank with the spaces properly filled in writing:

"OVERLAND MAIL AND EXPRESS COMPANY,
LAKE CITY, Dec. 17, 1880.

"Received of P. J. Carroll a box, said to contain a gold watch and chain, valued at fifty dollars, and marked Miss Mollie Carroll, Dubuque, Iowa, which we undertake to forward to the nearest point of destination reached by this company, only perils of navigation excepted. And it is hereby expressly agreed that the said Overland Mail and Express Company are not to be held liable for any loss or damage except as forwarders only; nor for any loss or damage of any box, package, or thing for over fifty dollars, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God, or of Indians, or of the enemies of the government, the restraint of governments, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any fragile fabric, unless so marked upon the package containing the same; nor upon fabrics consisting of or contained in glass. (Three dollars deposited to pay charges.)

"J. L. SANDERSON & Co., Proprietors.
"By E. H. SMITH, Agent."

At the time of delivering the package, as aforesaid, plaintiff informed defendant's agent that it contained a gold watch and chain, which were worth one hundred and fifty dollars, whereupon the agent advised him that the company would not be responsible in connection therewith for more than fifty dollars. The articles were inclosed in a small wooden box, neatly made, with the cover securely fastened by screws, the whole weighing about two and a half pounds. Plaintiff requested the agent to seal the box, and the agent agreed to do so; he did not, however, and when its destination was reached, the contents were missing; the cover

was held on with screws as when shipped, but the box contained only rolls or wads of paper.

Upon being informed by plaintiff of the theft, the agent exclaimed, "By George! I forgot to seal the box; I ought to have sealed it." And to another witness he said substantially: "I wish I had sealed the package, it might be some assistance to us to find out the locality where the watch was extracted from the box."

The box was duly delivered by defendant at Alamosa, the terminus of its line, to the D. & R. G. Express Company, for further transportation, but was not then opened or examined. Upon this state of facts plaintiff brought his suit, and recovered a verdict and judgment for one hundred and thirty-five dollars in the court below. Defendant prosecutes this appeal therefrom.

In the absence of special contract with the shipper, express companies are subject to the same liability as other common carriers. At common law they are regarded as absolute insurers of goods properly packed, when intrusted to them for transportation, against loss or injury, except it be occasioned by the act of God or the public enemy. And it is now the settled doctrine that they may at the same time be subject to liability both as carriers and forwarders. That is, they will always be held responsible as common carriers to the extent of the transportation upon their own line, and beyond that they are responsible as forwarders. Their responsibility in the latter capacity is in some respects greater than that of either common carriers in the ordinary course of business between connecting lines: See 2 Redfield's Am. R'y Cas., note on p. 81, and cases cited.

This liability may, however, be limited by special contract with the consignor. But it is held, on the ground of public policy, that they can not even by contract shield themselves from responsibility for loss or injury occasioned by the negligence of themselves, their employees, or servants: York Company v. Central Railroad, 3 Wall. 107; Field on the Law of Damages, sec. 394, and cases; 2 Redfield on Railways, p. 31 (5th ed.) Appellant undertook to limit its liability by contract in accordance with the foregoing doctrine. The receipt given Carroll upon delivery of the package is supposed to evidence the terms of this agreement.

It is the usual method of making such contracts, and is sufficient, so far as the form is concerned, for the purpose designed. Upon accepting without objection or protest such an instrument, with knowledge of its contents, the shipper ratifies, and is bound by all the conditions thereof, except those as to which no kind of a contract would, under the circumstances, be binding upon him.

The cause was tried by a jury and the question of negligence was fairly submitted to them. Upon the subject of sealing packages, Smith, the agent who received the box, testified as follows:

"Q. Have you an instruction to seal packages in your office? A. Yes, sir.

"Q. Is it the custom of the office to seal packages? A. No: I don't know that it is. It is more the custom to have other parties seal their packages before we receive them.

"Q. Why did you say to Mr. Carroll that you forgot to seal the package? A. It would have been better if I had said, 'I forgot to have him seal it.' It is the custom of nearly all common carriers not to receive valuable packages unless sealed. I ought not, perhaps, to have received the

package until it was sealed, although it was very nicely put together, and I never dreamed that anybody was carrying a screwdriver.

"Q. This sealing business is done mainly for the purpose of tracing packages, if the contents have been disturbed? A. Yes, sir.

"Q. Is it then always the custom to seal a package, if it appears to be packed in such a manner as to accomplish this end? A. No.

"Q. Is the rule universal with regard to sealing? A. No: we are guided by the appearance of the package."

Witness Flynn, having had eighteen years' experience in the express business, also testified:

"Q. If you are so familiar with the customs of said companies, state what the custom is, if any, as to sealing express packages upon sending, and the purpose of such custom, and how general among express companies? A. The packages must be properly sealed before shipment—I mean valuable packages. The purpose is for security. The custom is general of sealing packages sent by express."

From the foregoing testimony, coupled with the promise of Smith at the time he received the box, and his language upon hearing of the loss of its contents, the jury evidently arrived at the following conclusions, viz.: That Smith was guilty of negligence in not sealing the package; and that it was the custom of express companies to seal valuable packages themselves, or it was their custom not to receive them until sealed by the owner. We would certainly not feel warranted in disturbing either of these findings upon the evidence before us. But they establish the liability of appellant.

If it be the custom of express companies to seal such packages themselves, appellant is liable for its agent's negligence in not sealing; if, as the agent himself contends, the custom is not to receive them until sealed by the shipper, the company is responsible for his negligence in receiving the box unsealed, and afterwards shipping it in the same condition.

Appellant can not be excused on the ground that the loss may have occurred on one of the subsequent connecting lines; this may be true. For aught that appears in the testimony, the contents may have been extracted after the box was transferred to the D. & R. G. Express Company at Alamosa.

Yet it was a valuable package, and should have been sealed; the loss arises from the negligence of appellant's agent in not sealing, and for the result of such negligence it is responsible.

Appellant could not make a binding contract with the owner whereby it should be released from all liability in case of loss through its negligence; upon the same principle it could not make a binding compact with him limiting its liability for loss occasioned by its negligence to fifty dollars or any other sum short of the actual value of the goods shipped: provided, of course, that it had notice of such actual value when it received them.

The evidence shows the watch and chain to have been worth one hundred and thirty-five dollars, and the jury were justified in returning a verdict for that amount: See Southern Express Co. v. Moore, 39 Miss. 822; 2 Redfield's Am. R'y Cas., p. 86.

If conflicting and irreconcilable propositions of law are contained in the court's charge, and it appears that the jury may have been mislead thereby to appellant's prejudice, a new trial should be granted.

In this case the charge is by no means a model one; there is some conflict between certain of the instructions given on behalf of the respective parties. But upon a careful and thorough consideration of the entire charge, we are satisfied that appellant could not have been prejudiced by such conflicts, and that we would not be warranted in granting a new trial by reason of imperfections therein.

The law giving common carriers a right to limit their liability by contract, except in case of negligence, was correctly stated by the instructions for plaintiff. Those for defendant omit the qualification on the subject of negligence.

If the jury were in any way misled by this portion of the charge, it must have been in the company's favor, and the error constitutes, therefore, no ground for reversal. Appellant endeavored to restrict its liability by declaring in the contract that it should "not be held liable for any loss or damage, except as forwarders only." This, like all other portions of the contract incorporated for its benefit, must be construed most strongly against the company. Appellee, when he accepted the receipt, probably had no conception of the meaning of this limitation. But, supposing that he is estopped from asserting his ignorance, still appellant is not relieved from responsibility.

Technically, it could not be a mere forwarder while the goods were in transit over its own line; the contract itself shows that the company was to transport the package from Lake City to some other point, for it provides for delivering the same "at the nearest point of destination reached by this company." Appellant was, under the contract, not merely to receive and forward the box by some carrier, having no interest in the freight and no expense or responsibility in the transportation. It would be no strained or unnatural interpretation of the contract to say that the intention was to limit defendant's liability to that of a forwarder from the *terminus of its line;* leaving its responsibility, that of a common carrier, with the other restrictions imposed by the contract while the goods were in transit thereto.

But we may construe the contract to be, that while acting as a carrier over its own line it should only be liable as a forwarder; and we may suppose the contract to have been understood by the shipper, and binding upon him. Yet in the capacity of forwarder appellant was held to the exercise of ordinary care, it was responsible for the negligence of its agents while the package remained in its possession. And while itself acting as a carrier in transporting the goods, although relieved from liability save only as a forwarder, it must see that reasonable skill, prudence, and industry are used in protecting and preserving the same.

The law is that a restriction, like the one under consideration, does not relieve the express company from liability for loss occasioned by the negligence of an employee on a steamboat or other conveyance, owned and conducted by some third party, but ordinarily used by the company in its business as a means of transportation.

Certainly the restriction can not relieve it from responsibility where, as in this case, such loss results from the negligence of its own employee.

See on this subject Hooper v. Wells, Fargo & Co., 27 Cal. 11; also note in 2 Redfield's Am. R'y Cas. 261.

Under this view of the law it can not be that appellant was prejudiced by the fourth instruction given for appellee.

The judgment of the court below must be affirmed.

Affirmed.

ISRAEL *v.* ARTHUR, Adm'r, ET ALS.

Filed December 4, 1883.

STRICT COMPLIANCE WITH THE STATUTORY REQUIREMENTS IS NECESSARY in order to obtain a valid service of summons by publication.

NO JURISDICTION OVER THE DEFENDANT IN AN ACTION FOR DIVORCE is acquired by a service of summons by publication where the record shows on its face that the summons was issued and returned by the sheriff on the same day, when the statute commanded the "usual exertion on the part of the sheriff to serve the summons," in actions for divorce, notwithstanding the proceedings by publication.

VALIDITY OF A JUDGMENT FOR DIVORCE MAY BE COLLATERALLY ATTACKED FOR WANT OF JURISDICTION over the person of the defendant, when such fact affirmatively appears from the record, although such judgment recites that due service of process had been made.

LEGISLATURE OF COLORADO HAS NO POWER, UNDER THE CONSTITUTION, TO GRANT DIVORCES, nor can it validate a decree for divorce which was absolutely void for want of jurisdiction of the court over the person against whom it was rendered.

ERROR to the county court of Larimer county. The opinion states the facts.

D. & H. Haynes, for the plaintiff in error.

Wells, Smith & Macon, Rhodes & Love, E. A. Ballard, and *Barnum & McCord*, for defendants in error.

HELM, J. This action was brought by plaintiff in error, in the court below, for the purpose of establishing her right to the estate of John Arthur, deceased, as sole surviving heir at law.

Plaintiff was married to the said Arthur in 1859; there was no issue from the marriage, and unless divorced, plaintiff was his wife at the date of his decease, and entitled under the statute, there being no will, to inherit his entire estate. Defendants in the court below were deceased's brother, who was also administrator of the estate, and certain nephews and nieces, who were interested therein as heirs, provided plaintiff failed in establishing her right thereto.

At the trial the court admitted, over plaintiff's objection, the records and judgments in two divorce actions brought against her by the said John Arthur during his life-time.

The first of said actions was instituted in the probate court of Larimer county; and on February 9, 1875, a decree of divorce was granted therein. The second was brought in the county court of said county, and on June 12, 1877, a similar decree was again entered.

Two of the errors assigned attack the correctness of the court's rulings admitting in evidence the records of the divorce suits.

The code of civil procedure did not become a law until October, 1877, and consequently both of these actions were brought, and the service of process therein was attempted under the practice prevailing in Colorado before that instrument was adopted. Each of the records admitted in evidence shows on its face that the summons was issued and returned on the same day, and that the court relied for its jurisdiction over the person of defendant upon an attempted service of notice by publication. In obtaining constructive service in this way, a strict compliance with the method pointed out by statute must be observed. While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof. They tolerate the omission of no material step required by law in connection therewith. The statute, at the time these

actions for divorce were commenced, commanded the "usual exertion on the part of the sheriff to serve the summons," notwithstanding the proceedings by publication: R. S. Col. 13, sec. 8.

And it has been held by this court, that in divorce suit under that practice "a return *non inventus* before the return day of the writ would not support a notice by publication, and left the court without authority to proceed to judgment:" Clayton et al. v. Clayton's Heirs etc., 4 Col. 410; Vance's Heirs v. Maroney, etc., Id. 47; Palmer v. Cowdrey, 2 Id. 6.

Neither the probate nor the county court in these actions had obtained jurisdiction over the person of defendant; both were without authority to "proceed to judgment," and consequently both decrees were absolutely void.

But it is argued by counsel: 1. That these decrees are not subject to collateral attack in this proceeding; 2. That in any event, the finding of the county court in the latter, that "due service by publication has been had on said defendant," is conclusive upon the question of service, and fortifies *that* decree against such an attack. There is some conflict of authority upon the question as to whether, in an attempt to secure constructive service by publication, any presumption of regularity will be indulged in, the record being entirely silent. It has been held that a compliance with the material requirements of the statute must appear on the face of the record. On the other hand, courts of high authority have announced that such presumptions are applicable to the proceedings of courts of superior jurisdiction, whether such proceedings rest upon actual or constructive service. It is unnecessary, however, for us in the case at bar to determine this question.

For where the record is not silent on this subject, and where it affirmatively appears therein that the court did not have jurisdiction of the person, certainly no such presumption can be indulged in: Clayton v. Clayton, *supra;* Galpin v. Page, 18 Wall. 336.

And the finding in one of these records that due service of process has been had is not conclusive. We are not prepared to accept without qualification the doctrine upon this subject stated in Gondy et al. v. Hall, 30 Ill. 116, relied upon by counsel for plaintiff in error; the opinion in that case *seems* to hold that the finding in the record of due and legal service is only *prima facie* evidence of that fact, and may be attacked in a collateral proceeding. Interpreted or understood without condition, it modifies the beneficent rule that judicial records import absolute verity; and its effect would be to subject them in many instances to collateral attack, where upon principle and authority they should be held conclusive.

In Harris v. Lester et al., 80 Ill. 307, the court use the following language with reference to a similar finding of service by the court which tried the cause: "In all collateral proceedings we entertain no doubt such finding is sufficient evidence of service by publication as to defendants, nothing appearing in the record to the contrary, and to warrant the decree as in cases of regular notice by publication." This may fairly be said to modify the position taken in Gondy v. Hall, and is, we think, in accord with the weight of authority.

It sanctions the view that where, as in the case under consideration, the record expressly recites the facts relied upon as constituting service, and those facts show clearly that no jurisdiction of the person was obtained thereby, it would be absurd to pronounce conclusive and binding a declaration therein that legal service was had.

The record stultifies itself, and is not protected by the rule that such findings are decisive of the question in collateral proceedings.

The divorce records before us were offered by the parties to be directly and materially benefited thereby, and we are clearly of opinion that they were subject to collateral investigation.

In 1877 the legislature passed the following act, which was approved by the governor on the first day of March, viz.:

"*Whereas*, the probate courts of certain counties have heretofore exercised jurisdiction in divorce cases, and various parties have obtained decrees of said courts granting divorces with the belief that the courts possessed jurisdiction in relation to said matters; *and whereas*, doubts exist as to the validity of said proceedings and as to the right of said courts to exercise jurisdiction in the said matters;

"Therefore, be it enacted as aforesaid, that all proceedings of any probate courts, the jurisdiction of which is or may be questioned, as aforesaid, heretofore had in any case, so far as the same or any part thereof relate to the matters aforesaid, and to the jurisdiction of the courts therein, be and the same are in all respects legalized:" Gen. Laws, sec. 925.

It was generally supposed that the probate courts of the territory of Colorado had no jurisdiction in divorce proceedings; that such actions could only be brought and determined in the district court. The correctness of this supposition is questionable in view of the chancery jurisdiction conferred upon probate courts by the amendment to the territorial organic act, approved March 2, 1863: R. S., p. 38, sec. 3.

But the state legislature, as appears from the foregoing act, shared sufficiently in the general belief on the subject to attempt to neutralize the effect of the supposed errors in question.

Counsel for defendants in error contend that this legislative enactment rendered valid and binding the decree of the probate court in 1875. They argue that although in that case the court may have had no jurisdiction, either of the subject-matter or of the person of defendant, this act was intended to and did cover and cure these defects.

Our state constitution provides that the general assembly shall pass no local or special laws for granting divorces. This provision deprives the legislature of the authority existing under the territorial organization to divorce husband and wife by statute. It still has power to declare what shall be necessary to constitute a valid marriage, and what grounds shall be sufficient to authorize a divorce; it may also provide the method of procedure by the courts, upon application thereto for such relief. But it can not, under this constitutional provision, assume judicial powers, and sever the bonds of matrimony in a given case.

If the legislature in 1877 could not do this directly, could it accomplish the same result indirectly? Could it by statute give vitality to the decree of a court which was absolutely lifeless and void for want of jurisdiction over the person against whom it was rendered?

The legislature may by statute validate judicial proceedings where the statute is only in aid thereof, and tends to support the same by precluding parties from taking advantage of errors or irregularities which do not affect their *substantial rights*. But it can not by retrospective legislation give validity to previous judicial proceedings which were void for want of jurisdiction over the parties. Two reasons may be assigned for this inhibition: 1. Because it would be an exercise of judicial power not con-

templated by our constitution: See art. 3. 2. Because it would operate to deprive parties of their "day in court;" property rights might be divested without notice to those interested, and without giving them the opportunity to be heard: See Bill of Rights, sec. 25; Mason v. Eldred, 6 Wall. 239; Cooley on Const. Lim. *107, and cases cited in notes.

A decree of divorce generally affects the property rights of the parties as well as their marital relations: Israel v. Arthur, 2 Col. 319. "Upon this question we can not doubt or hesitate. They [the legislature] can no more impart binding efficacy to avoid proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other:" McDaniel v. Correll, 10 Ill. 226.

"If it was competent for the legislature to make this declaration, then it was competent for it to have declared that to be a judgment which before was no judgment, and binding upon the party against whom it was rendered, when before he was not bound at all; for such is the direct result. It is a proposition not to be discussed at this day, that the legislature has no such power:" Nelson v. Roundtree, 23 Wis. 370; see Pryor v. Downey, 50 Cal. 403; Wade on Retroactive Laws, sec. 164.

The statute of 1877 can not be held to cure the defect of want of jurisdiction over the person of defendant in the divorce action of 1875.

It is doubtful if the legislature intended this statute to produce any such consequence.

The act itself, viewed in the light of the "*whereases*" prefixed thereto, seems to indicate that it was simply the intention to remedy the defect of want of jurisdiction over the subject-matter, where the court had complied with the law in obtaining jurisdiction over the person. It is unnecessary for us to consider the constitutionality of the act in this view of its supposed design and operation further than is necessarily implied by the foregoing discussion. The records of the divorce proceedings should have been excluded by the court; for errors in admitting them, the judgment must be reversed and the cause remanded.

We may deplore the effect of these conclusions in this particular case, but the consideration of hardship to these defendants therefrom must not be permitted to influence our judgment upon the questions presented. In the language of Mr. Justice Elbert, in Clayton v. Clayton, *supra*, "it can not avail against the greater hardship of concluding parties by adjudications of their most sacred rights, in the proceedings of which they have no notice and to which they have never appeared."

Reversed and remanded.

ISRAEL *v.* ARTHUR, Adm'r, ET ALS.

Filed December 4, 1883.

DECEASE OF THE HUSBAND AFTER A DECREE OF DIVORCE HAS BEEN GRANTED in his favor, and before proceedings in error thereon are instituted, does not operate to prevent a review and reversal of such decree.

ERROR to the county court of Larimer county. The opinion states the facts.

D. & H. Haynes, for the plaintiff in error.

Wells, Smith & Macon, Rhodes & Love, E. A. Ballard, and *Barnum & McCord,* for the defendants in error.

HELM, J. John Arthur, now deceased, in his life-time brought suit and obtained a decree of divorce against his wife, who is the plaintiff in error herein. This writ is prosecuted for the purpose of reversing that decree.

The record of proceedings in that cause shows on its face that the court acted without obtaining jurisdiction of the person of the defendant. In the case of Israel v. Arthur et al., *ante,* we have fully considered this record and declared the proceedings of the county court therein void and of no effect.

The judgment and decree must be reversed. This court has held that the decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review and reversal of the decree. That "where property rights are involved, as in this case, the same reason exists for determining its validity as in civil cases generally:" Israel v. Arthur, 2 Col. 319.

Reversed and remanded.

GLASS-PENDERY CONSOLIDATED MINING CO. *v.* MEYER MINING CO.

Filed December 4, 1883.

AWARD OF ARBITATORS WILL NOT BE SET ASIDE FOR THE FAILURE OF ONE of the arbitrators to inspect the subject-matter of the controversy, in company with his associates. Such inspection, if no testimony is taken, or points involved in the litigation decided, does not constitute a hearing.

OBJECTIONS TO ALL IRREGULARITIES IN THE PROCEEDINGS OF ARBITRATORS, which are not jurisdictional, must be seasonably made, in order to render them available; and if a party to an arbitration, knowing of an irregularity in the proceedings, remains silent, and permits the investigation to proceed, in order to avail himself of all chances of an award in his favor, he can not afterwards question the validity of an award unfavorable to him.

PROCEEDING VOID FOR WANT OF JURISDICTION IS A MERE NULLITY, and the defects which make it void are incapable of being waived.

FAILURE OF ONE OF SEVERAL ARBITRATORS TO BE PRESENT AT A MEETING of his associates is not a jurisdictional defect, and may be waived by the parties to the arbitration. Such waiver takes place by proceeding with the business of the meeting without interposing any objection to the absence of the said arbitrator.

FAILURE OF ARBITRATORS TO EXAMINE CERTAIN BOOKS, as required by the articles of submission, is immaterial, where by stipulation of counsel a complete statement of all that such books contained was used by the arbitrators instead of the books.

REFUSAL OF ARBITRATORS TO EXAMINE A WITNESS OFFERED IN BEHALF OF THE UNSUCCESSFUL PARTY will not warrant setting aside the award, unless the record shows that the facts which the witness could have testified to would have been material or pertinent.

APPEAL from the district court of Lake county. The opinion states the facts.

William Harrison, for the appellant.

J. B. Bissell, for the appellee.

BECK, C. J. The two mining companies which constitute the parties appellant and appellee to this appeal were, in the month of December, 1880, the respective owners of adjoining mining claims in Lake county. The appellee, being the owner of the Ætna mine, complained that the appellant company had by its agents and servants crossed the boundary line, and committed various trespasses upon its property, including the running of divers drifts, levels, and other developments, and

the extraction of valuable ores and mineral-bearing substances. It was finally agreed to submit the whole controversy to the decision of five certain individuals as arbitrators, and in pursuance of this agreement articles of submission were entered into on the eighth day of December, 1880, the respective corporations binding themselves to abide by the award that should be made by the arbitrators, or any three or more of them, provided the award was in writing and ready to be filed with the clerk of the district court of Lake county on or before the first day of January, 1881.

The arbitrators agreed upon duly qualified, investigated the subject of dispute, and on the twenty-ninth day of December made their award in writing, in favor of the appellee. It was filed with the clerk of the district court on the same day. All the arbitrators signed the award, although one of them, Nelson Hallock, dissented from the conclusion arrived at by his associates. Afterwards, on the third day of January, 1881, the appellant filed a motion to vacate the award, assigning as grounds of the motion certain acts and omissions of the arbitrators pending the investigation. The district court denied the motion and entered judgment upon the award. The appellant then filed a motion to set aside the judgment, which was also denied. Exceptions were reserved to these rulings, and it is now assigned for error that the district court erred in refusing to set aside the judgment, and in refusing to vacate the award.

We learn from the record that the arbitrators had three meetings. The first meeting was at the Ætna mine, which they visited for the purpose of personally inspecting its workings; the second meeting was held for the purpose of hearing testimony; and the third and last meeting was to hear further testimony, and to deliberate upon and make their award.

The first ground assigned in the motion to vacate the award is, that the arbitrators did not all meet or act together during the investigation of the matters submitted to them. The specific objections urged under this head are, that Henderson, one of the arbitrators, did not attend the meeting at the mine, and that Hallock, another arbitrator, did not attend the second meeting, at which most of the testimony was heard and taken. The appellant supported these objections by affidavits, but the conceded facts concerning the same are embodied in a stipulation signed by the counsel of the respective parties, which is inserted in the bill of exceptions. Referring to the objection that Henderson failed to attend the meeting at the mine, it is proper to consider the object of that meeting, and the action taken thereat. The arbitrators say they considered it a necessary part of the investigation which they were required to make in the case; but the record shows that no witnesses were examined at this meeting; that no measurements were taken, and no rulings made.

Its object appears to have been to afford the arbitrators an opportunity to personally inspect the mine and its workings so as to enable them to comprehend the testimony to be introduced, and the more intelligently to investigate the controversy. Although Henderson did not visit the mine at the same time the others did, he afterwards, and before the award, visited it in company with one of the other arbitrators, and made the same personal inspection which the others had previously made. He also attended the second and third meetings; was present when all of the witnesses were examined, and participated in all of the deliberations of the board. In view of these facts, we do not think that

the failure of Henderson to meet all his associates at the mine vitiated the award. Merely inspecting the subject-matter of the controversy, without taking testimony or deciding points involved in the litigation does not constitute a hearing. Such a meeting does not necessarily require the joint action of all the members of a commission, as do meetings at which testimony is to be heard or consultation is to be had and rulings made.

A more serious question is presented by the objection that arbitrator Hallock did not attend the second meeting, at which the greater portion of the testimony was heard and taken. This was a meeting which all the arbitrators were required to attend, by an express provision of the statute then in force. The provision was: "All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question:" C. C. P. 1877, sec. 283. The absence of Hallock from this meeting was clearly an irregularity, but whether it was fatal to the validity of the award depends upon whether it was such an irregularity as could be waived by the parties. The stipulation of counsel shows that the appellant was present and knew of Hallock's absence. It is not pretended that any objection was made to proceeding with the hearing without him, as he had requested should be done when notified to be present. The simple inquiry, therefore, is whether, under these circumstances, the absence of the arbitrator could be waived by the parties. The well-settled rule of law relating to all irregularities in the proceedings of arbitrators which are not jurisdictional is, that an objection to be availing must be seasonably made; that if a party, knowing of an irregularity in the proceedings, in order to avail himself of all chances of an award in his favor, remains silent and permits the investigation to proceed and money to be expended, and the time of all concerned to be consumed for the purpose, he will not afterwards be heard to question the validity of an award that is unfavorable to him. His silence will be construed into consent that the proceedings continue without objection, notwithstanding the error; for had an objection been interposed before the award was made, the irregularity might have been corrected. Neither legal nor moral considerations entitle him to raise the objection afterwards: Morse on Arbitration and Award, p. 177; Maynard v. Frederick, 7 Cush. 250; Broom's Leg. Max. *137.

The point to be determined in this connection is, whether the irregularity complained of is jurisdictional; for it is an elementary principle that consent can not confer jurisdiction. A void proceeding is a nullity, and the defects which make it void are incapable of being waived. Mr. Sedgwick says: "So it is well settled that not even the most formal and solemn consent can give jurisdiction to a court not authorized to take it. And whenever the objection is raised, although it may be a breach of faith and good morals to insist upon it, still it will be fatal:" Sedgwick's Stat. and Const. L., p. 87. Accordingly, this court held, in Haverly Invincible Mining Co. v. Howcut, 4 Col. 62, that parties to a litigation could not by agreement confer jurisdiction to try a cause upon one not a judicial officer authorized by law to hold the court: See also Derry v. Ross et al., 5 Id. 295.

That many statutory provisions relating to judicial proceedings may be waived by the litigants, and that the waiver may be either express or implied, is beyond controversy. That other provisions can not be waived, is equally well established. A provision which, if insisted on, would

inure to the benefit of a party not involving principles of public policy may be waived, and its non-observance will not invalidate the result of the proceeding. But where the requirement is a prerequisite to jurisdiction, or where the purpose of the enactment is to secure general objects of public policy or morals, its observance can not be dispensed with by consent of parties: Sedgwick's Stat. and Const. L., pp. 87, 359; Selleck v. Sugar Hollow T. Co., 13 Conn. 452; Ives v. Finch, 22 Id. 101; Florence & R. Co. v. Ward, S. C. Kan., Feb. 1883; Abbott v. Dexter, 6 Cush. 108.

It sometimes becomes a difficult question to determine whether a statutory requirement is a prerequisite to jurisdiction or not. An illustration of the difficulty is furnished by the contrariety of judicial opinion upon the usual statutory provision that arbitrators shall be sworn before proceeding to hear any testimony. Courts which have held that the oath may be waived base their ruling upon the proposition that the taking of the oath is not a prerequisite to jurisdiction, while those of opinion that the oath may *not* be waived hold that it *is* a prerequisite to jurisdiction.

Among the cases taking the former view are: Howard v. Sexton, 4 Comst. 157; Browning v. Wheeler, 24 Wend. 257; Woodrow v. O'Connor, 28 Vt. 776; Tucker v. Allen, 47 Mo. 488.

In the following cases the contrary view is presented: Inslee v. Flagg, 26 N. Y. 368; Overton v. Alpha, 13 La. Ann. 558; Combs v. Little, 3 Green Ch. 310; Hepburn v. Jones, 4 Col. 98.

We are of opinion that the failure of Hallock to attend the meeting referred to was not jurisdictional; it follows, therefore, that the error complained of was an irregularity, and might be waived by the parties; also, that inasmuch as the stipulation shows that the appellant was present at the meeting in question, and knew of the absence of the arbitrator but interposed no objection to proceeding without him, the objection made after the award was made and filed came too late.

The appellant does not appear to have been in any manner prejudiced by the irregularity complained of. All the testimony produced at the meeting was written down by a stenographer and afterwards transcribed by him. The transcript was submitted to Hallock, and read and examined by him without objection at the final meeting. All the arbitrators were present at the last meeting, and all, with the whole evidence before them, consulted and deliberated together concerning their award. The objection can not be sustained: White v. Robinson, 60 Ill. 499; Akridge v. Patillo, 44 Ga. 585.

The point raised, that the arbitrators made no examination of the books of the Glass-Pendery company, as required by the articles of submission, is wholly without merit. The stipulation of counsel shows that the appellant did not produce the books for examination; and further, that a complete statement of all that the books contained, pertinent to the case, was, by consent of the appellant, furnished to and used by the arbitrators instead of the books. The oral objection urged on hearing of the motion below, that the arbitrators refused to allow one Joseph Uhl to be examined as a witness before them on part of the appellant can not be sustained in the form presented by the record. The request to examine Uhl as a witness does not appear to have been made by an officer or stockholder of the company, nor by a person authorized to make it. It was made by the foreman of the Glass-Pendery mine, whose position indi-

cates simply an employee in the mine. Nor is it shown what facts the proposed witness could have testified to, without which we can not say that the testimony would have been material or pertinent. In the present state of the record, it does not appear that the arbitrators refused to receive testimony pertinent to the controversy, which was offered by one of the parties thereto, or that they rejected competent testimony upon a point that needed to be proved; nor is it shown that they omitted to pass upon any matters included in the submission.

Upon the whole record we discover no evidence of misconduct upon the part of the arbitrators, and no evidence that any action taken by them was prejudicial to the rights of the appellant. Every step in their proceedings appears to have been taken with the knowledge and express or implied consent of the appellant, and no objections to their proceedings were made until the award was made and found to be in favor of the appellee.

The motion to vacate the award was properly denied, and the same grounds being urged upon the motion to set aside the judgment, it, too, was properly denied.

The judgment is affirmed.

SUPREME COURT OF IDAHO.

SCHNEIDER ET AL. *v.* HUSSEY ET AL.

Filed September 14, 1881.

STATUTE OF LIMITATIONS, WHEN ACT TAKES EFFECT.—Where the statute of limitations provides that in cases where the cause of action has already accrued at the passage of the act, the party shall have the whole period prescribed by the act, after its passage, in which to commence action, and by another act of the same legislative session it was provided that said statute should take effect at a day subsequent to its approval by the governor, the period of limitation to an existing cause of action will not begin to run until such latter date.

THE WORDS "PASSAGE OF THIS ACT," used in such connection, mean the time when the act takes effect.

APPEAL from a judgment of the district court of Idaho county, entered in favor of the plaintiffs. The opinion states the fact.

J. Brumback, for the appellants.

Huston & Gray, for the respondents.

MORGAN, C. J. This action was brought on a promissory note given by defendants to the plaintiffs, a copy of which appears in the complaint, filed in the court below. The note was dated October 31, 1874, and was due on demand. Suit was commenced on the same, February 28, 1880. Defendants plead the statute of limitations. Plaintiffs move for judgment on the pleadings, which motion was allowed by the court and judgment entered accordingly for the amount of the note, interest, and costs. From that judgment defendants take an appeal to this court.

The question whether this action was barred by the statute of limitations, depends upon the construction to be given to the language contained in section 2 of said act, which states that "when the cause of action has already accrued, the party entitled, and those claiming under him, shall have, after the passage of this act, the whole period herein

prescribed in which to commence an action," which period at the time of the commencement of this suit was five years.

The question is as to whether the words "passage of the act" mean when it is signed by the governor, or when by law the act goes into effect. The first section of the act of January 15, 1875, fixes the time when this act, among others, takes effect, which is July 1, 1875. It will not be contended that one section of an act will take effect or be in force at any earlier date than other sections, unless the act itself shall so state. There is no clause in this act providing that this section shall take effect sooner than any other sections of the same act.

This section, therefore, and no clause of it, can take effect until the first day of July, 1875. The words "passage of the act," while they have a technical meaning which is well understood in this connection, and as used in the sections referred to, must be held to mean the time when the act takes effect. Any other construction of the words would give life and action to this section before it can have any life.

The same construction of these words was given in the case of Keys v. Vass, 6 Iowa, 408. The court there says: "A prominent objection made by defendant is, that the right of pre-emption was taken away by the act of January 24, 1857, which appealed all prior acts allowing pre-emption on swamp lands, but with a proviso saving all actual settlers on said lands at the time of the passage of the act. As the act was passed in January, and the petitioner began his improvements in June, the defendant insists that the former acquired no right of pre-emption, he not being a settler at the passage of the act. But the objection is not well founded; this and similar expressions in statutes have legal reference to the time of their taking effect. No other construction would be consistent with the requirements of the constitution, which requires that the laws shall be published before they take effect."

It is also the well-settled rule of courts that when there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizens.

The judgment of the court below is therefore affirmed.

CALDWELL *v.* RUDDY.

Filed September 14, 1881.

OBJECTION THAT AN ANSWER DOES NOT CONTAIN FACTS SUFFICIENT to constitute a defense may be made in the supreme court for the first time. If, however, the answer contains any defense, the objection must be overruled.

OBJECTION THAT AN ANSWER CONTAINS INCONSISTENT DEFENSES CAN NOT BE MADE by demurrer, but by motion to strike out or to require the defendant to elect upon which he will stand.

IMPROVEMENTS UPON THE PUBLIC LANDS ARE LAWFUL SUBJECTS OF SALE, and are sufficient consideration to support promissory notes and other contracts.

INADEQUACY OF CONSIDERATION IS NO DEFENSE TO AN ACTION ON A PROMISSORY NOTE unless there was fraud also on the part of the promisee.

CONTRACT OF AN INSANE PERSON IS MERELY VOIDABLE, not absolutely void. The right to avoid it is a personal right, which can only be exercised by the insane person or his guardian or representatives. Other parties to the contract who are of sound mind are not affected until it is avoided by the party entitled to disaffirm it.

INSANE PERSON CAN NOT DISAFFIRM HIS CONTRACT WITHOUT RETURNING THE CONSIDERATION therefor.

SURETY TO A PROMISSORY NOTE IS DEEMED TO CONTRACT that the principal maker is in every way competent to contract in the way he has done.

APPEAL from a judgment of the district court of the first judicial district for Nez Perce county, entered upon a verdict for the defendant. The opinion states the facts.

A. E. Isham, for the appellant.

Huston & Gray, for the respondent.

PRICKETT, J. This action was brought by the plaintiff against the defendant in the district court upon two joint and several promissory notes, alleged to have been executed by the defendant and one Michael Ruddy, deceased. Each of said notes is for the sum of two thousand six hundred and forty-six dollars and thirty-eight cents, both dated March 7, 1872. One due October 15, 1872; the other, October 15, 1873. Also upon an account for three hundred and three dollars and thirty-four cents. Upon the first-mentioned note is credited one thousand five hundred and fifty-four dollars and thirteen cents, January 15, 1873.

The defendant's amended answer consists of ten subdivisions, each of which was no doubt intended as a complete or partial defense to the said several causes of action, or to some one or more of them. Such proceedings were had in the district court as resulted in the striking out of the seventh and ninth subdivisions of the answer. The plaintiff demurred, in the court below, to the amended answer alleging as objections that the second and third subdivisions are inconsistent with the tenth, and that the sixth and eighth paragraphs are inconsistent with each other; and also specially demurs to the tenth paragraph, on the ground that it constitutes no defense to the action. The district court overruled the demurrer, and the plaintiff excepted to that ruling. The cause being tried by a jury, a verdict was rendered for the defendant, whereupon a judgment was rendered against the plaintiff for costs. From that judgment the plaintiff appealed to this court. Much of the matter contained in the transcript was stricken out, on motion, because it constitutes no part of the record, not being made such either by the statute or by bill of exceptions or statement.

The case as it now stands is to be reviewed upon the judgment roll alone, which consists of the complaint, amended answer, the demurrer to the answer and the decision of the court thereon and the exception of the plaintiff thereto, the verdict, and the judgment.

The plaintiff and appellant claims that he is entitled to a reversal of the judgment of the district court, on the ground that the amended answer does not set forth a defense to any of the causes of action alleged in the complaint. This brings us to a consideration of the answer as upon a general demurrer to the whole thereof on the ground just stated.

This objection may no doubt be raised in this court for the first time, but in determining it we must be governed by the same rule that the district court would have been had it been raised there, which is, that if there is any defense contained in the answer, the objection must be overruled. Upon an examination of the amended answer, we find that the sixth subdivision thereof is as follows: "For a further and separate defense, avers that the said notes and accounts have been fully paid." This, if true—and it is admitted to be so for the purpose of this objection—constitutes a full and complete defense to all of the several causes of action set forth in the complaint, and this general objection to the answer as a whole must be overruled.

We now proceed to an examination of the written demurrer interposed in the district court, and to review the decision of that court thereon. The first two subdivisions of the demurrer will be considered together. The language of the demurrer is that several defenses have been improperly united, but the objection urged on the argument is that the second and third paragraphs of the answer are inconsistent with the tenth, and that the sixth and eighth paragraphs are contradictory and inconsistent with each other; and the specifications of the particulars as contained in the demurrer clearly show that the real grounds of the objection are based upon an alleged inconsistency between the specified portions of the answer, and not upon an improper joinder of defenses. An objection that a pleading contains inconsistent allegations or denials can not be made by demurrer. The grounds upon which a party may demur are specified and enumerated in the statute, and he must be limited to the statutory grounds. That a pleading contains inconsistent allegations or defenses, is not one of those grounds. When this objection exists, it should be taken advantage of by motion to strike out, or to require the party pleading to elect between them. The first and second subdivisions of the demurrer were therefore properly overruled.

The third subdivision of the demurrer is directed to the tenth paragraph of the answer. It is, in effect, an objection that that paragraph does not contain facts sufficient to constitute a defense to any of the causes of action set forth in the complaint, and it specifies the particulars in which it is claimed to be deficient.

The tenth paragraph of the answer is as follows: "For a further and separate defense, defendant avers that the said notes were procured from the said Michael by the said plaintiff by fraud and misrepresentation. That the pretended consideration for said notes was certain improvements upon a certain piece or parcel of government land in said county; and the defendant alleges that the said plaintiff, in order to secure the execution of the said notes by the said Michael, and well knowing that the said Michael was then sick, and laboring under both physical and mental derangement which rendered him wholly incapable to transact his own business, falsely and fraudulently represented to the said Michael that he was the owner of the said land and the improvements thereon, and that the same was then worth the sum of the said notes; and the said Michael at that time was the father-in-law of the said plaintiff, and had full confidence in and fully believed all the representations made by the said plaintiff, and was thereby induced to sign the said notes; and defendant alleges the fact to be that the said land and improvements were not worth the said amount, or any amount in excess of sixteen hundred dollars, and that the said plaintiff well knew the same. And defendant avers that the said plaintiff was not the owner of the said land or improvements, or any portion thereof more than one half of the same, and plaintiff well knew the same at the time; and defendant avers that the most, if not all, of said improvements were made by one James Pierson, and that he, said Pierson, was the owner of at least one half thereof, all of which was well known to said plaintiff."

This portion of the answer is clearly intended to show illegality in, or failure of consideration, either in part or in whole, for the promissory notes alleged to have been made by the defendant and his deceased father, Michael Ruddy, in his life-time, and fraud on the part of the plaintiff in procuring the execution of the notes by the said Michael

Ruddy; but it is wholly insufficient for either purpose. The sale of improvements upon the public lands of the United States is not prohibited by any law, neither is it against sound morals, public policy, or public interests, and there is no reason why they may not be proper subjects of sale, and serve as actual value and valuable consideration for promissory notes and other contracts. It is apparent that an entire want of consideration is not relied upon as a defense because it is admitted by defendant that the land and improvements sold were worth the sum of one thousand six hundred dollars. The defendant does not say that his father did not get all the property for which the notes were given; but in effect, that it was not worth the price agreed to be given therefor. This is merely alleging inadequacy, not failure of consideration. This is no defense, unless there was also fraud on the part of the plaintiff in inducing the purchaser to believe it to be of greater value, which we shall presently consider.

It is not the business of courts to relieve parties from the obligations of their contracts fairly made, because they are disadvantageous or foolish, but to enforce them. Courts, both of law and of equity, refuse to disturb contracts on grounds of mere inadequacy, whether the consideration is of benefit to the promisor or of injury to the promisee: 1 Parsons on Cont. 436.

It is alleged in this portion of the answer, it is true, that the plaintiff was not the owner of more than one half of the improvements sold to Michael Ruddy, but that one James Pierson was the owner of at least one half thereof; but it is a sufficient answer to this allegation that it nowhere appears that said Michael Ruddy in his life-time, or his heirs or representatives, have ever been disturbed in their possession of the property, or that Pierson has ever asserted any rights thereto; but even if he had done so, and the purchaser had been actually evicted from a portion of the premises and improvements, he could not avoid payment of the notes without first surrendering or offering to surrender the remainder to the plaintiff, so that the parties might be remitted to their original rights.

Upon the question of the mental incapacity of Michael Ruddy to make the notes, it is sufficient to say that this constitutes no defense in favor of this defendant. The contract of an insane person is voidable only, not absolutely void: 2 Bla. Com. 291; 2 Kent's Com., 6th ed., 451. The right to avoid it is a personal right which can only be exercised by the insane person or his guardian or representatives. The contract is binding upon the party who is of sound mind, and his liability is not affected until it is avoided by the party entitled to disaffirm it. Nor could Michael Ruddy have disaffirmed the notes on this ground without returning the property. A person may not disaffirm or rescind a contract and yet retain any portion of the consideration. The only exception to this rule is when the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser can not derive any benefit from a purchase and yet rescind the contract. It must be nullified *in toto* or not at all. It can not be enforced in part and rescinded in part. And if the property would be any benefit to the seller, he is equally bound to return it. He who would rescind a contract must put the other party in as good a position as he was before, otherwise he can not do it: Chitty on Cont. 276.

And so as to all the other allegations intended to show fraud, the rule

and principle apply. One of the two joint and several makers of a promissory note can not defend on the ground that the signature of the other maker was procured by fraud. If, as is alleged, the defendant, as a matter of fact, executed the notes as surety for Michael Ruddy, then his standing is in no respects better, for a surety, grantor, or indorser of a promissory note is deemed in law to contract that the principal maker of the note was in every way competent to contract in the manner he has, and that the instrument is a binding obligation upon said maker. This subdivision of the answer does not contain facts sufficient to constitute any defense to the notes, and the demurrer thereto ought to have been sustained by the district court, and for that reason the judgment must be reversed and the cause remanded.

Judgment reversed and a new trial ordered.

SUPREME COURT OF NEVADA.

VICTOR MILL AND MINING CO. *v.* JUSTICE'S COURT ETC.

Filed June 4, 1883.

NO INTENDMENTS CAN BE PRESUMED IN FAVOR OF THE JURISDICTION OF A JUSTICE OF THE PEACE, but each step towards its acquirement must be affirmatively shown.

SECTIONS 1093 TO 1097, BOTH INCLUSIVE, OF THE CIVIL PRACTICE ACT, relating to service of summons, are applicable to justice's courts.

AFFIDAVIT FOR PUBLICATION OF SUMMONS AGAINST A NON-RESIDENT DEFENDANT, the same being a California corporation, must state the facts showing what diligence had been used to obtain a personal service. An allegation that the plaintiff has used due diligence, and that the summons has been returned by the constable unserved, is not sufficient.

SERVICE OF SUMMONS BY PUBLICATION IS VOID, WHERE THE RESIDENCE OF THE NON-RESIDENT or absent defendant is known, unless the order for publication directs a copy of the summons and complaint to be deposited in the post-office, directed to the person to be served, at his place of residence. The affidavit for such publication must show that a cause of action exists against the defendant, and state whether his residence is or is not known; and if known, such residence must be stated.

DEPOSIT OF COPIES OF THE SUMMONS AND COMPLAINT IN THE POST-OFFICE, directed to a non-resident defendant at his known place of residence, has no effect on an attempted service by publication, unless done by order of the court.

STATEMENT IN AN AFFIDAVIT FOR PUBLICATION OF SUMMONS, that the amount claimed was "due from defendant to plaintiff," is simply an allegation of a legal conclusion.

APPLICATION for a writ of *certiorari* to the justice's court of township number 18, Esmeralda county. The opinion states the facts.

Bennett & Reddy, for the petitioner.

No appearance for the defendant.

LEONARD, J. The petitioner seeks to review, by *certiorari*, the action of respondent in an action entitled "A. Hasset, plaintiff, v. Victor Mill and Mining Company, defendant," wherein judgment by default was rendered and entered of record against the defendant therein, November 17, 1881, for the sum of two hundred and seventy-three dollars damages, besides eighty-seven dollars and forty-one cents interest, and forty dollars and ten cents costs.

It is alleged in the petition, among other things, that the defendant in said action was never served with summons or complaint; that no service of summons was made on any officer, agent, or servant of the defend-

ant; that no service of summons was made by posting copies thereof in said township number 18; that no attorney was appointed by said justice's court to appear in behalf of the defendant; that the defendant never knew or was cognizant of the pendency of said action until September 1, 1882, or thereabouts.

There is nothing in the court's return which contradicts the above allegations of fact. The defendant's time for appeal did not lapse, therefore, by its own fault. An attempt was made to get service upon the defendant by publication, but it is not claimed there was personal service.

A complete transcript of the record and proceedings of the court in said action is before us, and it is to be decided therefrom whether respondent acquired jurisdiction of the person of the defendant. If it did not, the judgment rendered in said action is null.

It is well settled in this and other courts that nothing can be presumed in favor of the jurisdiction of a justice of the peace, but that each step towards its acquirement must be affirmatively shown; that the statutory provisions for acquiring jurisdiction over a defendant by any other than personal service must be strictly pursued; that an affidavit for publication of summons, which merely reports the language of the statute, or its substance, is not sufficient, but the ultimate facts of the statute must be proved by the affidavit by showing the probative facts upon which the ultimate facts depend, and that it is not sufficient for the order to state that the ultimate facts "appear to the satisfaction of the court," but they must be sustained by the probative facts stated in the affidavit. The probative facts set out in the affidavit must be sufficient to justify the court in being satisfied of the existence of the ultimate facts required by the statute before it has jurisdiction to order service of summons by publication: Little v. Currie, 5 Nev. 90; Roy v. Whitford, 9 Id. 372; Scorpion S. M. Co. v. Marsano, 10 Id. 382.

The civil practice act relating to service of summons, from section 1093 to 1097, compiled laws, both inclusive, are applicable to justices' courts. Section 1092 is not made applicable, in direct terms, but it must be read in connection with the former ones, for the purpose of ascertaining what the affidavit and order for publication should contain, in order to satisfy the law and make the service complete.

Section 1093 provides, that "when the person on whom the service is to be made resides out of the state, or has departed from the state, or can not after due diligence be found within the state, or conceals himself to avoid the service of summons, or, being a corporation or joint-stock association, can not be served as provided in section 29, compiled laws, 1092, and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons."

It is plain from this section that a corporation must, if possible, be served as required by section 1092; and if it can not be so served, then, upon proof of the fact by affidavit to the satisfaction of the court, service may be made by publication, if the affidavit also shows a cause of action against the person to be served, or that he is a necessary or proper party.

Section 1092 provides, that "if the suit be against a foreign corporation * * * doing business in this state, the summons shall be served by delivering a copy thereof attached to a certified copy of the complaint to an agent, cashier, or secretary, president, or other head thereof; *provided*, that if the suit be against a corporation organized under the laws of the state of California, in addition to such personal service, a copy of the summons attached to a certified copy of the complaint shall be deposited in the post-office, addressed to the president and trustees of said corporation, at their place of business in the state of California, if the same be known, or can by due diligence be ascertained."

By section 1094 it is provided, that "in case of publication, where the residence of a non-resident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be deposited in the post-office, directed to the person to be served at his place of residence."

Let us now test the affidavit and order for publication by the requirements of the section from which we have quoted. Petitioner is a California corporation doing business in this state.

The only showing made in the affidavit that the defendant could not be served as required by section 1092, was the following: "That defendant has no agent or person upon whom service of summons can be had, and this affiant, in support thereof, states the following facts and circumstances: That a summons was duly issued out of this court, directed to the constable thereof, with instructions to said constable to serve the same; that the said constable has returned the same not served; that affiant has made diligent inquiry to find said defendant, but can not, after due diligence, find it within this state."

The matters set forth in an officer's return are presumed to be true, but the presumption as to what he has done does not extend beyond the facts stated by him. Here, by the affidavit, it was shown that the constable had returned the summons not served.

That fact did not tend to prove that it could not be served according to the requirements of section 1092. It was not proof that the defendant had no officer in the state upon whom personal service could be had. The plaintiff also stated in his affidavit that he had made diligent inquiry to find the defendant, and that after due diligence it could not be found in the state. Of course the defendant could not be found in the state, because it was a foreign corporation. Its residence was in California. But it may have had an officer here upon whom service could have been made under section 1092, and if that was the case the court had no right or power to order service by publication. It was then incumbent upon the plaintiff to show that the defendant did not have such officer in the state, by setting out the facts showing what diligence he had used, what he had done in attempting to ascertain the required information. It may be that if the plaintiff had stated the diligence used and the grounds of his belief, the court's conclusion would have been different from his. There was not a sufficient showing that the defendant could not be served according to the requirements of section 1092.

Again: if service is made by publication, and the residence of the non-resident or absent defendant is known, the service is void unless the court directs a copy of the summons and complaint to be deposited in the post-office, directed to the person to be served, at his place of resi-

dence. If the residence is known, such deposit is an indispensable part of the service.

In this case, the affidavit contained no statement as to the defendant's residence, and the court made no order directing the deposit.

Plaintiff may have known the residence. If he did he should have stated it in his affidavit. The court should have made the requisite order, and the return in this proceeding should have shown a full compliance therewith. Nothing less, at least, than an affidavit to the effect that plaintiff did not know defendant's residence, could justify the failure to order the depositing of copies of the complaint and summons in the post-office, directed as required. Whether or not the affidavit should also state facts showing sufficient diligence in attempting to ascertain the residence, we do not deem it necessary to decide.

We can not presume that plaintiff did not know the defendant's residence, and without that presumption the return would not show a legal service, even though we should conclude that the affidavit contained facts sufficient to justify the court in deciding that service could not be made under section 1092.

There is, however, in the return an affidavit of plaintiff's attorney to the effect that on the seventeenth day of October, 1881, three days after the date of order for publication was made, he deposited in the post-office at Candelaria, Nevada, a copy of the summons, attached to a certified copy of the complaint in said action, postage fully prepaid, directed to the president and trustees of the Victor Mill and Mining Company at San Francisco, California; but neither justified the order for publication nor aided the attempted service.

The place of residence was not stated in the affidavit, and the court did not order the deposit in the post-office. Without an order so to do, the deposit was a mere gratuitous act on the part of the attorney. It did not cure what had already been done.

Again: the affidavit must show that a cause of action exists against the defendant. The complaint filed stated a cause of action, but the affidavit did not, and the complaint was not sworn to. Besides, the order for publication shows upon its face that the court did not consider the complaint in making the order. Nor could it have done so, in any event, since it was not incorporated in the affidavit.

These are the only statements of a cause of action in the affidavit, viz.: "That said action is brought to recover two hundred and seventy-three dollars due from defendant to plaintiff on account for work and labor done for defendant, at Candelaria, Nevada, between March 15, 1879, and March 15, 1880, a voucher or statement of which is attached to my complaint herein, and interest on the same sum."

That the amount claimed was "due from defendant to plaintiff," is simply a legal conclusion, and there is no allegation or statement that the work was done at the defendant's request. It may have been done voluntarily on the plaintiff's part. At any rate, the contrary does not appear from the affidavit upon which the court acted: Huguet v. Owen, 1 Nev. 466; McManus v. The Ophir S. M. Co., 4 Id. 16; State Tel. Co. v. Patterson, 1 Id. 150.

Our opinion is that the order for the publication of summons was void, and that the court acquired no jurisdiction of the person of the defendant in said action.

The judgment rendered therein is annulled.

SIMPSON ET AL. v. OGG ET AL.

Filed June 11, 1883.

FINDINGS OF FACT CAN NOT BE CONSIDERED ON APPEAL, unless they are embodied in the statement of the case.

APPLICATION FOR A NEW TRIAL, ON THE GROUNDS OF INSUFFICIENCY OF THE EVIDENCE to justify the findings of fact, conclusions of law, and judgment of the court, and that the same were against law, and for errors of law occurring at the trial, must be made upon a statement prepared as the statute requires.

APPEAL FROM AN ORDER DENYING AN APPLICATION FOR A NEW TRIAL, made on such grounds, will be dismissed, unless the transcript contains a statement of the case, properly certified as to its correctness by the judge.

ERRORS APPEARING IN THE JUDGMENT ROLL CAN NOT BE REVIEWED on an appeal from an order denying a motion for a new trial only.

APPEAL from an order of the third judicial district court for Esmeralda county, denying the defendants a new trial. The opinion states the facts.

T. H. Wells, *P. Reddy*, and *A. C. Ellis*, for the appellants.

M. A. Murphy and *A. W. Crocker*, for the respondents.

LEONARD, J. Prior to the oral argument in this case, a preliminary motion was made to dismiss the appeal for various reasons stated. The motion and the case were submitted together.

We shall not stop to consider at length the objections urged against the notice of appeal and the undertaking on appeal. It is, however, proper to state that they are faulty in many particulars.

It is stated in the notice that the defendants will appeal, when it ought to state that they do appeal.

Again: the undertaking was executed and filed more than a year after judgment, and consequently the judgment could not be appealed from. It was executed, however, before the notice of appeal was served and filed.

One of the recitals in the undertaking was that, on the fifth of July, 1880, plaintiffs obtained judgment against defendants for the sum of one thousand nine hundred dollars, with interest thereon then accrued in the sum of one hundred and eleven dollars, and interest on said sum of one thousand nine hundred dollars from date of judgment until paid, at the rate of ten per cent. per annum, while the fact is that the judgment gave interest on two thousand and eleven dollars from date of judgment until paid.

Another recital was to the effect that defendants were desirous of appealing to this court from said judgment, and every part thereof, and from the order denying a new trial, and were desirous of having execution stayed pending such appeal.

The undertaking was sufficient in amount to stay execution, but the appeal is from the order denying the motion for a new trial only; and the sureties "undertake and agree, to and with the said plaintiffs, that if said appeal be perfected, the said defendants will pay to the said plaintiffs the amount of said judgment, principal, interest, and costs, and all accruing costs and damages in said cause, for which they may obtain judgment against said defendants, in case said judgment be affirmed, wholly or in part, or said appeal abandoned or dismissed."

In view of the fact that the sureties bound themselves to pay only in the event that said appeal, that is to say, an appeal from the judgment

agreed upon as correct, we could not regard it on this appeal, even though it had been read and referred to on the hearing, for the reason that it would have been unsettled: Solomon v. Fuller, 13 Nev. 278.

Under the agreement that plaintiffs should have until ten days after the judge should settle and certify the bill of exceptions in which to file amendments, the statement is now as unsettled as it would have been if, without the stipulation, amendments had been proposed and filed, and no further action had been taken thereon.

It was appellants' place and duty to present to the judge below such a statement as the statute requires; and, failing to do so, they can not complain of his action in disregarding it. He had no right or power to consider the imperfect statement filed.

This being an appeal from an order denying the motion for a new trial only, errors appearing in the judgment roll can not be reviewed: Thompson v. Patterson, 54 Cal. 545; Jenkins v. Frink, 30 Id. 596; Martin v. Matfield, 49 Id. 45; Shepard v. McLeil, 38 Id. 74.

Besides, it is not shown that any of the papers in the transcript constituting the judgment roll were read or referred to by the judge in deciding the motion; and, as before stated, we are confined in our investigations to the record made and used in the court below.

Respondents' motion to dismiss the appeal in this case would have to be sustained, even though injustice had been done appellants at the trial; but we shall now enter the order of dismissal with less reluctance than we should have felt in that state of the case, being satisfied, upon an examination of the evidence, that the action was fairly tried.

Appeal dismissed.

Robinson *v.* Longley.

Filed August 9, 1883.

Judgment Appealed from may be Affirmed if the Appellant fails to file any points and authorities, as required by the rules of the supreme court.

District Court has Jurisdiction of an Action to Recover Back money paid under protest in satisfaction of an illegal tax, although the amount in controversy is less than three hundred dollars.

Property Belonging to a Circus Which is Passing through the State, although it remains there for a few days in the ordinary course of its business, is not subject to taxation.

Appeal from a judgment of the second judicial district court for Washoe county, entered in favor of the plaintiff. The opinion states the facts.

John R. Kittren and *Thomas E. Haydon*, for the respondent.

No appearance for the appellant.

Leonard, J. Plaintiff is a resident of Hamilton county, state of Ohio, where he pays, and has heretofore continually and uniformly paid, taxes upon the property hereinafter mentioned.

In July, 1882, he was, and for a long time prior thereto had been, the owner of a circus and menagerie. In the month mentioned he was traveling and exhibiting his said circus and menagerie, transporting the same on the cars of the Union Pacific and Central Pacific railways, from Omaha, Nebraska, to the town of Reno, in this state, where he remained and exhibited one day. He also exhibited in other towns in the state along the lines of railroads. He did not come to the state, or bring his

property here, to remain longer than was necessary in order that he might exhibit the same. After exhibiting in the state, as before stated, he intended to take his circus and menagerie to the principal cities and towns in California, and in fact did so.

While said property was in Washoe county, the defendant, as assessor thereof, assessed said circus and managerie, for state and county purposes, in the sum of ten thousand dollars, and threatened to seize and sell said property unless the tax of two hundred and seventy-five dollars should be forthwith paid thereon. To prevent such seizure and sale, plaintiff then and there paid said tax under protest, and thereafter brought this action to recover back the same.

Defendant demurred to the complaint on the ground that the same did not state a cause of action, and that the second judicial district court did not have jurisdiction of the cause of action. The demurrer was overruled, and defendant failing to answer in the time allowed therefor, judgment by default was entered. This appeal is taken from the judgment.

Appellant has failed to file any points and authorities, as required by the rules of this court. For this reason alone, we shall be justified, under former decisions, in affirming the judgment appealed from; but from the character of the case, we deem it advisable to pass upon the merits of the appeal. The court below had jurisdiction of the cause of action. The case involves the legality of a tax: Const., art. 6, sec. 6. The complainant states a cause of action against defendant.

The property was not assessable in this state. In the sense of the statute, for the purpose of taxation, it was not within the state. It was passing through the state at the time of the assessment. It was here temporarily, in the ordinary course of business. When he came here, plaintiff intended to remain in the state but a few days—just long enough to fill the engagements advertised, and then to continue his journey to other places in a neighboring state. He intended to take away all the property he brought with him. He was actually "on the wing," passing from one state to another. As well might this property have been taxed, if for the purpose of rest or health plaintiff had stopped for a few days in Washoe county. As well might a resident of another state be taxed on his money and team, if he comes on a visit to the state to remain a week: Barnes v. Woodbury, 17 Nev.; Conley v. Chedic, 7 Id. 341; State v. Engle, 34 N. J. L. 427; Hoyt v. Commissioners, 23 N. Y. 240; Id. 245.

The judgment is affirmed.

SUPREME COURT OF UTAH.

JONES *v.* GALLAGHER.

Filed September 1, 1881.

ONE WHO PURCHASES STOCK FOR ANOTHER, WITH MONEY ADVANCED BY HIMSELF, taking the title thereto in his own name, has a special property in the stock so purchased, and may hold the same as security for such advances; nor is he compelled to obey an order to sell, given him by the party for whom such purchases were made, which would necessarily result in a loss to himself.

QUESTION OF GOOD FAITH AND THE EXERCISE OF A SOUND DISCRETION on the part of the one so refusing to sell should be left to the jury.

DIRECTION BY THE OWNER OF SUCH STOCK TO THE HOLDER THEREOF to sell the same and invest the proceeds in another stock, constitutes an indivisible order, and confers no authority on the holder to sell and apply such proceeds to the owner's account due him.

WHETHER DAMAGES RESULTED TO SUCH OWNER BY REASON OF A REPORT TO HIM by the holder of such stock that he had sold the same at a certain date, when in fact they were not sold, but were held by him for a long time, and afterwards sold at an advanced price, is a question for the jury.

APPEAL from a judgment of the third district court, entered in favor of the defendant. The opinion states the facts.

Bennett & Harkness, for the appellant.

Sutherland & McBride, for the respondent.

TWISS, A. J. This action is brought to recover the sum of five thousand dollars, loaned and advanced by the plaintiff to defendant, for defendant's use, between the fifteenth day of January, 1877, and the fifteenth day of January, 1879.

The plaintiff is a banker, and the sum sued for is a correct statement of his account, which the defendant admits would be due the plaintiff, were it not for the counter-claims alleged in the answer.

The evidence shows that during the time the account was accruing, the plaintiff purchased with his own money, for the defendant, stocks, upon the order or request of the defendant, taking title to them in his own name, and until the thirteenth day of November, 1878, sold the same as directed or requested by the defendant, charging him interest for the money so used. That on the day last named the plaintiff held, purchased as aforesaid for the defendant, three hundred and twenty shares of Justice stock, worth nine dollars per share; fifty shares of Alta stock, worth eighteen dollars per share; and two hundred shares of Tip Top stock, worth one dollar and eighty cents per share; which the defendant on that day directed the plaintiff to sell and invest the proceeds of such sales in the stock of the North Bonanza, at a price per share not exceeding two dollars and seventy-five cents. The plaintiff refused to comply with this direction, saying, "Not knowing anything about North Bonanza except its feline reputation, I must decline to relinquish Comstock securities for 'wild-cats,' although by the turn you propose we should have more of them." The North Bonanza soon afterwards advanced to upwards of five dollars per share, and remained there for a day or two. Since then it has been down to twenty-five cents, and from that up to one dollar and fifty cents, and has been regularly assessed. If the plaintiff had complied with the directions of the defendant, and the North Bonanza stock had been sold at the time when it was at the highest price, there would have been a profit in the deal of about six thousand dollars, which the defendant claims as one item in his counter-claim.

Was the plaintiff under obligation to sell the stock, and invest the proceeds of such sale, as directed by the defendant? In other words, did the plaintiff have such an interest in the stock which he was directed to sell as would enable him to disregard the express directions to sell and reinvest, without incurring liability to the defendant for the results of such refusal to act?

The plaintiff and defendant both say in their testimony, that the plaintiff held the stock as security for the payment of the account. The defendant drew from the plaintiff when the stocks held by him were in excess of the amount of the account. The defendant in his testimony

says: "It was understood in a general way that I should keep the account good, or make it good. I was to give him money when he wanted it; and to take money down when I wanted it. In 1878, he began to call on me for money, and I was unable to put it up. The stocks I then had were not sufficient to make my account good. I think my account was several thousand dollars behind, selling at the market prices. That condition of affairs had existed for several months. I think I got into extremely deep water during the spring. He asked once or twice for money, and as long as I thought I had a chance to pull through, I said I would try to pay as soon as I could; then when I found I could not get through, I told him I did not know when I could. * * * He was not to buy all the stocks I ordered, without reference to the state of my account; I could have swamped him if he did; as my account then stood, I reasoned that when I ordered any particular stock bought, he had the right to buy or not, as he chose, depending on the state of my account. In the condition my credit was with him, at that time, I would have to provide for the payment of the stock ordered; that is the reason I provided for the purchase of this stock, by ordering the sale of other stocks. There was no agreement as to the amount of stock he would buy, nor of what kinds; he always bought anything I asked him to; I suppose each transaction amounted to a separate one; if he chose to fill it, all right; if he didn't, all right; I don't suppose I could have made him buy stock unless he wanted to; he usually wanted to, though."

From the facts testified to by both plaintiff and defendant, it is apparent beyond controversy that upon purchase of stock for the defendant, by the plaintiff, with his own money, credit was given upon the stocks held for the defendant by the plaintiff; and as a conclusion of law, the plaintiff had a special property in the stocks purchased by him with his own money, the title to which was made to himself, with the knowledge and without objection of defendant, and therefore with his acquiescence; that he held them as security for the money advanced by him in their purchase, as well as for the benefit of the defendant for the purpose for which they were purchased: Brown v. McGraw, 14 Pet. 479.

If the plaintiff had simply held these stocks for sale, he would have been the agent or factor of the defendant for the purpose of selling them, and as such bound to comply with his directions as to their sale. But they were not consigned to the plaintiff for sale, nor were they purchased with the intention of holding them for accruing dividends; but for the purpose of speculating upon the fluctuating prices. At the time the order for sale was given, the account of plaintiff exceeded the value of the stocks held by him, therefore the defendant was not the absolute owner, nor was he entitled to the absolute control and disposition of them; each party had interests which the other was bound to respect, and each was bound to act in good faith, and in the exercise of a sound discretion, so far as his acts affected the interest or rights of the other; and the plaintiff was not compelled to obey an order to sell, given to him by the defendant, that would unnecessarily result in a loss or damage to himself. Suppose the order to sell to be construed to be distinct and disconnected with the order to reinvest, the good faith and the exercise of a sound discretion on the part of the plaintiff, in refusing to sell, should have been, with proper instructions, submitted to the jury: Field v. Farrington, 10 Wall. 141.

But I am not of the opinion that this dispatch contains two distinct

and separate orders—one to sell, the other to reinvest. The words "turn my Tip Top, Justice, and Alta, without limit, into North Bonanza" constitute one indivisible order, an entirety. The order to sell was inseparably connected with the order to reinvest. He had no authority to sell and apply the proceeds in payment of defendant's accounts. The direction was to turn the stocks named into North Bonanza. If he performed one, he must comply with the other. This direction was given at a time when defendant says, "I think my account was several thousand dollars behind," and "that condition of affairs had existed for several months." This order, in effect, directed the plaintiff to dispose of certain securities held by him, and to take another in place of them. I do not find, in the examination of the record and testimony, any contract or understanding between the parties requiring the plaintiff to do it. The order to sell and reinvest being one the plaintiff was not obliged to comply with, the difference between the value of the stocks at the time the order was made and at the time they were afterwards sold, is immaterial in this action. The right of the plaintiff to sell, at the time of sale, and the good faith and sound discretion in which it was made, are not in issue.

I am therefore of the opinion that the verdict allowing damages for the failure of plaintiff to sell the Justice, Alta, and Tip Top mining stocks, as directed by the defendant, on November 13, 1878, is not supported by evidence rightfully before the jury, and that there was error in admitting evidence as to the value of the stock of the North Bonanza in support of the item in the counter-claim based upon the failure of the plaintiff to comply with the order to purchase.

The questions raised by the allegations of the defendant claiming damages because the plaintiff reported to him sales of Challenge and Ophir stocks, when in fact, as deponent alleges, upon his information and belief, they were not sold, as reported by plaintiff, but were held by him for a long time, and afterwards sold by him at an advanced price, were properly submitted to the jury by instructions 9 and 10, in which the jury were instructed that, if the sales were made and the stocks sold, as reported, the defendant was not entitled to the damages claimed in his counter-claim, by reason of such alleged report of sale, and subsequent sales of these stocks, which were refused by the court.

Judgment reversed, and the case remanded for new trial.

EMERSON, A. J., concurred, and HUNTER, C. J., dissented.

LEVY *v.* SALT LAKE CITY.

Filed November 16, 1881.

MUNICIPAL CORPORATION, THE CHARTER OF WHICH IMPOSES, AND WHICH ASSUMES, THE DUTY of exclusively controlling and regulating the distribution of water within its limits, for irrigating and other purposes, although it may not own the water so used, is liable for damage suffered by a private individual by reason of its neglect to perform such duty with reasonable care and prudence, although no right of action against the municipality is expressly given by statute. Such duty is ministerial, and not judicial.

DISTINCTION BETWEEN THE LIABILITY OF A MUNICIPAL CORPORATION for failure to perform duties imposed on them by charter, and the liability, under such circumstances, of *quasi* corporations, such as counties and towns, stated.

APPEAL from a judgment of the third district court, entered in favor of the defendant. The opinion states the facts.

Sutherland & McBride, for the appellant.

A. Miner, for the respondent.

Twiss, A. J. The plaintiff in this complaint alleges that the defendant is a municipal corporation, organized under and by an act of the legislature of Utah; "that under and by virtue of the power granted by defendant's charter, the defendant has taken the entire control and possession of all the flowing waters and the watercourses within its territorial limits. That on the first day of July, 1880, the defendant had exercised such control and possession, that by virtue of its ordinances it excluded all persons from any control over or interference with the abundant waters which were flowing in the city, under penalties to be sued for and collected for the benefit of said city, and from all use of said waters except such as should be distributed by said defendant's agents and servants, to persons paying therefor. That on said first day of July, 1880, the defendant turned the waters aforesaid, then in its control and possession, and flowing in the vicinity of the plaintiff's lot or premises, into and upon the land adjacent to the plaintiff's premises, upon which was plaintiff's cellar, in which was stored a stock of tobacco owned by the plaintiff, and wrongfully permitted and caused the said waters to run in great volume into and upon said adjacent land for a long time, and there to accumulate in a large body without the knowledge or consent of the plaintiff, and there to soak into the ground and discharge itself into said cellar, and thereby filled said cellar with water, and ruined said stock of tobacco, without any fault or negligence of the plaintiff, to the damage of the plaintiff in the sum of five thousand dollars.

The defendant in its answer denies that the tobacco mentioned in the complaint was owned or stored by the plaintiff as alleged; admits that it is a municipal corporation as charged, but denies that by virtue of its charter right or power, or otherwise, it has taken the entire or any control or possession of all or any of the water or watercourses within said city whatsoever, or that it exercises such control. The defendant also makes a specific denial of the allegations of the complaint, and alleges contributory negligence on the part of the plaintiff. The answer also contains the following sentence: "Defendant further says and admits, that by virtue of its chartered powers, and as by its charter it was and is required to do, it has assumed and does regulate and control the distribution of the waters flowing into said city, throughout such public channels as it deems most advantageous for the inhabitants of said city, and in such a manner only as shall prevent the unnecessary waste of such waters. That defendant does claim the right, and the same is enjoined as a duty upon defendant by its charters, to regulate and control the distribution of such waters flowing throughout the public channels or watercourses in said city, for the respective use and benefit of the inhabitants of said city, who are the owners of and entitled to the use of such waters, and not further or otherwise."

On the trial, at the conclusion of plaintiff's case, the defendant moved for a nonsuit, which was by the court granted.

A municipal corporation is created by legislative act, for the purpose of enabling its inhabitants to manage and control their local affairs; in other words, that they may have the right of local self-government within the limits of and in accordance with the provisions of its charter, which is its constitution, the source of its authority and power, creating and defining its duties. Mr. Dillon, in his work on Municipal Corpora-

tions, section 89, says: "It is a general and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incidental to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Where power to act is clearly given, the right of the city to act by its authorized officers or agents within the limits and scope of the granted power can not be judicially interfered with or questioned, except in cases of imputed fraud, or where, within the province committed to its charge, there is a manifest invasion of private rights. The power to act necessarily carries with it the right of determining the manner of acting, and of exercising the power, and if a city, by its common council, or other authorized agents, in undertaking to carry out or execute a power granted by its charter, commits a wrongful act, causing a direct injury to the person or property of another, outside the limits of its public work, then in such case it becomes liable for such injury in a private action."

In Perry et al. v. City of Worcester, 6 Gray, 544, Chief Justice Shaw says: "A public work authorized by law must be executed in a reasonably proper and skillful manner, with a just regard to the rights of private owners of estates. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and unskillful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable, and a wrong for the redress of which an action of tort will lie." This proposition of law, so clearly expressed by this learned and eminent jurist, is so universally adopted, and so abundantly sustained by authority, that a citation of cases would be useless.

The charter of defendant empowers it "to distribute, control, and to regulate the water flowing into the city throughout such channels as may be most advantageous, and to prevent the unnecessary waste of water;" and for the purpose of carrying out and executing this power, it also grants to the city power, by ordinance, to annually levy and collect taxes on the assessed value of all real and personal estate or property in the city made taxable by the laws of the territory, not to exceed one and one quarter mills on the dollar, to control the waters of said city." From the ordinance read in evidence, it can not be pretended that the city had not accepted those provisions, and was not at the time of the alleged injury to plaintiff's property acting upon and under them; and in its answer it "claims the right, and the same is enjoined as a duty upon defendant by its charter, to regulate and control the distribution of the waters flowing throughout the public channels or watercourses in the city for the respective use and benefit of its inhabitants, who are the owners of and entitled to the use of such waters, but not further or otherwise," but says, the "defendant does not claim the ownership or possession of such waters, and never has so claimed such waters." The fact that the defendant does not claim to own the waters is of no importance in the consideration of a claim for damages for a wrongful or negligent use of them. The waters of a stream running through a city do not belong to the corporation; but if it, in the performance of a public duty, build a bridge over the stream in an improper and unskillful manner, or, if having built it in all respects in a proper and skillful manner, it ceases to have a just

regard for the rights of proper owners of adjacent estate, and becomes negligent in sustaining and keeping the same in good repair, and thereby private property is damaged, it can not escape the just responsibility for its negligence: Perry et al. v. Worcester, *supra.*

By the testimony produced on trial it appeared that the defendant, as a part of its general plan of irrigation, had constructed a water ditch near to one side of one of its streets. From this, which unquestionably is a public ditch or channel, flowed the water which irrigated the premises of the plaintiff and others, and filled the plaintiff's cellar and caused the damage complained of. This ditch belongs to the city, and was under its sole and exclusive control. The expense of its construction was paid by the defendant. By its ordinance it authorizes and directs a payment, in the nature of a special assessment upon those who make application for the use of the water, for the purpose of "constructing and keeping in repair all gates, dams, sluices, flumes, and ditches necessary to convey the water from the main or natural water channel to the premises of each applicant." The city assumes the whole and exclusive control, management, and distribution of the water, provides for the appointment of a water-master, and assigns to him the duty of seeing to the proper location, construction, and repair of all gates, dams, flumes, ditches, and reservoirs, that water may not be wasted, streets or sidewalks overflowed or obstructed, or private property damaged. This duty and power of managing and controlling the waters of the city, granted by the legisture, accompanied with ample power to raise the necessary means of carrying out the same, is, when so far executed that nothing remains to be done except to manage and control the waters in the channels or ditches constructed for them by the city, and permit them to flow upon the grounds of the several persons who are entitled to the same during the hours and in accordance with the city ordinance, or the regulations of the water-master made in compliance therewith, is certainly not judicial but ministerial, and the performance of this duty is accompanied with obligations requiring fidelity to the persons who, by the payment of their money to the city for the use of the water, have become entitled thereunto, and a neglect to perform this duty with reasonable care and prudence, resulting in damages to such person, entitles him to an action for the damages sustained by him: Dillon on Mun. Corp., secs. 966–970; Merrifield v. Worcester, 110 Mass. 216; Lloyd v. Mayor of N. Y., 5 N. Y. 369; Burton v. City of Syracuse, 36 Id. 54; Weed v. Village of Balston Spa, 76 Id. 329; Hines v. City of Lockport, 50 Id. 236–238; Weightman v. The Corporation of Washington, 1 Black, 39.

The distinction between the liability of a municipal corporation made by the acceptance of its city charter, and the involuntary *quasi* corporations known as counties, towns, etc., must not be forgotten. In More v. The Town of Leicester, 9 Mass. 247, it was held that a *quasi* corporation is not liable for the neglect of a corporate duty unless such action be given by some statute. In Harman et al. v. The County of St. Louis et al., 62 Mo. 313, the court, quoting from Biglow v. Randolph, 14 Gray, 541, says: "This rule of law, however, is of limited application. It is applied in cases of towns only, to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate consent, and not to the neglect of those obligations which a town incurs when a special duty has been imposed on it with its consent, expressed or implied, or a special authority is conferred on it at its request. In the latter case

a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be, if the same duties were imposed or the same authority conferred on them, including their liability for the wrongful neglect, as well as for the wrongful act of their officers and agents." If this doctrine is correct, and it seems to be supported by abundant authority, then, although there is no statute expressly giving the right of action against the defendant city for the recovery of damages caused by the neglect of a corporate municipal duty, yet the liability of a city invested with its corporate powers, involving the right of raising revenue by taxation, and special assessments, and the expenditure of the same for general and also for special or local purposes, is greater than that of counties or towns, which are deemed to be auxiliaries of the state merely, and when corporations are of the very lowest grade and invested with the smallest amount of power: Burns v. District of Columbia, 91 U. S. 540; Askeld v. Hall County, 25 Am. Rep. 730.

In Burns v. District of Columbia it is said: "It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act, and if injury arises from the mere execution of that plan, no liability exists: Child v. Boston, 4 Allen, 41; Thayer v. Boston, 19 Pick. 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation can not be charged. City of Detroit v. Blackly, 21 Mich. 34, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair. The authorities which establish the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them."

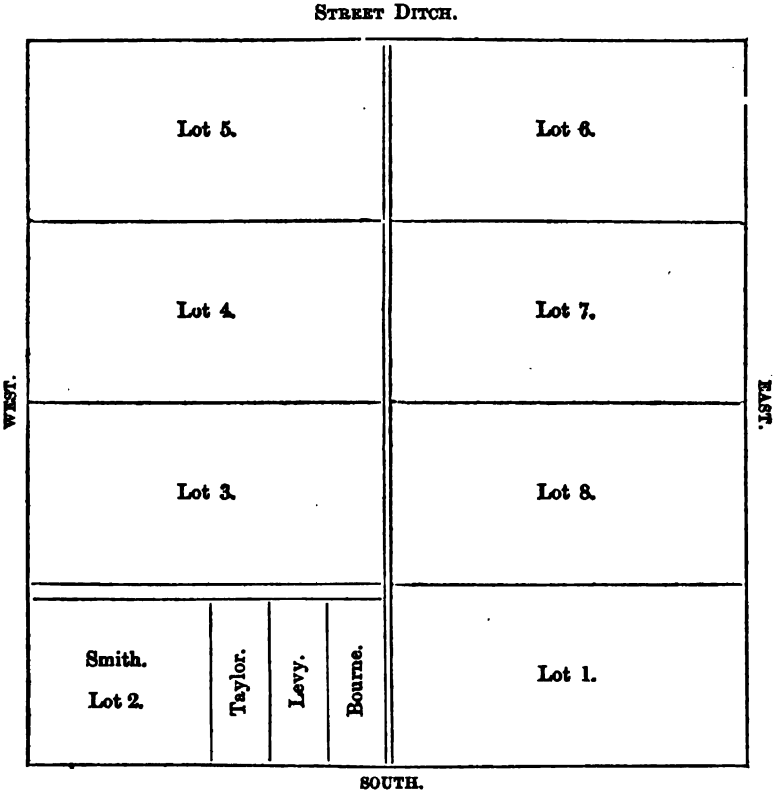
The motion for a nonsuit was based on the following grounds: "The plaintiff has not shown by any evidence produced that the city defendant had any possession or control of the water at the time of the alleged injury, or any testimony to show that the defendant is in any way culpable or liable for the alleged loss." The evidence produced by the plaintiff tended to show that the water which caused the damage to the plaintiff's tobacco came from a channel or ditch in one of the public streets of the city, and that while in such ditch it was under the sole control of the defendant; that the water in passing from the ditch in the street ran through the gate put in the side of the ditch by the city, which was also under its control; that after it left the public ditch in the street it was used to irrigate the land adjacent to it, and upon all of one side of it, as shown by the following diagram.

The city water-master certified that the water flowing in the ditch in front of plaintiff's premises was allotted to the persons entitled to the same, as follows:

P. Richardson, Mondays, 3:15 P. M. to 10:45 P. M; Webber, Tuesdays, 4 A. M. to 10 A. M.; Huntly, Tuesdays, 10 A. M. to 11:05 A. M.; Thomas, Tuesdays, 11:05 A. M. to 6:30 P. M.; Burkett, Tuesdays, 6:30 P. M. to 7:45 P. M.; Johnson, Tuesdays, 7:45 P. M. to 9:15 P. M.; J. Johnson, Wednesdays, 4 A. M. to 8:55 A. M.; Horne, Wednesdays, 8:55 A. M. to 4:25 P. M.; Willcott, Wednesdays, 4:25 P. M. to 6:30 P. M.; McManamon, Thursdays, 4 A. M. to to 9:15 A. M.; Taylor, Thursdays, 9:15 A. M. to 4:45 P. M.; Bourne, Thurs-

days, 4:45 P. M. to 5:55 P. M.; Levy, Thursdays, 5:55 P. M. to 7:20 P. M.; Taylor, Thursdays, 7:20 P. M. to 8:55 P. M.; Smith, Fridays, 4 A. M. to 7:20 P. M.

This witness also stated that he issued to each of the persons named a certificate for the use of the water, at the times specified, from the allotment of water for the block in which plaintiff's premises were situated. It appears that the plaintiff was entitled to it from 5:55 to 7:20 P. M., on Thursdays; that Taylor, whose property adjoined and was below the plaintiff's, was entitled to the water from 7:20 to 8:55 P. M.; that from and after 8:55, the time when Taylor's right to the water ceased, no one was



entitled to its use until four o'clock the next morning. The evidence tends to show that during all of this time the water was not shut off at the head of the ditch leading from the ditch in the street to and passing plaintiff's premises, but was permitted to flow all night, and that this was the cause of the overflow into the plaintiff's cellar. There was certainly negligence on the part of some one, in allowing this water to flow all night from the street. I am not of the opinion that the evidence shows this to have been the fault or neglect of the plaintiff.

The argument of the defendant, that upon the testimony it is in no way culpable, or liable for the plaintiff's loss, is based upon the testi-

mony of Harris, and the ninth section of the ordinance read in evidence, which is as follows: "No person shall be entitled to convey his portion of water from a main ditch to his lot or premises, without first having constructed a substantial gate both in the main ditch and at the head of his branch ditch, the latter to be closed and water-tight, except during the turn of such person to use his portion of the water. When such branch ditch crosses any portion of a sidewalk, the same shall be made of lumber or other substantial material, the covering of which shall be on the same level with such sidewalk. Any person violating any of the provisions of this ordinance shall be liable to a fine not exceeding (25) twenty-five dollars for each offense."

James Harris testified that he was employed by plaintiff to irrigate plaintiff's premises; that he used the water July 1st for two hours; took it from Bourne, who lives just east of Levy; that irrigation by him did not flood the cellar on July 2d, and never did; that when he got through irrigating on July 1, 1880, he did not turn the water off at the head of the ditch, but shut it off from Levy's lot and left it to flow down the ditch situate just north of Levy's lot. Who then took and used the water he did not know, neither does he know where it went to.

The main ditch mentioned in this section of the ordinance, is in this case the ditch immediately in front of plaintiff's premises, and the "substantial gate there required, both in the main ditch and at the head of his branch ditch," is a gate immediately below the point where the plaintiff's branch leads from the main ditch to his premises, and a gate at the head of his branch ditch. The testimony of Harris is quoted solely to explain the plan of irrigation adopted by the defendant, and the relation of the plaintiff to the city by means of it. It is not at all clear that it was the duty of the plaintiff, at the time his right to the water ceased, to close or shut the gate at the head of the main ditch leading from the ditch in the street near to the premises of plaintiff. The ruling of the court below granting a nonsuit was error.

The case is reversed and remanded for new trial.

EMERSON, A. J., concurred, and HUNTER, C. J., dissented.

KIMBALL *v.* MCINTYRE ET AL.

Filed November 16, 1881.

DISTRICT COURTS OF UTAH HAVE JURISDICTION BOTH IN LAW AND IN EQUITY, under the act of congress of June 23, 1874, and by the territorial legislation the distinctions in the forms of actions at law and suits in equity are abolished. There is now but one form of civil action for the enforcement of private rights and the redress or prevention of private wrongs, and the defendant is permitted to set up by answer as many defenses as he may have.

EQUITABLE DEFENSE SET UP AGAINST AN ASSERTED LEGAL RIGHT should be first considered and passed upon by the court.

UNITED STATES LAND PATENT IS, IN GENERAL, THE HIGHEST EVIDENCE OF TITLE, and can not be varied, contradicted, or controlled by extrinsic evidence; but upon a proper presentation of adequate facts, with a prayer for equitable relief, a court of equity may control the legal title conveyed thereby, and compel the grantee to convey the same to his *cestui que trust*, ward, or other person equitably entitled to the same.

APPEAL from a judgment of the first district court, entered in favor of the defendants. The opinion states the facts.

Williams & Young, for the appellant.

P. T. Van Zile, for the respondents.

TWISS, A. J. This is an action of ejectment to recover the possession of an undivided thirty-seven and one half feet of the first northern extension of Mammoth vien, lode, or deposit, in East Tintic mining district, county of Juab, and the surface ground thereto belonging, the same being an undivided one eightieth part of said lode, vien, or deposit of three thousand feet.

The plaintiff, in support of his claim, relies upon a patent granted by the United States to Thomas Jenkins, George Crismon, Charles Crismon, Charles Crismon, jun., and the plaintiff, of said lode or mining property, dated on the sixth day of May, 1873.

The defendants, in their joint answer, deny specifically the allegations of the complaint, and for a further equitable defense, allege that on and immediately prior to the date of the patent, the plaintiff owned only three sixteenths of the claim or lode that was patented, to wit: five hundred and sixty-two and one half undivided feet, and no more, of said mining claim, although the patent was issued jointly to the five persons therein named, and thereby one fifth part of said property was granted to the plaintiff; and that the plaintiff before the commencement of this action had conveyed all of his interest in said mining property to the defendants or their grantors, and prayed that the court decree and adjudge the plaintiff to have no title or right of possession to said thirty-seven and one half undivided feet of said mining property, or any part thereof.

The act of congress approved June 23, 1874, giving to the district courts of this territory exclusive jurisdiction in all suits or proceedings in chancery, unites in these courts the functions of common law and chancery. The forms of such actions and suits are by our territorial statutes abolished. But one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, is allowed, and the defendant is permitted to set up by answer as many defenses as he may have. It obviously was the intention of the legislature, that all controveries respecting the subject-matter of the litigation might be determined in one action, and the provisions are adapted to give effect to such intent.

The plaintiff in this case, standing upon his legal rights under the patent, and the land, the possession of which he seeks to recover in this action, being admitted to be within the limits of the patent, there was nothing to be determined in the legal part of the case, except the damages, and they were incidental to the ownership, and until that was determined, no damages could be assessed. Therefore the main question was upon the equitable defense set up by the answer, and was properly and necessarily first considered by the court: Lestrade v. Burt, 19 Cal. 660; Weber v. Marshall et al., Id. 447; Johnson v. Towsley, 13 Wall. 72.

This matter of practice being thus determined, the only remaining questions are:

1. Whether the equity asserted by the defendants is sufficient to control the legal title and justify a decree giving them affirmative relief against the action.

2. Whether the evidence produced at the trial of the case sustains the allegations and establishes that equity. It is claimed by the appellant that a patent from the United States is the highest evidence of title, and that it can not be varied, contradicted, or controlled by evidence *dehors*

the patent. This, as a general rule, is undoubtedly correct in a court of law. But upon a proper presentation of adequate facts, with a prayer for equitable relief, a court of equity will control the legal title to the principal's *cestui que trust*, ward, or other party equitably entitled to the same. In Murquer v. Frisbie, 101 U. S. 473, the court say: "After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced." In Moore v. Robbins, 96 U. S. 530, it is said: "In this class of cases, as in all others, there exists in the courts of equity, the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that the officers have by a mistake of the law given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

Upon the trial, the defendants introduced the notice of the location of the mining property containing the names of the locators thereof, and evidence that it was duly recorded, and sundry deeds of the locators conveying their several and respective interests to the patentees and others, some of whose names are not mentioned in the patent, who occupied and were the possessory owners of the mining claim and premises, at the time it was patented; that before said patent was issued there was a mutual understanding and oral agreement between all of the owners of said claim and premises, including the plaintiff; that the plaintiff's portion of the patented premises was five hundred and sixty-two and one half undivided feet, and no more; that the other owners of the premises, who were the defendants, or their grantors, owned the remainder thereof, two thousand four hundred and thirty-seven and one half undivided feet; and that the said parties paid the expenses of work and development, and received dividends in those proportions, in accordance with this agreement. Upon this evidence the court found that the plaintiff, at the time the patent was granted, had and claimed to own only five hundred and sixty-two and one half undivided feet of said lode or mining premises, all of which he had sold and conveyed to the defendants, or their grantors, before the commencement of this action.

We are therefore of the opinion that there is no error in the rulings and decree of the court below.

The decree is affirmed.

BOOK REVIEWS.

AN ELEMENTARY TREATISE ON THE AMERICAN LAW OF REAL PROPERTY. By CHRISTOPHER G. TIEDEMAN, A. M., LL. B., Professor of Law and Instructor in the Law of Real Property in the Law Department of the University of the State of Missouri. St. Louis: F. H. Thomas & Co. 1884.

From a somewhat careful examination of this book, we believe it to be a compendium of the common-law principles and doctrines concerning real property, very admirably fitted for the use of students. We say "of the common-law doctrines," because, although the work contains brief chapters upon a few distinctively American topics, such as homesteads and governmental grants of public lands, it is chiefly devoted to a presentation of the common-law principles and doctrines; the effects of statutes in various states abrogating or modifying these doctrines are but slightly noticed. The treatment of the subject-matter is simple, clear, and methodical. The author has certainly succeeded in showing to thoughtful students that the common law concerning real property is not "extremely technical, arbitrary, and unreasonable;" that its rules, although sometimes unjust in their practical operation, had a historical origin, and were all developed, by processes of legal logic, from general principles and primitive institutions. Such a book as this has long been needed. It is the experience of every instructor, we believe, that Professor Washburn's great work is extremely confusing, and even misleading, to the unaided student of the law, however valuable it may be to the well-informed practicing lawyer. From that author's wealth of learning, from the minuteness of his discussions, and from his desire to present all the rules on a given subject prevailing in different states, the student often finds it difficult to determine what are the rules prevailing in a particular state, or what rules are still subsisting and what have become obsolete. A work which should give the student within a moderate compass the fundamental principles and general doctrines of the common law, which should trace the development of these doctrines from their principles, which should furnish, in short, such information as would be the settled foundation of all subsequently acquired knowledge, has been needed. The volume before us is, we believe, a work of this character, and we do not doubt that it will be found useful to students of the law in all parts of the country, and that it will generally be adopted as a text-book by instructors in this branch of law. At the same time, we must add that, in our opinion, a treatise upon the *American* law of real property as it now *actually* exists, upon the real-property law

of the United States at present, and not upon that of England a hundred years ago, nor upon that of Massachusetts, New Jersey, or Pennsylvania, is yet to be written. Such a work would be one of enormous labor, since it would be based to a very great extent upon the differing statutory legislation of different states. It must start from, be founded upon, and embody the following *facts*, among others: That the real-property law in the great majority of the states is not derived from, and has no direct historical or other connection with, the feudal system: That in the real-property law of a great majority of the states the common-law notion or conception of "seisin" has no existence whatever. And that in the great majority of the states conveyances of land do not operate under nor derive any efficacy from, nor have any connection with, the "statute of uses." These statements may shock many traditional beliefs; but they are the necessary results of constitutional and statutory legislation, which has in reality severed the historical and vital connection between the common-law and the American systems of real property.

NOTES.

In the case of Wells, Fargo & Co. v. Pacific Coast Steamship Co., an important ruling, involving the status of corporations, after the territory under which they were incorporated had become a state, was recently made by Judge Sawyer, of the ninth circuit. This was a suit for an injunction to restrain the defendant for denying to the complainant certain facilities for the carrying on of its express business, which had heretofore been granted it. The bill, as originally drawn, alleged that the complainant was duly incorporated under the laws of the territory of Colorado. Afterwards a motion to amend the bill was made for the purpose of setting out the facts that since the incorporation of the complainant, Colorado had become a state, and had adopted a constitution which continued in force all laws of the territory not inconsistent therewith, and among them the law under which the complainant acquired its charter. This motion was contested by the defendant, which assumed the position, that even if the amendments proposed were allowed, the complainant would still not be a "citizen of another state," and as such entitled to sue in the United States courts. This position the court refused to entertain, and in granting the motion to amend, held, in effect, that by the adoption of the constitution the plaintiff became a corporation of the state of Colorado, and as such entitled to sue in the United States courts of the district of California. The court further said that in alleging the existence of corporations, incorporated in a manner similar to that of the complainant, it was unnecessary to set forth the several acts of the territory and of the Congress of the United States by means of which such territory became a state; but that it was sufficient to allege, in general terms, the fact of incorporation under the laws of such state.

WEST COAST REPORTER.

No. 4. JANUARY 24, 1884. VOL. I. No. 4

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

IN the case of Broder v. Natoma Water Co.,[1] the supreme court seems to have held, or at least to have intimated by the course of its reasoning, that the subsequent grantee from the government would take subject to the rights of the prior appropriator, even in the absence of the express declaration contained in the act of 1870. A person had made a prior appropriation from the water of a stream running through a portion of the public domain included in a tract of the public land, which was afterwards, and before the statute of 1870, granted by congress to a railroad company. As between this appropriator and a subsequent purchaser from the railroad company of another parcel on the same stream, it was held that such purchaser took his title subject to the prior appropriation, because the congressional grant to the railroad company was expressly declared to be subject to all "lawful claims." Although this provision in the grant to the railroad was similar in its import to the more comprehensive statute of 1870, yet the reasoning of the court is largely based upon the rights of the appropriator of water acquired through the operation of local customs, and recognized and protected by the earlier legislation of 1866. The established doctrine of the court was said to be, that the "rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect before the passage of the act of 1866."

Where a private person can thus acquire a right of property in the water of a public stream, or, if not an absolute right of *property*, at

[1] 11 Otto, 274.

least a right in the nature of an easement or servitude to use the water, which is good against the United States, as proprietor of the remaining tract of land through which the stream flows, it would seem to follow, as a necessary result of the common-law doctrines concerning the devolution of title, that the same right would remain good and attached to the stream, as against any and all subsequent proprietors who may acquire title from and under the government, to all or to any part of the public lands bordering upon, adjacent to, or situated near the same stream. In other words, it would seem that the statute of 1870 should be construed as simply declaratory of a familiar legal doctrine, and not as circumscribing or restricting such doctrine. If the language of such statute be found to be too narrow or incomplete to afford, of itself, a sufficient protection to the claims of prior appropriators against subsequent owners, then the courts may fall back, if necessary, upon the broader principles of the common law. In this connection, it will be important to determine who are grantees or owners acquiring title from and under the United States. While the statute should be liberally construed in favor of the prior appropriators, it should also be fairly and equitably interpreted in ascertaining who are the grantees and owners holding title to the public domain under the government. The discussion of this question belongs, however, to a subsequent portion of our essay.

The rules thus far considered are avowedly confined in their operation to the public lands of the United States. The first contemplates an appropriation from the water of a stream or lake while it lies wholly in the public domain, before any titles of tracts adjacent to it have been acquired by other persons. The second renders a prior appropriation, thus made, valid and effectual as against private persons who subsequently acquire, from the general government, titles to portions of the public land bordering on the same lake or stream. The question is at once presented, whether the same rules apply to the public lands of the state, as well as to those of the United States. The United States has, through congressional legislation, donated to individual states—to California, for example—large tracts of the original public domain, under the name of "tide-water," "swamp," and "overflowed" lands. Over such lands the state has, of course, both the proprietary rights of an owner, and the governmental rights of a political sovereign; while over its public lands within the territory of a state, the United States has only the rights of a proprietor. If a stream was wholly situated on such public lands of California, and an appropriation should be made of its waters for irrigating, agricul-

tural, or manufacturing purposes, before any other private persons had acquired title to tracts bordering upon its banks, would this prior appropriation be valid against the state, and also against other riparian proprietors holding titles subsequently obtained from the state? This is an important question, but its discussion will be more appropriate in connection with subsequent topics. It is enough now to say, that the considerations which led to the adoption of the rules previously laid down concerning the public lands of the United States, would seem to apply, with at least an equal force, to the lands owned by the state. The federal government, through its congress and its courts, has avowedly carried out a policy which was inaugurated by the legislative and judicial decisions of the state. As the doctrine of prior appropriation on the public lands of the United States originated from a policy recognized, favored, and promoted by state authority, and as similar needs exist and similar reasons apply in connection with the public lands of the state, it seems to be a natural, even if not an inevitable, consequence, that the same doctrine should be extended to those lands, as against the state itself and its subsequent grantees.

III. The two foregoing general doctrines apply only to the public lands of the United States.

Whatever rules may be adopted by the statutes or the decisions of a particular state, with reference to the rights of riparian proprietors who have acquired titles to all the lands on the borders of a stream, before any appropriation of its waters had been made while these lands were public—even though the state might by its statutes or decisions expressly extend the same doctrines to all such proprietors—still the two doctrines, heretofore described as originating from the local customs of miners and sanctioned by the legislation of the state and of congress, are confined in their operation to the public domain of the United States. All extension of these doctrines to other lands and other proprietors, and all additional rules, must necessarily proceed from the states themselves.

It should be observed, in this connection, that the United States government has no power whatever to prescribe for its grantees any general rules of law concerning the use of their lands, or of the lakes and streams to which they are adjacent, binding upon its grantees of portions of the public domain situated within a state, and becoming operative after they have acquired their titles from the federal government. The power to prescribe such rules, forming a part of the law concerning real property, belongs exclusively to the jurisdiction of the states. Over its public lands situate within a state, the United

States has only the rights of a proprietor, and not the legislative and governmental rights of a political sovereign. Even with respect to the navigable streams within a state, the powers of the federal government are limited, and *a fortiori* that is so with respect to streams which are unnavigable. In the great case of Pollard's Lessee v. Hagan,[2] the authority of the United States over its public lands within a state was thus defined by the supreme court:

"When Alabama was admitted into the Union, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States. Nothing remained in the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state, except in cases in which it is expressly granted. * * * In the case of Martin v. Waddell,[3] the present chief justice, in delivering the opinion of the court, said: 'When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution.' To Alabama, then, belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States." [Recognizing the power of the United States over such navigable streams for the purpose of regulating commerce, the court adds:] "The right of eminent domain over the shores, and the soils under the navigable waters, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it." * * * [Summing up its conclusions, the court said:] "First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively; secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states; thirdly, the right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition

[2] 3 How. (U. S.) 223. [3] 16 Pet. 410.

thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

Over the public domain within a state, and the unnavigable streams and lakes situated thereon, the United States has, therefore, only the rights of a proprietor. Undoubtedly, as held in the case of Union Mill and Mining Co. v. Ferris,[4] by virtue of its proprietorship, the United States has a perfect title to the public domain, and an absolute and unqualified right of disposal; and neither a state nor a territorial legislature can modify or affect, in any manner, the right of the federal government to the *primary* disposal of the public land. Also an unnavigable stream or lake, lying within the public domain, is a part and parcel of the land itself, inseparably annexed to the soil, and the use of it is an incident to the soil, and as such passes to the patentee of the soil from the United States. As the federal government, in conveying any particular portion of its public domain within a state to a particular grantee, may as proprietor annex any conditions to the conveyance, so that the title will be taken and held subject thereto, so it may, by congressional legislation, adopt any general regulations imposing any conditions or limitations upon the use of the public domain by all persons, or upon all persons who acquire title to portions of the public domain from the government, and the titles so acquired will be held by the grantees thereof subject to such conditions and limitations. Thus, congress may provide, by general statute, for a right of way over the public lands unsold, for the ditches and canals of those who have made a prior appropriation of water, and that all grantees who subsequently acquire portions of this land shall take and hold their titles subject to such existing rights of way; or that all grantees of the public lands bordering upon a stream shall take and hold their titles subject to any previously existing appropriation of its water; or that all grantees of the public lands shall take their titles subject to the local customs or laws of the state within which the lands are situated, concerning the uses of water for mining, irrigating, agriculture, and other purposes. Congress has, in fact, adopted such legislation, prescribing rules concerning the disposition of public lands, and imposing conditions or limitations upon the titles obtained by purchasers. By one section of the act of 1866, already mentioned, it is enacted:[5] "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; *and those con-*

[4] 2 Saw. 176, before Sawyer and Hillyer, JJ. [5] R. S. of U. S., sec. 2338.

ditions shall be fully expressed in the patent." The patent here spoken of is clearly that issued by the United States to the purchasers and other grantees of the public domain, and such grantees take their titles subject to easements and other similar rights held by other persons under the customs and laws of the state.[6] This power of the United States to impose conditions and limitations upon the use of the lands within a state, which were originally public, is confined to their *primary* disposal to its immediate grantees. If, therefore, the public land bordering upon a stream, and situate within a state, should all be conveyed to private persons, free from any conditions or limitations, congress would have no power to control such persons in the use of their lands or in the use of the stream upon which their lands border. The power to legislate and to prescribe rules under these circumstances belongs exclusively to the state, as a part of its supreme municipal authority over persons and property within its jurisdiction.

J. N. P.

(TO BE CONTINUED.)

[6] See the observations of Sawyer, J., in Woodruff v. North Bloomfield G. M. Co., 1 West Coast Rep. 200, 201, 202.

CIRCUIT COURT, DISTRICT OF OREGON.

BOYLE *v.* CASE ET ALS.

Filed November 28, 1883.

COMPENSATORY DAMAGES, THE ELEMENTS OF, STATED.—A person receiving a willful injury from another is entitled to recover compensatory damages therefor, irrespective of the motive of the wrong-doer, or his own calling or condition in life.

PUNITIVE DAMAGES, WHEN ALLOWED in addition to compensatory damages, and what for.

VIGILANCE COMMITTEE.—No plea of the public good or safety can justify a voluntary assemblage of people in inflicting a personal injury upon any individual, but in an action to recover damages therefor, the jury, in considering whether the plaintiff is entitled to punitive damages or not, may and ought to take into account the causes or motives which led the defendants to do the wrong complained of.

ACTION to recover damages for personal injuries. The jury returned a verdict for the plaintiff. The facts are stated in the charge to the jury.

A. H. Tanner, *Robert Bybee*, and *W. Carey Johnson*, for the plaintiff.

George H. Williams, *Rufus Mallory*, and *W. Lair Hill*, for the defendants.

DEADY, J. (charging the jury orally). *Gentlemen of the Jury:* You have heard the allegations of the parties, the evidence offered in support of them, and the argument of the respective counsel. It now remains for you to determine the issue between them, under the instructions of the court.

The plaintiff claims that the defendants in this action, in connection with others, unlawfully arrested him at Astoria, on the sixth of July last, and confined him in jail; that they pretended to try him, and sentenced him to receive twenty-five lashes on his bare back, and in pursuance of said sentence caused him to be blindfolded, gagged, and taken from the jail during the following night, onto the hill back of the town, where he was first tantalized or tortured by the information that he was to be hanged, and then to receive two hundred lashes, and finally was whipped on the bare back with a cat-o'-nine-tails—five men giving him five lashes each, when he was sworn upon his knees never to reveal what took place on that occasion, nor to harm any one engaged in the transaction; that he was then taken back to the jail, where he was left until morning, when he was taken in irons to the Portland steamboat, and sent away on her, for which he brings this action to recover twenty-five thousand dollars damages. These facts are substantially admitted by the defendants; and, of course, there is no absolute defense to this action, and none is attempted to be made.

The burden of the defense is, that the acts of which the plaintiff complains were done under circumstances that will not warrant or justify you in giving him what are called punitive or exemplary damages; and that he ought not to recover more than nominal damages. It is admitted that he is entitled to what are called compensatory damages, and therefore you must find a verdict for the plaintiff in some amount. In this respect you have no discretion. You must find a verdict for such damages as will, in your judgment, compensate the plaintiff for the wrong and injury he has sustained at the hands of the defendants.

What constitutes or may enter into the estimate of compensatory damages is well stated in section 615 of Field on Damages, from which I read to you as follows: "As a summary of the element of damages in such cases, it may be remarked: that in all cases of simple trespass, when no element of outrage or malice enters into the commission of the offense, only compensatory damages should be allowed, or such as will compensate the party for actual injuries, including loss of time, medical and other expenses, physical pain and mental anguish, as these are fairly and reasonably the plain consequences of the injury."

The value of one's time depends on circumstances. Where a person is in the receipt of a large salary or has important matters committed to his charge, his time is correspondingly valuable. But when he is not engaged in any business, or has no lawful vocation, or is incapable of earning more than a mere living or less, his time is less valuable. You must judge from the circumstances what loss the plaintiff has sustained on this account.

He testifies that he suffered from the effects of the beating about two months. But how long he was thereby incapacitated from doing anything that he could or would do under ordinary circumstances you must judge. There is no evidence of medical expense or medical treatment, except the cursory examination of his back at Dr. Chapman's office, for which no charge appears to have been made.

The three important heads under which you will be called upon to consider the subject of compensatory damages are the physical pain, the mental anguish, and the personal indignity caused by and attendant upon the transaction.

The physical pain and mental anguish which the plaintiff must have suffered under the circumstances can not be exactly measured by dollars and cents, but the law can not give any other compensation, and leaves it to your judgment, founded upon your experience and knowledge of men and things, to fix the amount which he ought to have.

You are also to consider the personal indignity involved in the matter. A formal whipping is calculated to disgrace a man—to dishonor him in the eyes of the community or his fellows.

But in this respect you will consider who the plaintiff is. All men are considered equal before the law, but they are seldom so in fact. In their condition and circumstances, men are unequal. A man whose life is low, coarse, and brutal, who is accustomed to brawls, to knock down and drag out, may not feel the same degree of suffering and shame at being beaten or whipped as one who lives a higher and purer life, and who deserves and is accustomed to receive from his associates and the community personal esteem and favorable consideration. As I have said, what may be a great indignity to one person may not be felt to be such by another. Apply these suggestions to the circumstances of this case, as they appear to you from the evidence, and allow the plaintiff what you think right on this account.

In estimating compensatory damages in this case, you will endeavor to reach a fair and just conclusion. And in this respect your conclusion ought not to be unfavorably affected towards the plaintiff by the number and respectability of the defendants or the character of the motives or causes which induced them to act. Nor should these damages be diminished, so far as the physical pain and mental anguish are concerned, by the fact that the plaintiff is an obscure man in the lower walks of life—

that he is a bar-tender, a professional gambler, or even a vagrant. The physical pain and mental anguish, which you find from the evidence the plaintiff suffered from the whipping and the attendant circumstances, you ought by your verdict to compensate him for, irrespective of his calling or condition in life. But the damages to be allowed for the indignity and disgrace involved in his treatment by the defendants depend largely, as I have said, upon such circumstances.

You will next consider whether the plaintiff is entitled to punitive damages, and if so, how much. Punitive damages are such as are allowed by way of punishment of the defendant, to discourage the commission of the wrong, as well as for compensation to the plaintiff.

On this subject, the author from whom I have just read (Field on Damages, sec. 615) says: "That when the elements of outrage, oppression, or malice enter into the commission of the offense, exemplary or punitive damages may be allowed; and the jury are not limited to actual compensation, but blending together the rights of the injured party and the interests of the community, they may give such a verdict as will compensate for the injury received, and at the same time inflict some punishment upon the defendant for his wrongful act."

It was with a view of enabling you to judge fairly and justly in this matter that the court allowed the defendants to give evidence, showing how this committee, that caused the plaintiff to be arrested and punished, originated—its purpose and general conduct, and particularly as respects the plaintiff.

It appears from the evidence that this organization had its origin in this wise: On July 2, 1883, a large and destructive fire occurred in Astoria. At the time the place was full of people, more or less transient and doubtful in their character, connected with the fisheries, and the riot and dissipation which seems to be incident to that season. The community was excited by the fire—by the destruction of property—and the loss of a large amount of personal property which appears to have been carried away from the burning buildings and vicinity. The road-way over the water between the upper and lower town was partially destroyed by the fire. There were but six regular policemen, and they were fatigued and worn out with watching and running to and fro night and day. Under these circumstances, the mayor of the town, Mr. John Hahn, issued a proclamation, calling a meeting of the council, and of the citizens, to take into consideration the repair of the road-way, and the appointment of special policemen. In this there was nothing wrong. The proposition involved the question of extraordinary expense, and whether the road-way should be repaired by general taxation or not, and the citizens were asked to meet with the council for the purpose of advising it in this emergency. The meeting advised the appointment of forty special policemen, and called upon the citizens to volunteer their services as such, which suggested the agreement out of which this committee came. It reads as follows: "We, the undersigned citizens of Astoria, hereby pledge ourselves, in view of any riot or any other lawless body in our city, to arrest, under the direction of the mayor and chief of police of our city, to quell the same by arms or otherwise."

There does not appear to be anything improper about this agreement. It was the result of the suggestion that all good citizens should be ready to volunteer in aid of the town authorities. And by way of manifest-

ing who would do so, this paper was prepared and signed by some one hundred and twenty-three persons.

Out of this agreement came this committee, called the citizens' or vigilance committee. The mayor testifies that he had no expectation they would "try" anybody, and that he did not approve of any such proceedings. But, as is usual in such cases, the larger body appears to have taken control, and the town council, as such, disappeared in the citizens' committee, which at once assumed some degree of permanence. In the mean time the timid, prudent, or distrustful fell into the background, while the more earnest, confident, enthusiastic, or reckless came to the front and took the lead.

The committee, having thus assumed the authority to exist in place of the council, began to look around for something to do—something to justify its existence. The first thing it did was to give notice to some sixteen persons, whom it considered obnoxious or dangerous, to leave the town. Its information in this respect appears to have been received from the chief of police. One of these notices was left with the plaintiff, who declined to receive it or obey it. Three or four days afterward he was arrested by the chief of police on the order of the committee, without any charge, and put in jail, in irons. Within a few hours he was taken to the committee-room, where he had a hearing before the committee, then composed of thirty or forty persons, the defendant, Mr. Case, being in the chair.

The plaintiff was examined as to his life, pursuits, and conduct, from which it appeared that he was a native of Canada—had lived a short time in Arizona, from whence he came to Astoria a few weeks before; that he was a gambler by profession, and was then also tending bar, more for the purpose of exempting himself from the charge of vagrancy than otherwise; that he had been arrested some time before the fire for carrying a pistol, and forfeited his bail.

No charge of any specific crime was laid against him, and on the foregoing facts, and the further one that he had refused to leave the town when warned, the committee determined that he should be punished by twenty-five lashes and sent away. He was then returned to jail and left there until about twelve at night, when he was taken out and whipped, as has been stated.

It is claimed for the defendants that their conduct, however unlawful, was influenced solely by a desire to promote the public safety in an extraordinary emergency, and not by any malice or ill-will towards the plaintiff personally. There is no evidence that any of the committee, and particularly these defendants, ever had any difficulty with the plaintiff, or that any relation ever existed between them from which it might be inferred that they or any of them entertained any unkind feelings toward the plaintiff.

On the other hand, it is claimed by the plaintiff that the disturbance and danger attending the fire had practically passed away before his arrest, and that the defendants were actuated by a desire to punish him because he had presumed to disregard their notice to leave town; and that the sentence was imposed upon him, not for the public good, but as a punishment for having denied the authority of the committee, and was also carried into execution with circumstances of wanton oppression and cruelty.

Much has been said to you in this connection by the leading counsel

for the defendants in extenuation, if not justification, of vigilance and citizens' committees, and it is maintained that there are times when the people of a place are justified in taking the law into their own hands, and administering justice in obedience to the methods of a higher law than that found in the books.

But, gentlemen, we are here as ministers of the law of the land, and we do not know or recognize any other. We have taken a solemn oath to administer this law and be governed by it in the determination of this case. When we lose our hold on this storm-tried anchor, we are adrift, without rudder or compass, on the dangerous sea of prejudice, passion, and falsehood.

But at the same time, when you are called upon to ascertain and characterize the motives of the defendants, with a view of measuring the degree of culpability that attaches to their conduct, you must not shut your eyes to the facts that surrounded the transaction. This is not the first vigilance committee that has usurped the functions of municipal government in this country, and while our towns are governed by illicit and irresponsible classes, it may not be the last.

But in my judgment, vigilance committees are but a choice of evils. They may palliate for a time, but can not cure the disease that provokes them, and in the long run will probably aggravate it, by bringing all established law and authority into disrepute. If the good citizens of Astoria—the tax-payers—had attended to their municipal affairs, as they ought to have done, this trouble would probably have never come upon them. But this class are generally engrossed in their private affairs—given over to the pursuit of wealth—adding dollar to dollar and acre to acre—and leave the government of the town to the idle, illicit, propertyless, and vagrant classes. And here lies the source of this evil, and probably it will never be permanently cured until the right to vote in municipal elections is confined to those who contribute to the support of the corporation and are directly interested in its well-doing.

With this statement of the case and the claims of the parties, I submit the matter to you to say what damages the plaintiff ought to have and the defendants to pay. The court is the judge of the law, and the jury of the facts. Therefore what I have said to you concerning the law of the case, you are bound to consider as such, and be governed by it; but what I have said to you about the facts is only advisory, or said by way of suggestion, and it is to have only such weight in your deliberation as you think it is entitled to under the circumstances. You are judges of the credibility of the witnesses and the weight or consideration to be given to their testimony.

This is no common case. It touches the foundation of civil society, and in some respects is of more importance to the public than the parties. The duty you are called upon to discharge in this case is one of the highest that falls to the lot of a citizen in a free, law-governed country, and I believe you will so regard it, and act accordingly.

the nature of the warrant more particularly because the said chief of police refuses to allow him a copy thereof. The writ was served on the same day, and at the time appointed the respondent produced the prisoner in court, and by consent was allowed until the next day to make his return, when he answered that he detained Kong Keog Hoon, named in the writ Doo Woon, awaiting the departure of the steamer for California, by virtue of a warrant of extradition charging him with the commission, in the state of California, of the crime of felony; to wit, feloniously and unlawfully embezzling and converting to his own use the personal property of Suen Sing, to the value of two hundred and thirty dollars, which warrant is dated December 12, 1883.

To this return there was a demurrer, and it appearing on the argument that the warrant set out in the return was not the one upon which the caption was made, and the prisoner detained at the time of the service of the writ, but that it issued after such service, and that the warrant under which the prisoner was so detained did not describe or set forth the specific crime with which the prisoner was charged, otherwise than as alleged in the petition, the court ordered the discharge of the prisoner: See In re Francois Farez, 7 Blatchf. 48.

The prisoner was then arrested on the second warrant, and on December 14th a second writ of *habeas corpus* was allowed on a petition denying the fleeing from justice—the commission of the crime charged, and the identity of the prisoner and the person described in the warrant as Koong Keok Hoon, and directed as before, and made returnable forthwith. On this writ the body was again produced, and the same return made as to the first one, to which there was also a demurrer.

In the argument the point was made by counsel for the prisoner that it does not appear from the warrant that the requisition from the executive of California was accompanied by "a copy of an indictment or affidavit" charging the prisoner with the commission of the crime charged therein, or any other, as required by section 5278 of the revised statutes.

The right of one state of the Union to demand from another the delivery of a person who has fled from justice depends upon the constitution of the United States: Art. 4, sec. 2. And the mode of proceeding, and the evidence necessary to support such demand, is prescribed by the statute of the United States: R. S., secs. 5278, 5279. Consequently, this is a case arising under the constitution and laws of the United States, and in which the prisoner "is in custody under order or by color of the authority of the United States," and therefore this court has jurisdiction.

The executive of this state, in allowing the requisition of the executive of California, acts under the authority of the United States statute, and must conform to its directions and limitations: Kentucky v. Dennison, 24 How. 66. One of these is, that before he can allow a warrant of extradition he must be furnished with a copy of an indictment or affidavit charging the person demanded with the commission of a crime against the laws of California. Without this he has no jurisdiction. A case for the exercise of his authority, in this respect, is not presented, and so far does not exist. And the warrant must bear upon its face the evidence that it was duly issued, and therefore, unless it recites or sets forth the indictment or affidavit upon which it is founded, it is illegal and void: Ex parte Smith, 3 McLean, 121; Ex parte Thornton, 9 Tex. 365.

The removal of a person from one state as a fugitive from justice is a

matter of the highest importance, and can not be made upon less evidence of the party's guilt and flight than would authorize a warrant and arrest in an ordinary case. And this, both by the constitution of the United States and of this state, is nothing less than information on oath, which gives probable cause to believe that the person demanded has committed a particular crime against the law of the state making the demand, and that he has fled therefrom on that account. The caption and detention of the prisoner are clearly illegal and void, and he must be discharged therefrom; and it is so ordered.

SUPREME COURT OF CALIFORNIA.

CITY OF LOS ANGELES *v.* WALDRON ET ALS.

Department Two. Filed January 14, 1884.

THE NECESSITY FOR A CONDEMNATION OF PROPERTY FOR A MUNICIPAL OR PUBLIC USE IS SUFFICIENTLY SHOWN by an allegation in the complaint which sets forth the ordinance of the city council authorizing such condemnation, and avers "that it is now necessary to condemn said land for public use agreeably to the provisions of said ordinance."

NOTICE OF THE PRESENTATION TO THE COURT OF A PETITION FOR THE CONDEMNATION OF LAND, required to be published by the charter of the city of Los Angeles, is in the nature of a summons, which is waived by the defendants appearing and demurring to the petition.

ORDINANCE PROVIDING FOR A REMONSTRANCE AGAINST A PROPOSED ASSESSMENT, by the owners of property within the limits to be assessed, and which describes such limits as extending "on both sides of Main street from Washington street to Adams street," is sufficiently definite.

PASSAGE OF AN ORDINANCE BY THE CITY COUNCIL IS SUFFICIENTLY SHOWN by an allegation which sets forth a copy of the ordinance, and avers that the same was "duly passed and adopted."

WHERE THE CHARTER OF A MUNICIPAL CORPORATION REQUIRES IT TO DO A CERTAIN ACT by resolution, it may do the same by ordinance.

DESCRIPTION IN THE COMPLAINT OF LANDS SOUGHT TO BE CONDEMNED held sufficient.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the defendants. This was an action for the condemnation of certain lands in the city of Los Angeles. The defendants demurred to the complaint, the demurrer was sustained, and judgment entered thereon. The land sought to be condemned was described in the ordinance of the city council and in the complaint as follows: "All that property lying and being situate in the city and county of Los Angeles, state of California, bounded and described as follows, to wit: Beginning at a point in the south line of Washington street in the city of Los Angeles, forty feet westerly from the middle line of Main street; running thence parallel to the middle line of Main street, south twenty-eight and one half degrees west, two thousand four hundred and seventy-one feet, to the north line of Adams street; thence along the north line of Adams street, north sixty-one and one half degrees east, twenty feet, to a point forty feet easterly from the middle line of Main street; thence parallel to the middle line of Main street, north twenty-eight and one half degrees east, two thousand four hundred and seventy-one feet, to the south line of Washington street; thence along the south line of Wash-

ington street, north sixty-one and one half degrees west, eighty feet, to the point of beginning—excepting that portion thereof lying within the present limits of Main street." The further facts appear in the opinion.

W. D. Stephenson, for the appellant.

J. F. Godfrey, for the respondents.

SHARPSTEIN, J. It is insisted on behalf of respondents that the demurrer to the petition was properly sustained:

1. Because it is not alleged that it is necessary to take the property sought to be condemned for any municipal or public use. It is alleged "that the council of said city, on the fourth day of November, 1882, duly passed and adopted an ordinance in writing" directing proceedings to be taken to condemn certain property of the respondents for the purpose of widening Main street, between Washington and Adams streets, and "that it is now necessary to condemn said land for public use agreeably to the provisions of said ordinance." We think this a sufficient allegation of the necessity of taking the land referred to for public use.

2. Because it is not alleged that there was a publication (of the ordinance, we presume), in a newspaper published in Los Angeles, once a week for two weeks. But the section of the city charter to which we are referred in support of this objection relates to the publication of notice of the presentation to the court. That notice is in the nature of a summons, and by appearing and demurring the respondents waived it.

3. Because the ordinance provides that, "if within twenty days from the publication of this ordinance the owners of property fronting along Main street, or cross-streets forming a junction therewith, within the limits to be assessed, amounting to two thirds of said frontage, shall make and file with the clerk of the council a written remonstrance against said proposed improvements thereupon, the same shall not be further proceeded with." The objectionable words are, "or cross-streets forming a junction therewith." In the preceding section (2) the council had declared that, "the assessment for the payment of the damages sustained by reason of said improvements shall extend on both sides of Main street from Washington street to Adams street." By section 3 it was only the owners of property "*within the limits to be assessed*" who were authorized to remonstrate, and those limits were prescribed by section 2. This appears to us to be sufficiently certain.

4. Because the petition does not show that any ordinance has ever been passed. We think it does. It alleges that the council "duly passed and adopted" the ordinance, a copy of which is set forth in the petition.

5. Because it is made the duty of the common council, by section 8 of article 8 of the charter, to do by resolution what it attempted to do by ordinance. The latter, in our opinion, is the equivalent of the former.

6. Because the property sought to be condemned is not sufficiently described. We think it is.

Judgment reversed, with directions to the court below to overrule the demurrer, with leave to the defendants to answer within ten days after being notified thereof.

THORNTON and MYRICK, JJ., concurred.

In re Tyler.

In Bank. Filed January 15, 1884.

An Attorney is Guilty of Contempt for Sending to a Grand Jury, while engaged in the discharge of its duties, an accusatory and threatening letter, for the purpose of exasperating the jurors by the aspersions upon their official conduct which it contained, or of deterring them from performing their duties by the threats of public clamor which it expressed, or of creating a distrust and want of confidence in any action which might be taken as the result of their investigation.

Grand Jury, while Engaged in the Discharge of its Duties, is a component part of the court with which it is connected.

Superior Court has Power to Punish for Contempt by Sentencing the Person Guilty thereof to pay a fine of five hundred dollars, or be imprisoned until payment of such fine at the rate of two dollars per day for every day's imprisonment.

Application for a writ of *habeas corpus*. The opinion states the facts.

George W. Tyler, in propria persona, and *George Flournoy*, for the petitioner.

J. D. Sullivan, district attorney, and *D. T. Sullivan*, for the respondent.

McKee, J. From the return to the writ issued in this proceeding it appears that the petitioner has been imprisoned under an order of commitment, made by the superior court of the city and county of San Francisco, for a contempt of court, of which he has been adjudged guilty, and sentenced to pay a fine of five hundred dollars, or to be imprisoned until payment of the fine at the rate of two dollars per day for every day's imprisonment.

The order was made by a court of competent jurdisdiction, and the only questions arising out of the return are whether the act, for which the petitioner has been adjudged guilty and punished, constituted a punishable contempt of court; and whether the court exceeded its jurisdiction in the punishment which it inflicted.

An act which is lawful or meritorious in itself, or which has been done in the assertion of a lawful right, is not a punishable criminal act merely because it has been so adjudged. In this instance the act condemned and punished consisted of writing and sending to a grand jury, then sitting in the court in and for which it had been impaneled and sworn, a letter, signed by the petitioner as "attorney for Mrs. Sharon," and addressed to "W. T. Garratt, Esq., and members of the grand jury," reflecting by severe and opprobrious language upon the conduct and integrity of the jurors in connection with charges which were the subject of investigation against the woman whom the petitioner represented as attorney. In substance, it accused and denounced many of the jurors of permitting themselves to be corruptly used by a person of wealth for the purpose of making presentments or finding indictments against the woman, upon matters which were the subject of litigation between her and him in the civil courts, to gratify his private malice, to oppress and crush the woman by his wealth, and to obstruct the course of justice in the civil tribunals.

If the invectives against the person named in the letter, and others who are accused of having been hired by him to aid and abet him in his design, were founded upon facts, and the petitioner, as an attorney of the court, had suggested them to the court in a regular way, it is not to be doubted that upon such a suggestion judicial inquiry would have been.

instituted, and that, if there were adduced any evidence at all to sustain the suggestion, prompt action would have been taken to vindicate law, maintain the respect due to the court, and to protect the court and the grand jury under its supervision and legal control against persons implicated in the attempt to commit or in the commission of such criminal acts. For it is criminal to tamper with or to attempt to tamper with a jury or judicial officers in the performance of their duties. Bribing or offering to bribe, corruptly influencing or attempting to influence, a juror, by means of promises, or assurances of any pecuniary or other advantage, or by means of any threat, intimidation, persuasion, or entreaty, or by means of any communication, oral or written, had with him, except in the regular course of proceedings, in respect to his verdict or decision in any cause or proceeding, are made by law criminal offenses, punishable by imprisonment in the state prison.

It is also a penitentiary offense for a juror to willfully and corruptly permit any communication to be made to him relating to any cause or matter pending before him, except according to the regular course of proceedings; or "to receive any bribe upon any agreement or undertaking that his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision shall be influenced thereby:" Pen. C., secs. 93, 95, 96. And such criminal acts are also punishable as contempts of court, for they taint with suspicion the proceedings which they touch, embarrass, hinder, and delay courts in the exercise of their functions, and, if suffered to pass unrebuked and unpunished by the court whose proceedings are tainted by them, they result in a paralysis of judicial confidence. To prevent, arrest, and punish for such offenses, whether committed or attempted to be committed by or upon any grand juror, is therefore the duty of every court in which such a jury may be sitting in the discharge of its duties; and if guilt should be found to attach to members of the grand jury, the jury should be promptly discharged, and the matters against the members thereof should be referred to another grand jury. Not only would it be greatly embarrassing to the administration of justice, but exceedingly mischievous in every way, to overlook or in any way sanction such acts. It is of the highest importance that jurors and judicial officers should be protected and preserved, not only from all improper influences, but even from the suspicion of such influences.

But while it is the right and duty of an attorney to address himself to a court for the purpose of putting in motion the power of the court to prevent the commission of such criminal acts, or to vacate and set aside proceedings tainted by them, or to convict and punish persons guilty of them, it is altogether irregular, unlawful, and criminal to send accusatory and threatening communications to a court, or jury sitting with it, while engaged in the discharge of its duties. None should know better the relation between court and jury, and the consideration and respect due to them, than an attorney, who is an officer of the court, bound, by his oath of office, "to support the constitution and laws; to maintain the respect due to the courts of justice and judicial officers; to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law; and to abstain from all offensive personality, and to advance no fact prejudicial to the honor or

reputation of a party or witness, unless required by the justice of the case with which he is charged:" C. C. P., sec. 282. None knew better than the petitioner that, in the investigation of offenses which are within their knowledge, or which have been brought to their attention by the court or district attorney, a grand jury can not receive any other evidence than the testimony of witnesses produced and sworn, or documentary evidence, or the depositions of witnesses taken according to law, and that the course which he pursued was forbidden by law, and violative of the duty which he owed to the court.

Unquestionably, the fact of the existence of exculpatory evidence may be brought by any citizen to the attention of the grand jury in a regular way. If such evidence exists, and they have reason to believe that it is within their reach, they may request it to be produced, and for that purpose may order the district attorney to issue process for the witnesses: Pen. C., sec. 920; to the end that the citizen may be protected from the trouble, expense, and disgrace of being arraigned and tried in public on a criminal charge for which there is no sufficient cause. A grand jury should never forget that it sits as a great inquest between the state and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded accusation, whether from the government, from partisan passion, or private malice.

But the letter was never written nor sent for the purpose of informing the grand jury of evidence which would explain away the charges under investigation against the petitioner's client. It was aimless for any purpose, except to exasperate the jurors by the aspersions upon their official conduct which it contained, or to deter them from performing their duties by the threats of public clamor which it expressed, or to create a distrust and want of confidence in any action which might be taken as the result of their investigation, and thus to embarrass the court itself in the administration of justice.

That such a communication to a jury sitting in or in connection with a court, of which it is a component part, and while engaged in the exercise of its functions, is a punishable contempt of court, does not admit of doubt: "Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt:" Bishop's Cr. Law, sec. 216. It would be strange, if under a government of law it were otherwise. On the part of an attorney it is not only a violation of the duty which he owes to the court, but an inexcusably unlawful interference with its proceedings: C. C. P., sec. 1209, subs. 3, 9; directly tending to impair the respect due to its authority: Pen. C., sec. 166. As such, the act of the petitioner was punishable, not only as a contempt of court, but as an offense against the criminal law.

In the punishment inflicted, the court did not exceed its jurisdiction. It had jurisdiction to punish by fine not exceeding five hundred dollars, or imprisonment not exceeding five days, or by both: C. C. P., sec. 1218. In the exercise of its jurisdiction it imposed a fine of five hundred dollars, and that exhausted its statutory power of punishment; but the committal was not an additional punishment, it was simply the written mandate or process by which the court undertook to enforce its judgment. A judgment of fine is enforceable by an execution as on a judg-

ment in a civil action: Pen. C., sec. 1214; C. C. P., sec. 1005; or by commitment under the criminal law: Pen. C., sec. 1205. A person against whom such a judgment has been pronounced has, therefore, the privilege under the law of paying it either by money or by imprisonment. If he pays in money, there can be no commitment. If he refuses to pay in that way, the commitment follows, as an incident to the judgment, until the judgment has been complied with according to law: Pen. C., secs. 1215, 1456; Ex parte Crittenden, 7 Pac. C. L. J. 483.

The petitioner is remanded.

MORRISON, C. J., and MYRICK and MCKINSTRY, JJ., concurring. We are of opinion that the petitioner, in sending the letter set forth in the return (containing as it did threatening and insulting language), was guilty of contempt, and that he thereby subjected himself to punishment. We are also of opinion that the court had power to enforce the payment of the fine imposed, by the method adopted by it: Ex parte Crittenden, 7 Pac. C. L. J. 483.

We therefore concur in the judgment.

THORNTON, J., concurring. That the grand jury is a part of the court, I think to be too well settled to be now disputed. Any citizen has a right to present charges of misconduct against any member or members of the grand jury to the court of which it forms a part, that the same may be investigated. But an insulting letter addressed and sent to such jury in relation to their functions, and saying to them that if they find an indictment against a person whose cause is before such jury for investigation, the community will conclude that they have been bribed to do so, is not submitting charges against them to the court, but is an unlawful interference with the proceedings of the court, tends to intimidate the grand jury in the discharge of their duties and to obstruct the course of justice, and is a contempt of court: C. C. P., sec. 1209. The court below clearly had jurisdiction of the matters involved in this case, to fine, and to designate the mode of collecting the fine which was adopted by its judgment. This is true, if we measure the power of the court by the statute of this state, and was so ruled in Crittenden's case: 7 Pac. C. L. J. 483. The court's having jurisdiction determines this case.

In my opinion the applicant for the writ should be remanded, and the writ discharged.

SHARPSTEIN, J., concurring. I concur in the judgment. I think no one would be to the trouble of communicating his views in writing to a grand jury on a matter which it had, or was likely to have, before it, unless he expected thereby to influence its action; and I think the policy of the law is to keep juries as free as possible from outside influences. How that can be done, if every one who feels so inclined shall be at liberty to communicate his views in writing to a jury, on any matter which it may have before it, is to me inconceivable. I think that every act of the kind constitutes an unlawful interference with the proceedings of a court.

COUNTY OF SAN DIEGO v. CALIFORNIA SOUTHERN RAILROAD COMPANY.

Department Two. Filed January 16, 1884.

DISTRICT ATTORNEYS CAN NOT COMMENCE AND PROSECUTE ACTIONS for the recovery of delinquent taxes, unless authorized so to do by the boards of supervisors of their respective counties. In such actions commenced and prosecuted by district attorneys without authority of the boards of supervisors, no attorney's fees can be recovered against the defendants, nor costs against the plaintiffs.

APPEAL from a judgment of the superior court for San Diego county, entered in favor of the defendant for its costs, in an action to recover from it certain delinquent taxes. The further facts appear in the opinion.

W. J. Hunsaker, *Will M. Smith*, and *Works & Titus*, for the appellant.

H. E. Cooper and *M. A. Luce*, for the respondent.

SHARPSTEIN, J. District attorneys are not expressly authorized by any law of this state, to which our attention has been directed, to commence and prosecute actions for the recovery of delinquent taxes. By the act of April 23, 1880, Stat. 1886, p. 136, any county is authorized to sue in its own name for the recovery of delinquent taxes, and a form of complaint is prescribed. But no officer or board of officers is expressly authorized to commence the action, and unless the power to do so is within the general powers of some officer or board of officers, we must treat it as a *casus omissus*. It is clearly not within the enumerated duties of district attorneys: Pol. C., art. 8. The powers of boards of supervisors are much broader. They have the power "to supervise the official conduct of all county officers * * * charged with assessing, collecting," etc., "the public revenue:" Id., sec. 4046. "To direct and control the prosecution and defense of all suits to which the county is a party:" Id., subd. 15; and "to do and perform all other acts and things required by law not in this title (I., part IV.) enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government:" Id., subd. 26. This, in our opinion, confers power upon boards of supervisors to direct the commencement and prosecution of actions for the recovery of delinquent taxes, and we think no one is authorized to commence such an action until directed to do so by the board of supervisors of the proper county. And as the court found that the board of supervisors never directed or authorized the institution or prosecution of this suit, or ratified the action of the district attorney in bringing the same, it necessarily results that no attorney's fees can be recovered of the defendant, nor costs against the plaintiff.

The judgment therefore must be reversed; and the court below is directed to dismiss the action.

MYRICK and THORNTON, JJ., concurred.

PEOPLE v. DAVIS.

In Bank. Filed January 16, 1884.

SUPREME COURT WILL REVERSE A JUDGMENT FOR THE REFUSAL OF THE LOWER COURT to give an instruction only when it was the duty of the court to give such instruction exactly as requested. If any part of a single instruction ought not to have been given, the rejection of the whole thereof will be affirmed. Such result follows when any part of a single instruction is so worded that it may have a tendency to mislead the jury, as well as when a part directly declares that to be law which is not law.

REFUSAL OF THE COURT TO INSTRUCT THE JURY IN REFERENCE TO CIRCUMSTANTIAL EVIDENCE, "that it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any rational probability of any other hypothesis being true," is not error. In such instruction the words "absolute moral certainty" are not synonymous with "moral certainty."

APPEAL from a judgment of the superior court for San Bernardino county, convicting the defendant of the crime of grand larceny, and from an order denying him a new trial. The opinion states the facts.

Harris & Franklin, for the appellant.

Attorney general, for the respondent.

The COURT. Defendant was found guilty of grand larceny, on circumstantial evidence. Counsel for defendant requested the court to charge the jury as follows: "The following principle of law is of universal application in all cases based on circumstantial evidence. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any *rational probability* of any other hypothesis being true, or the jury must find the defendant not guilty." The offered instruction was by the court rejected, as "superfluous—included in other instructions."

An instruction with reference to circumstantial evidence would not have been "superfluous." The charge, given in different forms, that the jury must be satisfied of defendant's guilt "beyond a reasonable doubt," is a legal proposition applicable to all criminal cases, as well where the evidence is direct as where it is circumstantial, and the court might very properly have instructed the jury further, in such manner as would have assisted them in reaching a correct conclusion upon the *circumstances* proved.

The rule, as laid down by Greenleaf, is: "Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion:" 1 Greenl. Ev., sec. 34. The rule was adopted and approved in People v. Shuler, 28 Cal. 490, and followed in People v. Strong, 30 Id. 154.

And in People v. Anthony, 56 Cal. 400, this court held an instruction not objectionable which read: "It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt," etc.

But, when it is urged here that the court below erred in rejecting an instruction requested, we are justified in reversing the judgment only when it appears that it was the duty of the court to give the instruction exactly as requested. It has been repeatedly held, that if any part of a single instruction ought not to have been given, the action of the trial court in rejecting the whole will be affirmed. And this result must follow when any part of a single instruction is so worded as that it may have a tendency to mislead the jury, as well as when a part directly declares that to be law which is not law. A philologist may be able to say that the word "absolute," in the instruction requested and rejected, adds

no force to the words "moral certainty." But the word suggests a degree of certainty greater than that moral certainty which can be reached upon such evidence as is securable in courts of justice. If the learned judge of the court below had stricken out the word "absolute," we certainly would not have held that it was error on his part. It follows that it was not error to decline to give the instruction as it was presented.

Judgment and order affirmed.

BURTON v. NICHOLS.

Department One. Filed January 17, 1884.

WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE, the judgment will not be reversed because the evidence does not sustain the findings.

APPEAL from a judgment of the superior court for Santa Barbara county, entered in favor of the defendant in an action of ejectment. The opinion states the facts.

Packard, Thompson, and *Stratton*, for the appellant.

Charles Fernald, for the respondents.

The COURT. The only point made by appellant is that the evidence does not justify the finding, that the lands described in the complaint are not situated within the boundaries of the rancho Jesus Maria, as patented by the United States. The testimony of the witnesses called by the defendants at least created a substantial conflict with reference to the location of the demanded premises, and we can not say that the evidence did not sustain the finding of the court.

Judgment affirmed.

HODGDON v. UNDERHILL ET ALS.

Department One. Filed January 17, 1884.

JUDGMENT FOR THE DEFENDANT IN AN ACTION OF EJECTMENT WILL BE AFFIRMED where the findings do not show that the plaintiff ever had any title to or estate in the lands sought to be recovered.

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the defendants, in an action of ejectment. The further facts appear in the opinion.

Taylor, O'Brien & Hodgdon, and *Johnson*, for the appellant.

J. B. Devine, for the respondents.

The COURT. The appeal is by plaintiff from a judgment in favor of the defendant Rock. The findings do not show that plaintiff ever had title to or any estate in the lands of which defendant Rock has had possession.

Judgment affirmed.

REFUSAL OF THE COURT TO INSTRUCT THE JURY IN REFERENCE TO CIRCUMSTANTIAL EVIDENCE, "that it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any rational probability of any other hypothesis being true," is not error. In such instruction the words "absolute moral certainty" are not synonymous with "moral certainty."

APPEAL from a judgment of the superior court for San Bernardino county, convicting the defendant of the crime of grand larceny, and from an order denying him a new trial. The opinion states the facts.

Harris & Franklin, for the appellant.

Attorney general, for the respondent.

The COURT. Defendant was found guilty of grand larceny, on circumstantial evidence. Counsel for defendant requested the court to charge the jury as follows: "The following principle of law is of universal application in all cases based on circumstantial evidence. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any *rational probability* of any other hypothesis being true, or the jury must find the defendant not guilty." The offered instruction was by the court rejected, as "superfluous—included in other instructions."

An instruction with reference to circumstantial evidence would not have been "superfluous." The charge, given in different forms, that the jury must be satisfied of defendant's guilt "beyond a reasonable doubt," is a legal proposition applicable to all criminal cases, as well where the evidence is direct as where it is circumstantial, and the court might very properly have instructed the jury further, in such manner as would have assisted them in reaching a correct conclusion upon the *circumstances* proved.

The rule, as laid down by Greenleaf, is: "Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion:" 1 Greenl. Ev., sec. 34. The rule was adopted and approved in People v. Shuler, 28 Cal. 490, and followed in People v. Strong, 30 Id. 154.

And in People v. Anthony, 56 Cal. 400, this court held an instruction not objectionable which read: "It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt," etc.

But, when it is urged here that the court below erred in rejecting an instruction requested, we are justified in reversing the judgment only when it appears that it was the duty of the court to give the instruction exactly as requested. It has been repeatedly held, that if any part of a single instruction ought not to have been given, the action of the trial court in rejecting the whole will be affirmed. And this result must follow when any part of a single instruction is so worded as that it may have a tendency to mislead the jury, as well as when a part directly declares that to be law which is not law. A philologist may be able to say that the word "absolute," in the instruction requested and rejected, adds

no force to the words "moral certainty." But the word suggests a degree of certainty greater than that moral certainty which can be reached upon such evidence as is securable in courts of justice. If the learned judge of the court below had stricken out the word "absolute," we certainly would not have held that it was error on his part. It follows that it was not error to decline to give the instruction as it was presented.

Judgment and order affirmed.

BURTON v. NICHOLS.

Department One. Filed January 17, 1884.

WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE, the judgment will not be reversed because the evidence does not sustain the findings.

APPEAL from a judgment of the superior court for Santa Barbara county, entered in favor of the defendant in an action of ejectment. The opinion states the facts.

Packard, Thompson, and *Stratton*, for the appellant.

Charles Fernald, for the respondents.

The COURT. The only point made by appellant is that the evidence does not justify the finding, that the lands described in the complaint are not situated within the boundaries of the rancho Jesus Maria, as patented by the United States. The testimony of the witnesses called by the defendants at least created a substantial conflict with reference to the location of the demanded premises, and we can not say that the evidence did not sustain the finding of the court.

Judgment affirmed.

HODGDON v. UNDERHILL ET ALS.

Department One. Filed January 17, 1884.

JUDGMENT FOR THE DEFENDANT IN AN ACTION OF EJECTMENT WILL BE AFFIRMED where the findings do not show that the plaintiff ever had any title to or estate in the lands sought to be recovered.

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the defendants, in an action of ejectment. The further facts appear in the opinion.

Taylor, O'Brien & Hodgdon, and *Johnson*, for the appellant.

J. B. Devine, for the respondents.

The COURT. The appeal is by plaintiff from a judgment in favor of the defendant Rock. The findings do not show that plaintiff ever had title to or any estate in the lands of which defendant Rock has had possession.

Judgment affirmed.

RANKIN ET AL. *v.* EKEL ET ALS.

Department One. Filed January 17, 1884.

CONSTABLE CAN NOT ATTACH AND SELL THE PROPERTY OF A THIRD PERSON, without incurring liability, notwithstanding he attaches and sells only "the right, title, and interest" of the defendant in the attachment suit.

APPEAL from a judgment of the superior court for Amador county, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. This was an action against a constable and the sureties on his official bond to recover for the conversion of certain personal property belonging to the plaintiff, and sold by said constable under an execution against the Empire Mill and Mining Co. The further facts appear in the opinion.

Eagon & Armstrong and *S. P. Scaniker*, for the appellants.

George G. Blanchard and *A. C. Brown*, for the respondents.

The COURT. It clearly appeared that the corporation defendant in the attachment suits had no interest in the property when the same was sold by the constable. The court erred in holding and instructing the jury that a constable may attach and sell the property of a third person, without incurring any liability to such third person, provided he attaches and sells only "the right, title, and interest" of the defendant in the action. If a defendant has no leviable interest in property, the purchaser at a constable's sale will acquire no interest. But it by no means follows that an officer can protect himself from interfering with the property of a third person by the plea that he only attached and sold the "interest" of a judgment debtor; and as the judgment debtor had *no* interest, no harm was done to such owner of the property.

Trespass will lie against a sheriff for any unlawful interference with personal property, as for a sale of it without any removal: Neff v. Thompson, 8 Barb. 215.

A new trial must be ordered. It is not necessary to decide whether defendants would have been authorized to prove, by way of mitigation of damages, that the property was, subsequent to the constable's sale, sold for taxes and removed by the purchaser at said last sale.

Order reversed, and cause remanded for a new trial.

REYNOLDS *v.* LYNCH ET ALS.

Department One. Filed January 17, 1884.

TENANTS AT WILL OF A TRUSTEE ARE NOT NECESSARY OR PROPER PARTIES in an action against the trustee to compel a conveyance of the trust estate.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendants. This was an action brought by the plaintiff, the owner of the land in controversy, against the defendant Lynch, as the surviving trustee of such land, under a deed of trust from certain parties claiming title thereto, and the other defendants as his tenants at will in said land, to compel them to convey the same to him. Lynch made default, and judgment was entered against him. The

other defendants demurred, their demurrer was sustained, and final judgment entered thereon. From such judgment the plaintiff appealed. The further facts appear in the opinion.

John Reynolds, in propria persona, for the appellant.

J. H. McKune and *Freeman & Bates*, for the respondents.

The COURT. The greatest scope of relief to which plaintiff would be entitled, as against the surviving trustee, would include a conveyance to plaintiff of the legal estate in the lands (the subject of the trust) which his assignors had when the trust was created. Assuming the fact to be, as alleged in the complaint, that the assignors of plaintiff were owners in fee of all the lands when the deed of trust was executed, and that the assignors of defendants had no right, title, or interest therein—a fact which is *admitted* by the demurrer—the complaint contains no statement of a cause of action against the defendants other than Lynch, in the absence of an averment that they are asserting some claim by reason of having joined in the execution of the trust conveyance.

The plaintiff omits to allege such assertion of claim, but avers that the defendants are in possession of portions of the same, *as he is advised* and believes, as tenants at will of Lynch, the trustee.

If the matter pleaded, as last stated, be sufficiently averred, it does not, of itself, make the defendants in possession proper or necessary parties. Their tenancy at will may of course be terminated by plaintiff, when a conveyance is obtained from the trustee. It is not pretended that they claim anything except as tenants at will of the trustee.

Judgment affirmed.

HARDWICK *v.* TYRREL.

Department One. Filed January 17, 1884.

IN AN ACTION AGAINST A SHERIFF FOR THE CONVERSION OF PROPERTY by reason of a sale under an execution against a third person, where issue is joined as to the ownership of such property at the time of sale, a finding that the plaintiff had sold the property to the execution debtor, and from the date of such purchase until the taking by the sheriff the same has remained in the debtor's possession "by virtue of such purchase," responds to the issue of ownership.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. This was an action against a sheriff for an alleged conversion of certain personal property of the plaintiff in the possession of one Turner. The answer and evidence of the defendant tended to show that prior to the time of the alleged conversion, the plaintiff had transferred the property to Turner and that the same had been sold under an execution against him. The further facts appear in the opinion.

York & Whitworth, for the appellant.

Fox & Kellogg, for the respondent.

The COURT. As the plaintiff alleges the ownership of the property by plaintiff prior to the lease or transfer to Turner, the finding that the latter purchased the property from plaintiff in the month of May, 1879, for twelve hundred dollars, etc., and that from the date of said purchase until the taking of the same by attachment the property remained in Turner's possession "by virtue of such purchase," responds to the ma-

terial issue. The evidence sustains the finding. The actual transaction, if we are to believe some of the witnesses, was a sale by plaintiff and purchase by Turner, as found by the court.

Judgment and order affirmed.

HALL *v.* RICE, Adm'r, ET ALS.

Department One. Filed January 17, 1884.

THE INSERTION OF THE NAME "THOMAS HEPTUM" IN A BOND FOR A DEED signed by Thomas Hepburn is immaterial.

SUPERIOR COURT HAS JURISDICTION OF AN ACTION FOR THE SPECIFIC PERFORMANCE of a contract for the sale of lands against the heirs and personal representatives of a deceased vendor, after the probate court has dismissed a petition praying that the administrator be compelled to convey such land. Such dismissal will be presumed to have been made on the ground of the dubiety of the petitioner's right, although the jurisdiction of the superior court does not depend upon the *correctness* of the action of the probate court in holding such right doubtful.

AN AMENDMENT TO A COMPLAINT FOR THE SPECIFIC PERFORMANCE OF A CONTRACT for the sale of land, alleging the adequacy of the price agreed to be paid therefor, may be allowed by the court after the trial and during the argument.

CONSIDERATION EXPRESSED IN A CONTRACT FOR THE SALE OF LAND will be deemed adequate, in the absence of evidence to the contrary.

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. This was an action for the specific performance of a written contract for the sale of certain land by the ancestor of the defendants, one Thomas Hepburn, to the plaintiff. In the description of the parties to such contract, said Hepburn was referred to as "Thomas Heptum," but the contract was signed by him in his true name. The lower court admitted evidence of the identity of "Thomas Heptum" with the ancestor of the defendants. After the trial and during the argument the court permitted plaintiff to amend his complaint by alleging that the sum which he had agreed to pay for the land was a fair, just, and adequate consideration for the same. The further facts appear in the opinion.

W. B. Treadwell, for the appellants.

J. Lambert, for the respondent.

THE COURT. 1. We think the insertion of the name "Thomas Heptum" in the bond, for a deed signed by *Thomas Hepburn*, is immaterial.

2. The superior court had jurisdiction of this action—which is, in effect, a suit in equity for specific performance of a contract for the sale and purchase of lands: Const., art. 6, sec. 5.

Whether the legislature did or did not have power to enact sections 1595 and 1607 of the code of civil procedure, the plaintiff herein alleged, and the court below found, that the plaintiff's petition, presented as provided in section 1598, was by the probate court "dismissed without prejudice," and this action was brought within six months after such dismissal.

The probate court had jurisdiction, if the provisions of the code are valid, to dismiss the plaintiff's petition "without prejudice," etc. The fact of such dismissal of a petition, praying that the administrator be compelled to convey the same land described in the complaint herein, gave the superior court jurisdiction—even if it be admitted its jurisdiction depended upon any previous action of the probate court. It must

be presumed the dismissal was on the ground of the dubiety of the right. The jurisdiction of the superior court can not depend upon the *correctness* of the action of the probate court in holding that the right of the petitioner was *doubtful;* if so, the superior court can never assume jurisdiction of such an action.

It is not for the superior court to inquire what reason the probate court gave for dismissing the petition. Ought the superior court to have held that the "facts and circumstances" were not examined by the probate court, and could not have been, because the order of dismissal followed upon an order sustaining a demurrer to the petition, and therefore, that the order of the probate court is void, and the petition is still pending in that court? It was not intended that the superior court should go behind the order of the probate court dismissing the petition without prejudice. Otherwise the party demanding a conveyance is without remedy, since he can not appeal from the order of the probate court: C. C. P., sec. 963.

3. There was evidence to sustain the finding that the bond was delivered during the life-time of Hepburn.

4. We think the court did not err in allowing the formal amendment to the complaint. The bill of exceptions recites that "no evidence" was given whether the sum mentioned was a fair, just, and adequate consideration for the land. But this must, of course, mean evidence other than the contract itself. The agreement by one, not claimed to be otherwise than mentally competent to protect his own interests, is evidence from which the court would be justified in concluding that the consideration was fair and adequate—nothing being proved to create suspicion that it was insufficient.

Judgment and order affirmed.

BOREL *v.* DONOHUE.

Department One. Filed January 17, 1884.

AN AVERMENT AND FINDING THAT AT THE DATE OF A MORTGAGE THE MORTGAGOR WAS IN POSSESSION of a certain tract of land, described by metes and bounds, is not supported by evidence of a mortgage in which the mortgaged premises are described as "all of the mortgagor's right, title, and interest in and to nine lots of land in block number 113, as per map of Clinton, said property being now in possession of" the mortgagor.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the plaintiff, for the foreclosure of a mortgage. The opinion states the facts.

Wright & Jonasson, for the appellant.

H. A. Leake, for the respondent.

The COURT. The description inserted in the deed of mortgage, a copy whereof is annexed to the complaint, is as follows: "All of his [the mortgagor's, present defendant's] right, title, and interest in and to nine lots of land in block number 113, as per map of Clinton, *said property* being now in possession of said party of the first part" (mortgagor).

The complaint alleges, "that the premises described in said mortgage, and which were in possession of said Michael Donohue at the time of the execution of said mortgage, are more particularly described as follows: 'All those certain lots or parcels of land situated in the city of

Oakland, county of Alameda, and state of California, bounded and described together in one parcel as follows.'" (Then comes a description by metes and bounds.)

There is no pretense that there was any mistake in drafting the mortgage, nor is there any prayer for a reformation of the instrument.

It is plain that the mortgage contains no description of land if the words "as per map of Clinton" be eliminated therefrom. If these words relate to a map in which *blocks* are numbered, but which contains no designation of *lots*, the mortgage and map contain no description of lands, unless the description was assisted by evidence that when the mortgage was executed the mortgagor was in possession of certain nine lots within the block 113, as laid down on the map. But the averment and finding is only that at that date defendant and mortgagor was in possession of a certain tract of land. It is not even alleged or found that the general tract included nine lots, or any lots in block 113.

Unless, therefore, the instrument is to be read as mortgaging any and all lands of which the mortgagor was in possession, the decree of foreclosure can not stand. But the language will not bear such construction.

Judgment and order reversed, and cause remanded to the court below for further proceedings.

JONES ET AL. *v.* MEYER.

Department One. Filed January 17, 1884.

FINDING OF THE COURT WHICH SUBSTANTIALLY RESPONDS TO THE ISSUES made by the pleadings is sufficient.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiffs. This was an action brought to recover five hundred dollars advanced by the plaintiffs to the defendant, under a contract, by the terms of which the latter was to sell and deliver to the former two thousand sheep, permitting the plaintiffs to reject one hundred of them. The complaint alleged a breach of contract on the part of the defendant, which was denied in the answer. The further facts appear in the opinion.

Smith, Brown & Hutton, for the appellant.

Bicknell & White, for the respondents.

MCKINSTRY, J. Appellant contends the finding 1, that defendant "refused to allow plaintiffs to reject one hundred sheep from the band of sheep, numbering about two thousand, *that he offered to deliver* to plaintiffs," does not respond to the issue, which was: Did defendant offer to deliver two thousand sheep, permitting plaintiffs to reject one hundred of them? But the court found that he offered to deliver a band of sheep, and refused to allow plaintiffs to reject one hundred of those so offered. And there was evidence to sustain the finding. The witness Collom testified: "The defendant had a band of sheep there *that he alleged to be two thousand* in number, which he offered to deliver to us, but refused to allow us to reject one hundred of the number," etc.

Judgment and order affirmed.

MCKEE and ROSS, JJ., concurred.

ANDERSON *v.* HANCOCK.

Department One. Filed January 19, 1884.

A TAX DEED WHICH FAILS TO RECITE THE RECITAL IN THE CERTIFICATE OF SALE, with reference to the time when the purchaser would be entitled to a deed, is void.

APPEAL from a judgment of the superior court for San Bernardino county. The opinion states the facts.

Satterwhite & Curtis, for the appellant.

Rowell & Willis, for the respondent.

The COURT. It is contended by respondent that the decision of this court, on the former appeal, 61 Cal. 88, that there is a sufficient description of land in the tax deed on which plaintiff and respondent relies, is a conclusive determination of the validity of the deed (so far as this action is concerned), and is the "law of the case," that as a consequence defendant could not avail himself of any objection to the deed at the second trial which he had failed to take at the first trial.

It does not appear, either from the report of the decision on the former appeal or from the transcript now before us, that the objections to the deed taken at the second were in fact taken at the first trial. The only question upon which the former decision is the "law of the case," is the question made at the first trial, to wit, that the tax deed contained no sufficient description of any lands.

The tax deed does not recite the recital in the certificate of sale with reference to the time when the purchaser would be entitled to a deed. The deed is therefore void: Grimm v. O'Connell, 54 Cal. 522; Hubbell v. Campbell, 56 Id. 527.

Judgment and order reversed.

SPRINGER ET AL. *v.* SCHUTZ ET AL.

Department One. January 19, 1884.

PARTIES AGAINST WHOM AN AWARD IS MADE, UNDER SEVERAL SEPARATE AND DISTINCT submissions to arbitration, are not estopped for disputing the validity of such award as to costs, which were jointly awarded against them, either by consenting to a common trial or by paying the separate sums awarded as damages.

APPEAL from a judgment of the superior court for Colusa county, entered in favor of the defendants. The opinion state the facts.

Hart & Hart, for the appellants.

Stabler and *Bayne*, for the respondents.

The COURT. Four distinct and separate submissions to arbitration were executed by the defendants on the one part and by each of the plaintiffs on the other. The arbitrators awarded to the plaintiffs, jointly, *costs* in the amount of seven hundred and forty-four dollars. It is clear that it was the duty of the arbitrators to render a separate award, on the submissions respectively, as between defendants and each of the plaintiffs.

The only questions are: 1. Is the award as to costs binding, because defendants assented to it by consenting to *one trial*, in which the rights of all the present parties were investigated? 2. Did they become liable for the costs, by paying to the plaintiffs separately the amount of damages awarded to each?

We do not think the defendants are estopped from asserting the invalidity of the award as to costs (on the ground that no authority for such an award was conferred by any or all of the several submissions), either by consenting to a common trial or by paying the separate sums awarded as damages.

Judgment affirmed.

PHILLIPS *v.* SUTHERLAND.

Department One. Filed January 19, 1884.

JUDGMENT FOR THE PLAINTIFF IN AN ACTION FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY should be primarily for the very property, or its value at the date of the trial, and an amendment to the complaint showing such value, and increasing that already alleged, is permissible.

APPEAL from a judgment of the superior court for Tulare county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The "amendments" spoken of in last paragraph of the opinion consisted in the insertion of a higher value of the property, and a like insertion in the prayer for damages. The further facts appear in the opinion.

Atwell & Bradley and *Wiggington*, for the appellant.

J. J. Jacobs, for the respondent.

MCKINSTRY, J. The action is to recover the possession of specific personal property. The property not having been delivered to plaintiff, the court properly found its value, and the judgment was in the alternative for the property, or its value, if the property could not be delivered: C. C. P., sec. 667. If plaintiff recover in such an action, he is entitled primarily to the *very property*, and the value which he is to receive, instead of the property, is the value as of the day of trial. The money value is a substitute for the property, and the amount can be approximately fixed by ascertaining it as of the date (when the value can be judicially determined) nearest to the time when the property would be delivered.

It follows that the error of the court in allowing an unverified amendment to a verified complaint, and in allowing the amendment to be made by defacing the record—erasing words from and interlining others in the original complaint—did not injure defendant.

Judgment and order affirmed.

MCKEE and ROSS, JJ., concurred.

DREYFUSS *v.* TOMPKINS.

Department One. Filed January 19, 1884.

REFUSAL OF THE COURT TO GIVE AN INSTRUCTION CONTAINING HYPOTHETICAL RECITALS of fact, having no bearing on the matters at issue, is not error.

APPEAL from a judgment of the superior court for Nevada county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This was an action against the defendant as sheriff, for the recovery of the possession of certain personal property, taken and

sold by him under an execution against one Phillips. The plaintiff claimed title to the property by virtue of a sale from Phillips. The defendant claimed that such sale was void, because unaccompanied by an actual delivery and change of possession. The further facts appear in the opinion.

Cross & Simonds, for the appellant.

J. M. Walling, for the respondent.

McKINSTRY, J. There was evidence to sustain the finding of the jury that there was an actual delivery and continued change of possession, from Phillips to plaintiff, of the personal property—the subject of this action.

The court did not err in refusing the instruction asked by defendant. The instruction purports to recite hypothetically the material facts which tended to prove that there was no actual delivery and continued change of possession of the property attached, and which were to be considered by the jury in determining the question of actual delivery and continued change of possession. It recites, among other things, "and (defendant sheriff) did garnish said Dreyfuss, by delivering to said Dreyfuss a true copy of said writ of attachment, together with a notification indorsed thereon, notifying him that all moneys, goods, effects, and credits, debts due or owing, or any other personal property *in his possession or under his control*, belonging to said Phillips, were attached," etc, and also that defendant, "under and by virtue of said writ of execution, levied upon, seized, and took into his possession said goods, wares, and merchandise, by *delivering to said Dreyfuss a true copy* of said writ of execution."

The notification to Dreyfuss, served with a copy of the attachment, so far as such service would prove anything, would tend to prove that defendant *believed* that Dreyfuss had the property in his possession or under his control. It is certain that the service of the notice, or of the writs of attachment and execution, would not in any degree aid the jury in ascertaining whether there had been an actual delivery and continued change of possession. An instruction containing the recitals referred to was therefore properly refused.

Judgment and order affirmed.

McKEE and ROSS, JJ., concurred.

SUPREME COURT OF COLORADO

OWEN *v.* GOING ET AL.

Filed December 4, 1883.

NO APPEAL LIES TO THE SUPREME COURT FROM AN ORDER OF THE DISTRICT COURT setting aside a previous order vacating a judgment. The effect of such order is not to revive or reinstate the judgment.

APPEAL from an order of the district court for Pueblo county. The opinion states the facts.

Patton & Urmy, for the appellants.

No appearance for the appellees.

THE COURT. The appeal in this case must be dismissed; it is an attempt to have reviewed here an order of the district court setting aside a previous order vacating a judgment. It has frequently been held that no appeal lies to this court, except from a final judgment or decree: Higgins v. Brown et al., 5 Col. 345; Laws, 1879, p. 226, sec. 26.

In view of the theory upon which the court below seems to have acted in granting this appeal, we venture a suggestion as to the *status* of the parties when the cause is remanded. The judgment in question and the order vacating it were both entered at the same term. Courts have entire control over their judgments during the term at which the same are rendered; they possess a discretionary power to vacate and set them aside at such term, and their action in so doing is not subject to review in an appellate court: Freeman on Judg., sec. 90, and cases cited. We are of opinion that, however erroneous the action of the district court may have been in setting aside the judgment, the order effectively accomplished its purpose and vacated the same. When the court subsequently set aside this order, its action in so doing did not have the effect to revive or reinstate the judgment.

The appeal will be dismissed and the cause remanded, with leave to either party to move in the district court for final judgment.

Appeal dismissed.

TRIPPE ET ALS. *v.* OVERACKER ET ALS.

Filed December 4, 1883.

LEGISLATURE HAS POWER TO PROVIDE THAT THE OWNER OF AN EXISTING WATER DITCH upon or across his own land, or the land of another, shall not prohibit a third person from using and enlarging the same; but it can not limit or direct the compensation to be paid for the property so taken, or the damages occasioned by enlarging the ditch, or otherwise.

PROPRIETOR OF AN IRRIGATING DITCH, WHETHER UPON HIS OWN LAND or that of another, has a property ownership both in the ditch and the right of way therefor, and a third person can not use or enlarge the same without the owner's consent, except upon payment of just compensation as provided by the constitution.

PROVISIONS OF AN ACT, OR SECTIONS OF AN ACT, WHICH ARE CONSTITUTIONAL, and not connected with or dependent upon other provisions which are unconstitutional, will be enforced by the courts. Such rule applied to the act granting to one person the right to use and enlarge the ditches of another: Sess. Laws, 1881, p. 164.

APPEAL from a judgment of the district court for La Plata county. The opinion states the facts.

Hudson & Slaymaker, for the appellants.

Eugene Engly, for the appellees.

HELM, J. In 1881 the legislature of Colorado enacted, "that no tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches, constructed for the purpose of conveying water through said property to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch:" Sess. Laws, 1881, p. 164. Also: "No person or persons, having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed, in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch:" Id.

Plaintiffs in the court below attempted to bring this suit under the latter section. The object was to coerce consent of defendants by decree of the court, to their use and enlargement of a ditch theretofore constructed by defendants for their own private benefit. Plaintiffs were entitled to the right of way over defendants' lands for a ditch, upon payment of just compensation therefor, by virtue of both constitutional and statutory enactments: Const., sec. 7, art. 16; Gen. Laws, secs. 1058, 1373, 1374. But the lands of defendants were cultivated, and plaintiffs were prohibited by section 1 of the act of 1881, above mentioned, from taking a second ditch across the same to irrigate their premises beyond, if they could feasibly convey the necessary water through that of defendants.

We think it was competent for the legislature to adopt said section 1, aforesaid. It does not conflict with the constitutional provisions granting a right of way for the construction of ditches; but while recognizing the privilege, it simply undertakes to regulate the exercise thereof so as to inflict the least possible inconvenience and injury upon the owner of the servient estate. Section 1493 is in most respects a complement of 1491. In providing that the owner of an existing ditch upon or across his own land or the land of another shall not prohibit or prevent a third person from using and enlarging the same, the legislative intention evidently was to render more effective the equitable design expressed by the former section. But in so far as the latter undertakes to limit or direct the compensation to be paid for the property, it is clearly unconstitutional and void. For there are other elements of "taking or damage" which can not be ignored in determining the "just compensation" required by our constitution. It will almost always happen that the proprietor of the ditch will also be the owner of a part, at least, of the land upon which the same is constructed; and the legislature can not say that he may not be paid something for the right of way and for the damages to his land occasioned by enlarging the ditch, as well as for other injuries which a jury or board of commissioners might discover.

Property is defined as being "the right to possess, use, enjoy, and dispose of a thing." The thing mentioned does not always have a tangible or physical existence; it may be an easement, or anything else that can become the subject of private ownership. The proprietor of an irrigating ditch, whether upon his own premises or those of another,

has a property ownership, both in the ditch and the right of way therefor, and using or enlarging such ditch without the owner's consent is as much a taking or damaging of private property, within the meaning of the constitution, as would be appropriating the right of way therefor in the first instance. But such taking or damaging can not be tolerated, except upon payment in a constitutional manner of just compensation: See Mills on Eminent Domain, sec. 31, and cases cited. Where, however, part only of a statute is unconstitutional, it does not necessarily follow that the whole statute must fall; and the same is equally true as to different portions of the same section, where the act is divided into sections: See Commonwealth v. Hitchings, 5 Gray, 485. Whether the valid portions shall be enforced depends upon the design of the entire law, and their connection with the void provisions. "It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act but not connected with or dependent upon others which are unconstitutional:" Cooley on Const. Lim. 176, 3d ed., and cases cited.

We have already discussed the legislative purpose in adopting the statute under consideration, and have expressed our satisfaction with the wisdom thereof, and also with the validity of the law, except in the particular above mentioned. A careful examination of the entire act convinces us that if the objectionable phrases were stricken out a good law would remain, and the purpose of the legislature would still be accomplished. We feel warranted in entertaining the belief, that it was not the legislative design to have the enforcement of the whole act contingent upon the validity of the provision therein on the subject of compensation.

This act must be considered in connection with other statutes, as well as the constitutional provisions upon the same subject. And where so construed, omitting the objecticnable part, no trouble will be experienced in giving it full force and effect. The right to enlarge and use the ditch of another, already constructed, will be enforced in the same manner and under the same law as the right to take or damage any other kind of private property.

By the terms of the constitution, article 2, section 15, the compensation for taking or damaging private property against the owner's consent must be ascertained by a jury or board of commissioners; this requirement is imperative, and the legislature is powerless to dispense with it. Our act on the subject of eminent domain, Gen. Laws, sec. 1058 *et seq.*, prescribes a complete system of procedure for the taking or damaging of private property, and determining the compensation therefor when the same is authorized by law. It complies with the constitution in providing for a board of commissioners or jury; but is a special proceeding, and differs in many respects from our ordinary civil action.

This suit was brought in the court below as a civil action under the code, which was improper, as was likewise the trial thereof without the aid of a jury or board of commissioners. Defendants' demurrer to the complaint should have been sustained. The judgment must be reversed and the cause remanded, with directions to the district court to enter a judgment dismissing the same.

Reversed and remanded.

WILLARD *v.* MATHESUS.

Filed December 4, 1883.

IN THE ABSENCE OF A SHOWING THAT THE PEOPLE OF A CERTAIN COUNTY HAVE ADOPTED the so-called "fence law," the court will presume that the same has never taken effect therein.

OWNER'S LIABILITY FOR DAMAGE FROM TRESPASSING SHEEP.—When a flock of sheep is in the charge of herders upon a range, ordinary care should be exercised in preventing a trespass thereby upon the crop of another. When the crop is of such a nature as to be readily recognized, or is surrounded by a fence of any kind, so that the herder may know when he reaches its vicinity, he should use ordinary care to prevent the sheep from going upon the same and doing injury thereto. If such ordinary care be not exercised and a trespass and injury result, the owner of the sheep is liable for such damage.

DISTINCTION BETWEEN THE LIABILITY OF AN OWNER FOR DAMAGES RESULTING FROM TRESPASSING CATTLE and those resulting from trespassing sheep, stated, and shown to depend upon the difference in the customary manner of herding such animals.

APPEAL from a judgment of the county court of Elbert county. The opinion states the facts.

Wells, Smith & Macon, for the appellant.

R. A. Long, for the appellee.

HELM, J. Appellee was the owner of a quarter-section of patented land; forty acres of this land were inclosed by a pole-and-slab fence, which, according to the evidence, was probably sufficient to protect appellee's crops from cattle and horses running at large; but it was no protection against sheep, as they could pass through it almost anywhere without injury either to themselves or to the fence. Appellant's flocks, while in charge of herders, strayed upon appellee's lands, through her said fence, and damaged her hay crop. She brought suit; the cause was tried on appeal by the county court, without the intervention of a jury, and judgment rendered in her favor for the sum of fifty dollars damages; from that judgment this appeal is taken.

Several years before these alleged trespasses occurred, our legislature adopted what is known as the fence law; in this act they specify what shall be a lawful fence, and provide that any person suffering injury to his crops by the trespass of animals may recover damages for such injury, provided the crop be surrounded by such a fence as is therein described. But the statute was not to take effect or be in force in any county until the people of such county adopted the same by a popular vote.

Nothing appears in the record of this case showing the adoption of the fence law by the people of Elbert county. We must therefore presume that it has never taken effect therein, and determine the rights of the parties to this action by the general law prevailing in Colorado in the absence of statute: Morris v. Fraker, 5 Col 425.

Under the old common law, "every one was bound to keep his beasts within his own close, and if they went upon the grounds of another, the owner was liable in damages, unless he could show that the lands trespassed upon should have been fenced, either by prescription, agreement, or assignment."

In the case of Morris v. Fraker, *supra*, this court declared that the above common-law rule, in so far as it refers to cattle running at large upon the range, is inapplicable to Colorado, and therefore does not prevail. That on the contrary, "the general law of the state permits the own-

ers of cattle to allow them to range at will, and that in the absence of local acts, the owners of crops can only recover for damages done thereto by the trespasses of cattle when the same are, at the time of the trespass, inclosed by good and sufficient fences:" 5 Col. 433.

The owner of cattle in this state relies almost entirely upon his recorded brand, and upon the annual round-up for identification thereof and protection from loss; except in a few isolated instances, such stock is never, either in summer or winter, confined to an inclosed area, or kept close-herded upon the range. And the conclusion arrived at in the opinion above mentioned is based largely upon the general custom that has always prevailed among stock-men in this country of allowing their cattle to *roam at will* upon the public domain. But persons who make sheep-raising and wool-growing their business always pasture in inclosures or close-herd upon the range. The difference in intelligence and instinct, in disposition and physical characteristics, between sheep and cattle, renders it absolutely necessary to handle them differently. A flock of sheep turned loose to rove at will upon the range would soon be entirely lost to the owner. True, there is no law except that of self-interest to prevent the owners allowing them to run at large. But the custom of close-herding sheep is as fully established and as universally recognized as is that of allowing cattle to range at will. The reason of the law is said to be its life; and since the principal reason for the rule stated in Morris v. Fraker does not exist in this case, we are not prepared to recognize and apply that rule herein.

That which has become by long practice and recognition an established custom is law, and is accepted as such, until abrogated by statute or fallen into disuse. People make contracts and transact business with reference thereto; and rights acquired thereunder are protected by the courts. The farmer in Colorado, aware of the established custom of letting cattle run at will, in the absence of statute, builds a fence sufficient to protect his crop against trespass therefrom; but being advised also of the equally well-established custom of inclosing or close-herding sheep, he does not so construct his fence as to keep them out of his field. It would be manifestly unjust to apply the same rule for injuries to his crop by the latter that would be applicable for like injuries, under similar circumstances, by the former.

It appears that at the time of the trespass, complained of in this case, appellant's flocks were in charge of herders, and we are not called upon to determine the rights of the parties had the sheep been actually running at will, notwithstanding the custom aforesaid. It is sufficient, therefore, for the purposes of this case to say that when a flock of sheep is in the charge of herders upon the range, ordinary care should be exercised in preventing a trespass thereby upon the crop of another. That in such case, when the crop is of such a nature as to be readily recognized, or is surrounded by a fence of any kind, so that the herder may know when he reaches its vicinity, he shall use reasonable or ordinary care to prevent the sheep from going upon the same and doing injury thereto, and that if such ordinary care be not exercised, and a trespass and injury result, the owner of the sheep shall be liable in damages therefor.

In view of our conclusions above stated, we must affirm the judgment of the county court; for the amount of damages found is not more than a reasonable compensation for the injuries to appellee's *inclosed lands* by

appellant's flocks. The use of ordinary care by appellant and his agents is a question of fact; the court below determined this question in favor of appellee, and we do not feel warranted in disturbing the finding.

The judgment will be affirmed.

DORR *v.* HAMMOND.

Filed December 4, 1883.

PRIOR APPROPRIATOR OF WATER WHO FOR MANY YEARS MAKES NO USE THEREOF, but allows another to construct a ditch and divert such water without notifying the latter of his prior appropriation, will be presumed to have abandoned the same.

APPEAL from a judgment of the district court of El Paso county. The opinion states the facts.

J. M. Dorr, in propria persona, for the appellant.

John B. Cochran, for the appellee.

BECK, C. J. This was an adjudication before a referee under the act of 1881, Bromwell's Comp. 580–590, of the priority of right as between the owner of the Hammond slough ditch and the Robbins ditch, to take water through their respective ditches from a certain slough on the north side of Cheyenne creek. The appellant, J. M. Dorr, is the owner of the Robbins ditch, and the appellee, J. H. Hammond, is the owner of the Hammond slough ditch.

Twelve witnesses were examined by the referee and their testimony reduced to depositions, and copied into the bill of exceptions. The referee found that the Hammond ditch was first in order of priority, and that the Robbins ditch was second in priority, and numbered them accordingly. Dorr filed exceptions to the report and findings of the referee, which were heard and overruled by the district court, and the findings and decrees of referee approved. The proceedings below appear to have been conducted in strict conformity with the statute, and if any errors have been committed by the referee, they grow out of his judgment upon the weight of the testimony. That he erred in this respect, we are fully satisfied from a careful examination of the whole testimony.

The land owned by Dorr is the south-west quarter of section 19. Hammond owns the eighty-acre tract adjoining, on the south side. The slough from which the water for both ditches is taken appears to extend from the west to or upon the eighty-acre tract. Both ditches appear to be taken out upon the Smith ranch, lying to the west, the Robbins ditch on the north side of the slough, and the Hammond ditch on the south side of the slough.

The testimony may be fairly said to establish the fact that the Robbins ditch was made in 1868, and that it has been used ever since during the irrigating seasons to carry water from the slough to and upon the south-west quarter of section 19, and that the right to take water from the slough through this ditch has been continuously claimed by the owners and occupants of this quarter-section ever since its construction. So it is unnecessary to review the evidence upon this point.

The testimony also proves that a small ditch was taken out upon the south side of the slough, upon the eighty-acre tract, by Foster, one of the prior owners thereof, in 1866, and that it was used one season.

The land then passed into other hands, and the testimony fails to show that the subsequent proprietors used, claimed, or even knew of such a ditch until the claim preferred by the present occupant, Hammond.

The previous owners appear to have been Foster, Watson, Flannigan, and Hall, in the order of time as named. Foster's testimony is to the effect that he made the ditch in the spring of 1866, used it during one irrigating season, then sold the land, and did not see the ditch for four or five years afterward. He owned an interest in the Wolf ditch, which is taken out of Cheyenne creek, and which ditch covers the same land.

His wife, Elizabeth Foster, says she was present when her husband made the ditch; that it was in the spring of 1866; that it was made by plowing one furrow and cleaning it out with a shovel.

Flannigan says he purchased the land from Watson in November, 1867, and sold it to Hall in November, 1870. Afterward he acted as agent for Hall in respect to the land. During all this time it was watered from Cheyenne creek, and he did not know of the existence of the ditch now called the Hammond slough ditch, or of any ditch taken out of the south side of the slough.

If there had been such a ditch he says he would have known it. He knows the Hammond ditch, but thinks it was made after he sold the land. He owned the eighty when the Robbins ditch was taken out—interposed no objections and claimed no priority.

The testimony of Thomas H. Robbins is that he purchased the quarter-section in the early part of 1867; lived upon it for six years; that he took out the Robbins ditch in March or April, 1868, and used it continuously until the spring of 1873, neither Flannigan nor Hall interfering with his use of the water or claiming priority in respect to its use. He was familiar with the eighty-acre tract south, and the Hammond ditch was not there while he owned and lived upon the quarter-section, nor during the next year thereafter. He did most of his hauling over the eighty, and if there had been a ditch where it is now claimed to have been, it was so filled up that he never saw it. He says: "In the year 1869, we plowed where quite a portion of the present ditch is; I think it was in 1869, it might have been in 1868. Mr. Frank Flannigan owned or had control of this land at the time."

John Wolf says he settled in the neighborhood in 1862, and has lived there ever since. He knows the slough and both tracts of land; knows of the Robbins ditch being taken out of the north side of the slough; but does not know of any other ditch being taken out of the slough up to that time. He frequently passed over the ground, and thinks if a ditch had been taken out on the south side prior to 1868 he would have noticed it. The owners of the eighty-acre tract owned one fourth of the Wolf ditch, and prior to 1868 the land was watered from that ditch.

James Roberts testified that he passed backward and forward along Cheyenne creek for ten years, extending from 1860 to 1870. He knew the two tracts of land and the slough. Part of the slough was formed from water that ran down from his residence or land. He says there was no ditch on the south side of the slough during this period—he frequently passed by and would have known it if there had been; most of the table-land of the eighty was irrigated from the Wolf ditch.

The testimony of the other witnesses, including that of the appellee Hammond, is of later date, and of but slight importance upon the question of priority.

The conclusion is irresistible, upon review of the whole record, that the right of priority acquired by Foster by means of the furrow plowed by him to tap the slough in 1866, and his use of the water during that season, was afterward abandoned.

The testimony shows that no water was thereafter taken from the slough upon this tract of land for many years, and that the furrow mentioned became so obliterated as not to be noticeable by those driving over and plowing the land across which it had been run.

The subsequent owners of the land interposed no objections to the appropriation of the water by Robbins, but on the contrary, stood by and saw him construct his ditch, and permitted him for years to divert the water from the slough into it without ever notifying him of the prior appropriation. These facts amount to a voluntary yielding up and waiver of the priority acquired by Foster, without any intention of resuming it, and constitute a clear case of abandonment. The Robbins ditch, then, should have been decreed priority over the Hammond slough ditch, and numbered accordingly.

It is ordered that the decrees be modified in the particulars named, and that the appellee pay the costs of the appeal.

Remanded.

SUPREME COURT OF NEVADA.

EX PARTE SWEENEY.

Filed August 14, 1883.

COMMITMENT FOR CONTEMPT IS LEGAL, UNDER SECTION 473 OF THE COMPILED LAWS, which provides for the payment of a fine of five hundred dollars by the person guilty of the contempt, with the direction that unless such fine is paid immediately the prisoner shall be imprisoned for two hundred and fifty days.

CONTEMPT OF COURT IS IN THE NATURE OF A CRIMINAL OFFENSE, and the proceeding for its punishment is in the nature of a criminal proceeding.

FINE IMPOSED FOR A CONTEMPT IS PUNITIVE, AND INFLICTED AS PUNISHMENT in other criminal cases is inflicted. The direction for an alternative imprisonment is but a mode for the enforcement of the fine, incident to the power of the court to impose the same, and can not be regarded as a punishment for the contempt.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

Harris & Bartine, for the petitioner.

R. M. Clarke, in opposition to the writ.

HAWLEY, C. J. Petitioner, upon a hearing regularly had, was adjudged guilty of contempt of court for disobedience to the decree and injunction in the case of Phillips v. Welch, in appropriating more water than he was entitled to by said decree.

For this contempt he was fined five hundred dollars, and the commitment under which he is held declares that "if said fine be not paid forthwith," the petitioner is to be "imprisoned in the county jail of Ormsby county * * * for the space of two hundred and fifty days; that is to say, at the rate of one day for each and every sum of two dollars of said fine, and that for each day's imprisonment, under this order, defendant have credit upon the said fine for the sum of two dollars, and that defendant, if he so desire, after having served out part of said period of imprisonment, may be discharged from custody and set at liberty

upon his paying to the said sheriff any balance remaining due of said fine, after crediting thereon the imprisonment which defendant shall have undergone as aforesaid, at the rate of two dollars per day for such imprisonment, and not otherwise."

Petitioner claims that this order for his imprisonment is absolutely void, and, hence, that he is illegally restrained of his liberty.

The statute relating to contempts and punishments, like other statutes relating to proceedings criminal in their nature, is to be strictly construed, and no interpretation should be given beyond its obvious meaning. The section upon which petitioner relies reads as follows:

"In cases of contempt the punishment shall be by fine and imprisonment; but no fine shall exceed the sum of five hundred dollars, and no imprisonment shall exceed the period of five days, except as provided in section 469:" Stat. 1869, 267, sec. 473; 1 Comp. Laws, 1534.

The exception referred to has no application to a case like this. This section is identical in its provisions with the statute of 1861: Stat. 1861, 389, sec. 440.

At common law the power to punish for contempts was unlimited, dependent only upon the discretion of the court imposing the sentence. Under the statutes of this state, by the section above quoted, the power of courts is limited as to the extent of the punishment.

No court or judge can impose a greater fine than five hundred dollars, or imprisonment for more than five days (or both such fine and imprisonment), as a punishment upon any person adjudged guilty of contempt. In the proceeding against petitioner no imprisonment was imposed as a punishment for the contempt, and the question to be determined is, whether the provisions of the criminal practice act, or the act in relation to fines, as to the method of enforcing fines in criminal cases, applies.

The criminal practice act, in relation to the enforcement of judgments, provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every two dollars of the fine, or in that proportion:" Stat. 1861, 483, sec. 448; 1 Comp. Laws, 2073.

The "act in relation to fines" provides, among other things, that the court, in entering "a judgment that the defendant in a criminal case pay a fine, * * * shall, by such judgment, direct that if the judgment, or any part thereof, is not paid the defendant be imprisoned one day for each two dollars of the judgment not paid:" Stat. 1869, 96; 2 Comp. Laws, 3288.

These provisions, in my opinion, apply to all criminal cases of every kind and character, not otherwise specifically provided for; to cases of contempt when criminal, as well as to other misdemeanors. A contempt of the character of which petitioner was found guilty is in the nature of a criminal offense, and the proceeding for its punishment is in the nature of a criminal proceeding: Phillips v. Welch, 11 Nev. 187; Whittem v. State, 36 Ind. 204; Cartwright's Case, 114 Mass. 239; Hill v. Crandall, 52 Ill. 73; Passmore Williamson's Case, 26 Pa. St. 19; B. & O. R. R. Co. v. City of Wheeling, 13 Gratt. 57.

The fine imposed in such a case is punitive, inflicted as punishment in other criminal cases is inflicted, for the public good, in order to secure obedience to the lawful authority. The imprisonment is but a mode, which, in this state, is provided by statute, for the enforcement of

the fine. It is incident to the power given to the court to impose the fine, and it can not be regarded in the light of punishment.

In Ex parte Bollig, the petitioner was convicted of a violation of a city ordinance, before a police magistrate, was fined twenty-three dollars, and ordered to be imprisoned until the fine was paid. It was contended that the imprisonment was a punishment for the offense, and that such punishment was prohibited by the constitution. The court, in discussing this question, said: "Power is given to the magistrate to assess a fine only on conviction. The language is, 'shall forfeit and pay the sum of twenty-five dollars.' This is the whole extent of the punishment—the assessment of a fine. The imprisonment, though connected in the sentence by the copulative conjunction 'and,' is but a mode provided for collecting the fine. It is incident to the power to fine, and can not, in our judgment, be regarded in the light of punishment: Paley on Convictions, 271. The constitution never designed to abridge the modes usually resorted to, and most generally pursued, to carry out the powers with which justices of the peace are vested. They have power to try a case and assess a fine on conviction. * * * To collect this fine and the costs, * * * the magistrate, in very many cases, would be powerless without the power to hold the offender until he paid them, or was discharged in some other mode. * * * The provision of the constitution was designed to inhibit a justice of the peace from the trial of any case where imprisonment was denounced by the law as punishment in the first instance on conviction:" 31 Ill. 95.

In Brock v. State, the defendant was convicted of the offense of playing and betting at cards, and was sentenced to pay a fine of one hundred dollars and costs; and, on failure to say the same, to three months' imprisonment, unless said fine and costs were sooner paid. The court, in considering the effect of this sentence, said: "The penalty for the offense of which the defendant was convicted is pecuniary altogether. The court, on imposing the penalty, may enforce its payment by adjudging that the party convicted be committed until the fine and costs are paid. The imprisonment is no part of the penalty imposed, but it is the means, and the legal means, of enforcing the judgment of the court:" 22 Ga. 101.

If the courts have not the power to enforce a fine for contempt, in a case like this, they would be powerless to compel obedience to their lawful decrees and judgments—a power which is inherent in all courts. The judiciary would, indeed, hold but a barren scepter, if their powers ceased with declaring the law. The mere imposition of a fine amounts to nothing unless it can be enforced.

If the argument of petitioner's counsel, to the effect that the statute relating to contempts must govern this case as to the enforcement of the fine, as well as its imposition, should be sustained, then it would necessarily follow that there could be no enforcement of the judgment; for the statute does not provide any mode for its enforcement, either by the issuance of an execution or by imprisonment. The imposition of a fine, under such a construction of the statute, would be a mere farce. But the statute can not, within its obvious meaning, be so construed. The courts are invested with the power to enforce, as well as to pronounce their judgments.

The language in the statute, relating to contempts, that "no imprisonment shall exceed the period of five days," refers to the punishment

No imprisonment, as punishment for contempt, shall exceed five days. The entire section relates to punishments only, and was evidently not intended by the legislature as a prohibition of the power of courts to enforce their judgments imposing fines. It was intended as a limitation of the power of courts to inflict the punishment to the extent allowed by the common law, and it can not, it seems to me, be construed as a prohibition against the enforcement of any fine in the usual and ordinary methods provided by statute for the enforcement of judgments in criminal cases.

In Brown v. The People, the court said: "The only question in this case is whether a justice of the peace, who has imposed a fine for a contempt of his court, can imprison the party till the fine and costs are paid. Of this power we have no doubt. Such a power is indispensable to the proper administration of justice in these as well as all other courts. The statute has authorized justices' courts to impose a fine of five dollars for contempts, and to this extent it may be considered a limitation upon their power to fine for contempts, and it may even be held to take away the right to imprison directly for contempts; but surely it could never have been the intention of the legislature to limit the power of these courts to enforce the collection of such fines by the well-known modes previously practiced for the collection of such fines, and which are allowed for the collection of all other fines. It is a rule of the common law that all courts of justice possess the power to protect themselves from contempts by fine and imprisonment, and this was intended to be limited and regulated in justices' courts rather than taken away. Should we hold that the only means these courts have of protecting themselves is by imposing fines, and issuing ordinary executions to collect them, we might as well at once close the doors of these courts altogether. * * * A simple fine and a *fi. fa.* can have no terrors for one who has nothing, and never expects to have anything, out of which the fine could be made. The justice may fill his docket with such fines, and be laughed at all the time for his trouble. It is a matter of perfect indifference to such a party whether he is fined five cents or five thousand dollars. * * * It was within the power of the justice, and it was his duty, to imprison the party guilty of the contempt till the fine and costs were paid. We affirm the judgment without a moment's hesitation:" 19 Ill. 614.

The statutes of this state expressly provide that a judgment in a criminal case for a fine, imposed as a punishment, may be enforced by imprisonment, and the manner and extent of the imprisonment is specified. The statute in relation to contempts and their punishments must be construed with reference to these statutes in determining whether the fine can be enforced by imprisonment.

In State v. Myers, the defendant was adjudged guilty of contempt of court in violating an injunction, was fined thirty-five dollars, and an order was made that he stand committed until the fine be paid. It was there, as here, claimed that the court had no authority under the statute to impose the fine. The court, upon this question, said:

"Section 3493 of the code (relating to contempts) provides that the punishment for contempts by courts of record is limited to a fine of fifty dollars and imprisonment not exceeding one day."

"Section 4509 of the code (relating to judgments in criminal cases) provides that 'a judgment that the defendant pay a fine may also direct

that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three dollars and fifty cents of the fine.' We understand the provision of this section to apply to all fines properly imposed, whether the statute under which the conviction be had provides a punishment of a fine only, or both fine and imprisonment:" 44 Iowa, 584.

Petitioner is remanded into custody.

STEELE ET AL *v.* GOLD LEAD GOLD AND SILVER MINING COMPANY.

Filed September 3, 1883.

IN AN ACTION OF EJECTMENT TO RECOVER THE POSSESSION OF A MINING CLAIM, where the defendant relies upon a forfeiture by plaintiff, for failure to do the necessary work, as required by the act of congress (R. S., section 2326), such forfeiture need not be specially pleaded.

A PRIOR LOCATOR OF A MINING CLAIM, WHO HAS REGULARLY APPLIED FOR A PATENT, need not, in order to preserve his rights, protest against any subsequent application for the same ground, while his own application is pending in the land department; and, in a controversy between such applicants, the prior locator is entitled to be heard and have his rights determined in the proper forum where they are questioned, whether it be in the state courts or in the land office.

APPEAL from a judgment of the first district court for Storey county, entered in favor of the defendant. The opinion states the facts.

Kirkpatrick & Stephens, and *Lindsay & Dickson*, for the appellants.

Lewis & Deal, for the respondent.

HAWLEY, C. J. This suit was brought to determine the right of possession to certain mining ground, for which defendant had applied for a patent. The complaint and answer contain the usual averments. Defendant subsequently filed a supplemental answer, claiming title to the ground in controversy by virtue of a deed from the Jacob Little Consolidated Mining Company.

When the cause was tried, plaintiffs introduced evidence, oral and documentary, tending to prove a valid location by them on January 1, 1877, of the ground described in their complaint as the Emma claim.

The defendant introduced evidence, oral and documentary, tending to prove a location made by defendant's grantor, Andrew Charles, on August 28, 1878, of the Gold Lead claim. A witness was then called, and testified on behalf of defendant that he was and had been acquainted with the premises described in the complaint as the Emma claim, ever since the first day of January, 1877. This witness was then asked the following question: "Did the plaintiffs do any work on the Emma claim in the year 1877?"

Plaintiffs objected to this question, on the ground that defendant, in its answer, failed to plead or rely upon a forfeiture of plaintiffs' interest in the premises in controversy, by reason of their failure to perform the work or make the expenditure required by law upon the Emma claim. This objection was overruled, and the witness testified "that the plaintiffs had done no work on said Emma claim in the year 1877." Other witnesses gave testimony tending to prove that plaintiffs did no work and made no expenditures on the Emma claim in the year 1877; and that plaintiffs did not perform one hundred dollars' worth of work in labor on said claim in the year 1878.

The plaintiffs admitted, for the purposes of this trial, that the predecessors in interest and grantors of the Jacob Little Consolidated Mining Company made a valid location on the thirty-first of January, 1863, of the Jacob Little Consolidated Mining Company's claim; that said location embraces the portion of the Emma claim described in the answer; that the Jacob Little Consolidated Mining Company, on the second of July, 1877, regularly filed its application for a patent from the United States for said claim; that plaintiffs failed to make or file any protest or adverse claim to said application.

Defendant admitted that the Sierra Nevada Mining Company, within the time allowed by law, duly made and filed its protest and adverse claim to the application of the Jacob Little company, and within due time instituted a suit in the proper court against the Jacob Little company, to determine the right of possession to the premises embraced in said application; that a judgment was rendered in said action on the twenty-seventh of December, 1878, in favor of the Sierra Nevada company; that upon the determination of said suit the Sierra Nevada company caused a certified copy of the judgment roll in said action to be filed with the register of the United States land office; that no further proceedings have been had in said cause nor in said land office under said application; that the Sierra Nevada company has filed its protest and adverse claim against the application of the defendant herein for a United States patent, and duly commenced an action against defendant, which is pending and undetermined, to determine the right of possession to the premises in controversy herein, and that the Jacob Little company failed to file its protest and adverse claim to the application of the defendant for a patent.

Thereupon, defendant offered in evidence a deed executed on the twenty-sixth of September, 1879, from the Jacob Little company to the defendant, whereby all the right, title, and interest of the Jacob Little company in and to the Jacob Little claim was conveyed to the defendant. Plaintiffs objected to the admission of this deed in evidence, because it appeared from the admissions made by the defendant that the Jacob Little company, at the time said deed was executed, had no right, title, or interest in the premises in controversy, which could be used adversely to the plaintiffs in this action; that said deed, if admissible at all, is only admissible for the purpose of showing title in the defendant to that portion merely of the Jacob Little claim which is embraced in the Gold Lead and Emma claims, and which is not included within the premises recovered by the Sierra Nevada company.

The court overruled these objections, but limited the deed to so much of the Jacob Little claim, described in the deed as in conflict with the Emma claim.

There was no evidence in the case tending to show that the defendant or the Jacob Little company ever acquired any title or interest to any portion of the premises in controversy from the Sierra Nevada company. No evidence was introduced of any local laws, regulations, or customs.

The premises for which the Sierra Nevada company recovered judgment include nearly the entire claim described in the deed from the Jacob Little company to the defendant, and nearly all of the Emma claim which conflicts with the Gold Lead claim and the Jacob Little claim.

Judgment was rendered in favor of defendant.

1. Did the court err in admitting evidence to show that appellants did

not perform the amount of work required by law during the years 1877 and 1878?

It has been decided in an action of ejectment to recover the possession of mining ground, that if the defendant relies upon a forfeiture by plaintiff, for failure to comply with the local rules and regulations of the mining district, the forfeiture must be specially pleaded.

The reason given for this rule is, that "a defense based merely upon forfeiture does not involve a denial of the plaintiff's possession or right of possession at the date of the defendant's entry:" Morenhaut v. Wilson, 52 Cal. 268; which are the only necessary allegations in the action of ejectment. But this reason does not, in our opinion, apply to an action—like the present—brought under the "Act concerning the determination of conflicting rights to mining cases:" 1 Comp. Laws, 1674, which is designed to supplement section 2326 of the revised statutes of the United States.

These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy, and the "only sensible construction of the law is, that each party must prove his claim to the premises in dispute, and that the better claim must prevail:" Golden Fleece Co. v. Cable Con. Co., 12 Nev. 321.

In such actions, the question whether the plaintiff has forfeited any rights under the acts of congress is necessarily involved, and need not, when relied upon by defendant, be specially pleaded. The court did not, therefore, err in admitting this evidence.

2. Did the court err in admitting the deed from the Jacob Little company in evidence without limiting it to that portion of the ground which was not in controversy in the action brought by the Sierra Nevada Mining Company against the Jacob Little company?

It seems to us that it is unnecessary to decide this question. The action of the court in admitting it, if erroneous, did not prejudice appellants. The only title which they assert to the ground in controversy is derived from the location of the Emma claim, which was prior in time to the application of the Jacob Little company for a patent, and whatever rights they may then have had to this ground were waived and lost by their failure to protest against that application, at least so far as the rights of the contesting parties, under that application, are concerned: R. S., sec. 2326.

But appellants contend that the Jacob Little company had waived its rights to the premises in controversy by reason of its failure to protest against the application of the Gold Lead company for a patent.

This position can not be maintained. The Jacob Little company, having regularly applied for a patent, was not, in our opinion, compelled, in order to preserve its rights, to protest against any subsequent application for the same ground whilst its own application was still pending in the land department: Rose v. Richmond M. Co., 17 Nev. 25; Resurvey of Crown Point lode, Sickels' Min. Dec. 116; Application of Haggin for patent to Hurricane Lode, Id. 243.

This contest is not between the Gold Lead company, as the owner of a subsequent location, and the Jacob Little company, a prior applicant for a patent. It is between appellants, under their title to the Emma mine, which was located prior to the application of the Jacob Little company, and respondent, as the owner of the Jacob Little title.

We do not, therefore, think that, under the facts of this case, we are

required to decide whether the Gold Lead company (respondent) pursued the proper course in order to secure a patent, on the theory that the Jacob Little company and the Sierra Nevada Mining Company and the appellants had each forfeited their respective rights to the ground in controversy.

In a case where a party applies for a patent and thereafter fails—before the patent is issued—to comply with the law in respect to the amount of work required to be done, so that the ground becomes open and subject to relocation, and a new location is made, it may be that the party relocating the ground should first take steps to have the previous application dismissed in the land department before making an application for a patent, and that the rights of these parties would have to be tried and determined in the land department: Application for patent to Wildman quartz mine, Sickels' Min. Dec. 275. But, be that as it may, it is enough for us to declare, as we have, that if an application can be made by the subsequent locator, the previous applicant is not required to protest against such an application.

The Jacob Little company, having applied for a patent to the mining ground in controversy in this action, and its application being still pending, it is, it seems to us, entitled to be heard and to have its rights determined in the proper forum where they are questioned, whether it be in the state courts or in the land office. The defendant, having procured its title, is entitled to the same rights.

We deem it proper to add, that it is apparent to us, from the admitted facts in this case, that neither the appellants nor respondent have any right whatever to that portion of the ground in controversy for which the Sierra Nevada Mining Company obtained judgment. The result of this litigation, as to that portion of the ground, must necessarily be fruitless unless the Sierra Nevada Mining Company has abandoned or forfeited its rights, or will surrender them to the successful party in this action.

The judgment of the district court is affirmed.

LEONARD, J., dissented.

BARBER *v.* GILLSON.

Filed September 10, 1883.

A CONTRACT BETWEEN TWO PARTNERS, ENTERED INTO UPON THE DISSOLUTION of the copartnership, by the terms of which one partner agreed to assume the firm indebtedness, renders the other partner, as between the partners themselves, and all others dealing with them with knowledge of the facts, the surety of the one so agreeing; and as such he has the right to protect himself by settling the indebtedness for which he is liable with the firm creditors, at any time, whether such indebtedness, as between the partners themselves or their creditors, was due or not. If, however, the partner assuming the firm indebtedness has made a prior compromise with the creditors, the surety can not recover from him the amount paid in procuring the release of his own liability.

IN AN ACTION BY A SURETY AGAINST HIS PRINCIPAL, A PAPER PURPORTING TO RELEASE the former from his liability to the creditor is admissible as a receipt showing the payment of the consideration for the release, although inadmissible as a release because not under seal.

WHERE A SURETY HAS SURRENDERED TO THE CREDITOR CERTAIN NOTES OF HIS PRINCIPAL, payable to himself, in consideration of the creditor releasing him from liability on his contract of suretyship, the measure of damages in an action by the surety against his principal is the face value of such notes, and not their value as determined by the principal's ability to pay them.

APPEAL from a judgment of the second judicial district court for Ormsby county, entered in favor of the plaintiff. The opinion states the facts.

R. M. Clarke and *P. Reddy*, for the appellant.

A. C. Ellis and *W. H. Dickson*, for the respondent.

BELKNAP, J. The parties hereto composed a copartnership of merchants. Upon the twenty-fifth day of February, 1881, the copartnership was dissolved by mutual consent. Appellant purchased from respondent his interest in the property and effects, giving promissory notes therefor aggregating in value the sum of six thousand two hundred and twenty-eight dollars. In consideration of the transfer, appellant assumed the outstanding indebtedness of the firm, amounting to upwards of forty thousand dollars. This indebtedness remained unpaid until the latter part of the month of May succeeding, at which time appellant entered into negotiations with the view of obtaining a settlement by compromise.

At this time respondent, at the request of the creditors, and in order to procure his personal release from the firm indebtedness, surrendered the promissory notes to them. Thereafter he brought this action to recover as damages the sum of six thousand two hundred and twenty-eight dollars, the value of the notes exclusive of interest. He recovered judgment. Defendant appeals therefrom, and from an order overruling a motion for new trial.

The questions of law presented for review arise principally upon the rulings of the court in giving and refusing instructions requested. A determination of the legal status of the parties, and of their relative rights and liabilities, will determine the questions arising under the rulings in this regard.

The dissolution of the copartnership, and the agreement that Gillson should pay the debts of the firm, rendered Barber the surety of Gillson, as between themselves and all others dealing with them with knowledge of the facts: Brandt on Suretyship, sec. 23, and cases there cited.

As such surety Barber had the right to protect himself by settling at any time the indebtedness for which he was liable.

Upon this subject Chief Justice Gibson said: "As to the position taken, that payment before the bonds fell due would be essentially voluntary, it is proper to remark that the principle was ruled differently in Armstrong v. Gilchrist, 2 Johns. Cas. 429, where it was held that a guarantee of a note who has compromised and paid it for his own indemnity, before it had become due, was entitled to recover. That a surety is to wait until payment is extorted of him, is not pretended; but it is said that payment before maturity is necessarily voluntary, and that eventual liability is not equivalent to a precedent request. There is no authority for that; and it seems not to be defensible on principle. Why may not a surety take measures of precaution against loss from a change in the circumstances of his principle, and accept terms of compromise before the day which may not be obtainable after it? He may ultimately have to bear the burden of the debt, and may, therefore, provide for the contingency by reducing the weight of it. Nor is he bound to subject himself to the risk of an action by waiting till the creditor has cause of action. He may, in short, consult his own safety and resort to any measure calculated to assure him of it, which does not involve a wanton sacrifice of the interest of his principal:" Craig v. Craig, 5 Rawle, 98; Williams, Adm'r,

v. Williams, 5 Ohio, 444; Odlin v. Greenleaf, 3 N. H. 270; Goodall v. Wentworth, 20 Me. 322; Brandt on Suretyship, secs. 176, 177.

The instructions allowed were in accordance with these views: At the trial the court overruled an offer of defendant to show that at the time of the assumption of the firm indebtedness of Gillson neither of the parties contemplated that he should pay the debts immediately.

Under the authority of the foregoing, and all other cases to which we have been referred, it was immaterial whether the indebtedness, as between the parties themselves or the creditors, was due or not. Nor was Barber's conduct, in compromising the claims against himself, an interference with the affairs of the partnership contrary to the contents of the notice of dissolution. That notice provided that all indebtedness due the firm should be paid to Gillson, and that all claims against the firm would be paid by him. But Barber's settlement was not for the firm, but for himself.

It is claimed that Gillson compromised the firm indebtedness before Barber surrendered the notes to the creditors. If this position of appellant is correct, no recovery can be had against him. In one view of the testimony, Gillson settled with the creditors about the twenty-sixth day of May, 1881; in another view, the settlement was not made until the latter part of the month of June. If the settlement occurred in the month of May, Barber was expressly excluded from its operation by the terms of the written release.

He was then still liable, and was justified in procuring his own release. In the mean time, and before the adjustment of matters with the creditors by Gillson, in the month of June, Barber surrendered the notes. So, whether Gillson's compromise was effected in the month of May or in the month of June, Barber was justified in his action.

Appellant objected to the admission in evidence of a paper writing purporting to release Barber from the payment of the firm indebtedness, upon the ground that the instrument is not a release because not under seal. If it is not a release (a point we do not decide), and was treated as such at the trial, this fact could not have prejudiced appellant's case. It is at least a receipt for the notes surrendered, and was admissible for this purpose, for the reason that Barber was entitled to recover from Gillson whatever he may have paid on account of the firm indebtedness, whether he did or did not procure his release thereby.

Another question presented is, whether Gillson should have been allowed to have shown the value of his own promissory notes. The compensation to be recovered must be the actual loss sustained by the plaintiff. He gave full consideration for the notes. In consequence of the failure of defendant to pay the firm indebtedness, he has been deprived of them. He lost the value which they represented, and this is the measure of his recovery. His loss is not to be measured by the ability of defendant to pay. If this were so, no recovery in damages could be had against an insolvent.

The judgment and order of the district court are affirmed.

PINSCHOWER ET AL. v. HANKS, Sheriff, etc.

Filed September 25, 1883.

WHERE THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE, A VERDICT WILL NOT BE DISTURBED on the ground that the evidence was not sufficient to sustain it.

THE FAILURE TO JOIN A DORMANT PARTNER AS DEFENDANT, in an action against a partnership, can not be pleaded in abatement; and the refusal to admit in evidence the deposition of such partner, when all his acts and declarations in reference to the subject-matter of the controversy are already in evidence, is not error.

A WITNESS, IN TESTIFYING TO A CERTAIN CONVERSATION, MAY REFRESH HIS MEMORY by referring to and reading from a memorandum of such conversation taken down by him at the time.

AFFIDAVITS FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE must show that due diligence was used by the defeated party to procure such evidence for the trial; and the acts performed by such party must be particularly stated, so that the court may determine whether they constitute due diligence or not. The same amount of diligence is required of the defeated party, whether he be the real or only a nominal party to the action.

APPEAL from a judgment of the first judicial district court for Storey county, entered in favor the plaintiffs. The opinion states the facts.

W. E. F. Deal, for the appellant.

Kirkpatrick & Stephens and *William Woodburn*, for the respondents.

HAWLEY, C. J. This action was brought to recover damages for the conversion of certain personal property, consisting of a stock of clothing, which originally belonged to the firm of Rich Brothers. The plaintiffs in this action brought suit against A. Rich and J. Rich, alleged to constitute the firm of Rich Brothers, attached the property, recovered judgment by default, and purchased the property under an execution sale in said action. After the delivery of the property to them by the sheriff, and on the same day, the property was levied upon under an attachment issued in an action by the Colman Brothers against A. Rich, Isadore Rich, and J. Rich, alleged to be copartners under the firm name of Rich Brothers. Colman Brothers obtained judgment, and the property in question was sold under an execution in that action.

The defendant in this action is the sheriff of Storey county, and in his answer justifies his seizure and sale of the property under and by virtue of the proceedings in Colman Brothers v. Rich Brothers. He alleges that the notes upon which the action of Pinschower v. Rich Brothers was instituted (except a note to Kirkpatrick & Stephens, for one thousand dollars), were fraudulent, and were made for the purpose of hindering, delaying, and defrauding the creditors of Rich Brothers.

1. It is earnestly argued by defendant's counsel, that the evidence in this case is insufficient to justify the verdict in favor of plaintiffs. The testimony which plaintiffs gave in their own behalf seems to be, in some respects, improbable; but in several material and important points it was corroborated by impartial witnesses, and after a careful examination we are unable to say that it should be rejected and considered so false upon its face that no verdict should be allowed to stand upon it. Their testimony is not free from suspicion; but there is nothing in the record that would justify us in saying that it is "utterly untrustworthy."

The character of the testimony offered by defendant to impeach and destroy the testimony of plaintiffs, and to show that the notes hereinbefore referred to were fraudulent, is, in many respects at least, as suspi-

cious and improbable as the testimony of plaintiffs. In this state of the case, it was the duty of the jury and the district judge to determine, from all the facts before them, the truth or falsity of the testimony as given by the respective witnesses. If they considered the testimony of plaintiffs worthy of credit, the evidence is sufficient to sustain the verdict. There is not such a clear preponderance of evidence against the verdict as to warrant any interference by this court. There is a substantial conflict of evidence upon material points, and under the rule so frequently announced by this court, the verdict will not, upon this ground, be disturbed.

2. It is claimed that the court erred in excluding certain depositions showing that Isadore Rich was a member of the firm of Rich Brothers. We are of opinion that this question was immaterial. The respective suits were brought against the firm of Rich Brothers. The notes sued upon in Pinschower v. Rich Brothers were executed in the firm name, and the plaintiffs in that action were entitled to recover, if at all, whether Isadore was a member of the firm or not, or whether he was made a party to the suit: Whitmore v. Shiverick, 3 Nev. 306; Brown v. Birdsall, 29 Barb. 549; Wright v. Herrick, 125 Mass. 154.

The defendants in that action might, perhaps, have taken advantage of the defect of parties defendant by plea in abatement. But if Isadore was a dormant partner, then the non-joinder could not have been successfully pleaded by them. "Much less can it be pretended that upon a judgment against ostensible partners, in the firm name, the interest of the partners not named will not pass to the sheriff's vendee: Taylor v. Henderson, 17 Serg. & R. 453; Harper v. Fox, 7 Watts & S. 142; Grier v. Hood, 1 Casey, 430; Carey v. Bright, 58 Pa. St. 84.

The declarations of Isadore Rich were not objected to. All of his acts and conduct with reference to the question whether the transaction between the Pinschowers and the Rich Brothers were fraudulent were admitted in evidence without objection. Under these circumstances the court did not err, to the prejudice of defendant, in excluding the depositions.

3. Joseph Rodgers, who testified in favor of defendant, was asked, upon cross-examination, whether he did not, at a certain time and place, and in the presence of certain parties, make a certain statement as to facts within his knowledge (at variance with his testimony on the trial).

He answered that he made no such statement. The attorney for plaintiffs was called as a witness in rebuttal, and testified that the witness Rodgers came to his office at the time named, and made a statement (as referred to in the cross-examination of the witness); that this statement was written down by the attorney and read to the witness Rodgers; that Rodgers did not sign it, but stated that it was correct, and that he would so testify, if called as a witness upon the trial of the case. The attorney, when asked what statement Rodgers made, asked leave of the court to refresh his memory by referring to the written statement, and, leave being granted, he then read aloud the written statement as taken down by himself.

It is contended that the court erred in permitting the attorney to read this statement. The written statement was not offered in evidence for any purpose. The attorney had the right to examine the paper for the purpose of refreshing his memory as to the statement made by Rodgers. He testified to the correctness of the facts set forth in the statement, as read by him. It was not the written statement, but the recollection of

the witness, that was given in evidence. It was not erroneous to allow the witness to refresh his recollection by reading the statement: Cooper v. State, 59 Miss. 272; Halsey v. Siusebaugh, 15 N. Y. 486; Guy v. Mead, 22 Id. 465; Krom v. Levy, 1 Hun, 173; Commonwealth v. Ford, 130 Mass. 64.

4. Upon the motion for a new trial on the ground of newly discovered evidence, defendant presented the affidavits of Joseph McDonald and Charles Harper, who were his deputies, tending to show that the suit of Pinschower v. Rich Brothers was fraudulent. The facts alleged being declarations made by A. Rich, after the attachment was levied, to the effect that they (Rich Brothers) had been working for the San Francisco creditors long enough, and did not intend that they should catch them again, and the request of A. Rich to have Joseph Rodgers put in charge as keeper, and other matters of like import, leading deponent Harper to believe from was said "that all the expenses were borne by Rich Brothers, and that the suit and attachment was through some arrangement between Rich Brothers and plaintiffs;" and giving McDonald to understand "that said suit in which said attachment was issued, and said attachment, was a job between the plaintiffs * * * and the said A. Rich and J. Rich."

The record shows that Joseph McDonald was subpœnaed as a witness, and testified to other matters on behalf of the plaintiffs and the defendant, and that Charles Harper was subpœnaed, and was present, but did not testify at the trial. They state, in substance, that they considered that defendant was merely a nominal party to the action, and that he and his deputies should stand neutral as between the parties, and hence they never stated the matters tending to establish the fraudulent character of the transaction between the plaintiffs and the Rich Brothers to the defendant, or to his attorney, or the Colman Brothers, until after the verdict in this action was rendered, and that they make the statement set forth in their affidavits in the interest of justice, believing that a wrong has been committed by the verdict.

It is important, first, to determine whether the defendant used due diligence to procure the testimony within the knowledge of the witnesses making these affidavits. It seems manifest to us that no such diligence is shown as the law requires.

No affidavit was made by the defendant or the Colman Brothers. The statement in the affidavit of defendant's attorney, that "he diligently searched for testimony to establish the defense made by the amended answer in this action," and other like averments as to the diligence used by the defendant and the Colman Brothers, are too general. The acts performed by them should be particularly stated, so as to enable the court to determine whether the conclusions stated in the affidavit are supported by the facts.

It is the duty of litigants to be active and diligent in procuring the testimony upon which they rely to maintain their cause. Trials are not to be encouraged as experiments. A party is not allowed to present his case by piecemeal; to take a part of the facts first, and then, if he fails, apply for a new trial, and seek to strengthen his case by a statement of other facts which were reasonably within his power to present at the first trial. He must make diligent search and inquiry in advance of the trial, and be able to show to the satisfaction of the court that he used reasonable diligence.

It matters not whether the defendant is the real or nominal party to the action. He certainly can not claim that he is entitled to a new trial because he is only a nominal party to the suit.

If the Colman Brothers were the real parties in interest, it was their duty to make reasonable efforts to ascertain and procure the testimony upon which they relied to establish the fact that the suit of Pinschower v. Rich Brothers was fraudulent. Witnesses were introduced who testified to acts and declarations of the Rich Brothers and the plaintiffs at, prior to, and after the attachment in that suit was entered, tending to show that the transaction was fraudulent. McDonald and Harper were the officers who levied the attachment, and one of them took charge of the property as keeper. In the very nature of the case, their position was such that they were liable to hear and know what the Rich Brothers and the plaintiffs had to say or do (if anything) about the transaction, and it was the duty of the defendant, and of the Colman Brothers, to inquire of them whether they had heard or seen anything tending to show the true nature of the transaction. Ordinary prudence suggests that they should have pursued this course. Their failure to do so constitutes such inexcusable negligence as to prevent them from availing themselves of the facts set out in the affidavit.

In Arnold v. Scaggs, the court said: "As to the witness Covey, the case not only fails to show diligence in preparing for trial, but shows negligence. He was called by the defendant as a witness and examined at the trial, and the most ordinary diligence on the part of the defendant or his counsel would have led to the discovery of what further, if anything, he knew about the case. That the discovery, under such circumstances, was not made until after the trial, must be attributable to negligence:" 35 Cal. 687.

In Howard v. Winters, this court said: "It is for the public good that there be an end to litigation. When, therefore, a trial has been had, and a judgment rendered, a second trial should only be granted to further the ends of justice, and not to relieve litigants from the consequences of their own laches, thoughtlessness, or neglect. The law demands of the parties all reasonable diligence and caution in preparing for trial, and furnishes no relief for the hardships resulting from inexcusable negligence or want of diligence. When, therefore, a new trial is sought because of newly discovered evidence, it should most certainly be shown by the party making the application that his failure to provide such evidence at the first trial was not the result of any negligence upon his part. Of that fact the court should be perfectly satisfied. To grant new trials upon this ground, where no such showing is made, would simply be giving encouragement to negligence, and judicial approval to inexcusable carelessness:" 3 Nev. 542.

The authorities cited by respondent are to the same effect. See also Toney v. Toney, 73 Ind. 36; Zickefoose v. Kuykendall, 12 W. Va. 30; Atkinson v. Conner, 56 Me. 550; Blake v. Madigan, 65 Id. 530; Brown v. Luehrs, 95 Ill. 197.

The judgment of the district court is affirmed.

GILSON ET AL. *v.* PRICE.

Filed October 10, 1883.

AN APPELLANT CAN NOT COMPLAIN OF THE INSTRUCTIONS OF THE COURT, as to the test of his liability, which were given at his own request.

BURDEN OF PROOF IS ON THE PLAINTIFF TO PROVE THE ALLEGATIONS of his complaint, essential to his recovery; but he need not prove the negative of facts that go merely to support the defense, although he has himself alleged them.

THE DEFENSE OF A PRIOR RECOVERY IS NEW MATTER which the defendant must plead and prove.

IT IS NOT ERROR FOR A COURT TO PERMIT THE PLAINTIFF TO ANTICIPATE SUCH DEFENSE of a prior recovery, by introducing evidence, in the opening of his case, tending to show that the cause of action in such case was not identical with that in issue, and determined at a prior date.

APPEAL from a judgment of the second judicial district court for Washoe county, entered in favor of the plaintiffs. The opinion states the facts.

C. S. Varian, for the appellant.

R. M. Clarke and *T. Coffin*, for the respondents.

LEONARD, J. This action was brought by plaintiffs to recover the sum of two thousand two hundred and fifty dollars, alleged to be due from defendant for cutting, splitting, and delivering six hundred cords of wood, under a contract executed by defendant and one Hugh Porter, which contract, before its completion, with the knowledge and consent of defendant, was assigned and transferred to plaintiffs for a valuable consideration.

By the terms of the contract, Porter agreed to cut, split, and deliver cord-wood to the defendant at the Ophir dump, upon the cars of the Virginia & Truckee Railroad, at three dollars and seventy-five cents per cord, payable when sales were made and returns of sales received. It is not denied that, by the assignment, plaintiffs acquired all Porter's rights under the contract.

Instead of being satisfied with a statement of facts sufficient to authorize a recovery, plaintiffs inserted in their complaint many averments that were not necessary in stating their cause of action. They not only allege the terms of the contract, the assignment, a performance on their part, and the indebtedness of defendant by reason thereof, but also that on previous dates they brought an action and recovered judgment for the amount then due for wood delivered to defendant before such suit, and for which returns of sales had before that time been received; that after said action was brought and tried, and after said judgment was entered, they cut, split, and delivered to defendant, under said contract and in pursuance of its terms, six hundred cords of wood, which wood was not included in said action and judgment, and which had not, at the time of said suit, been delivered by plaintiffs to the defendant at the Ophir dump, and upon the cars of the Virginia & Truckee Railroad, and which wood has, since said suit, been so delivered, and sold and shipped by the defendant, and for which, and the sales thereof, defendant has, since said suit, had returns.

The complaint also contains averments to the effect that defendant is indebted to plaintiffs in the sum of two thousand two hundred and fifty dollars, for six hundred cords of wood cut, split, and delivered to him by them, at the Ophir dump, upon the cars of the Virginia & Truckee

Railroad; that defendant promised to pay the same upon return of sale thereof, and that return has been had.

Defendant did not move to strike out any portion of the complaint. In his answer he denies that, after the former suit was brought, plaintiffs, or either of them, under said contract, or any contract, either cut, split, or delivered any wood to defendant upon the cars of the Virginia & Truckee Railroad. This denial may be considered as eliminated from the answer by the stipulation entered into between plaintiffs and defendant, which will be referred to hereafter.

Defendant also denies that "any wood, since the action and judgment aforesaid, and not included therein, and not at the time of said action delivered by plaintiffs to defendant at the Ophir dump and upon the cars aforesaid, has been either cut, split, or delivered by plaintiffs to defendant, or that any wood as aforesaid has been sold or shipped to defendant, or that he has had returns for any such wood or the sales thereof." He then denies plaintiffs' allegations of indebtedness, and sets up the plea of estoppel by former judgment, in due form.

The stipulation before referred to, and introduced in evidence by plaintiffs, is as follows: "We stipulate that two hundred and sixty-eight and one half cords of wood which has been cut under the contract in suit was shipped away by Price from the Ophir dump since the former action, and said wood was at the Ophir dump and had not been delivered to said Price, on the cars of the Virginia & Truckee Railroad, at the time of said former suit and judgment." Plaintiffs had verdict and judgment for the number of cords stated in the stipulation, at three dollars and seventy-five cents per cord, less thirty-five cents per cord for loading on the cars.

This appeal is from an order overruling defendant's motion for a new trial, and from the judgment. The record shows that plaintiffs offered in evidence the judgment roll in the former suit, for the purpose of proving that the causes of action embraced in the complaint in this action were not identical with those litigated and determined in the former one.

Defendant objected, on the grounds that the evidence was irrelevant and immaterial to the defendant's case, and negatived the truth of the evidence pleaded by him, and because it was not proper evidence in chief. The court overruled the objection, on the ground that, under the form of pleading, if plaintiffs wished to anticipate the defense and enter upon their rebuttal, they would be permitted to do so.

Plaintiffs were permitted, also, to introduce other evidence, against defendant's objection, tending to show that the parties to this and the former action were the same, and that the alleged causes of action in this suit were not identical with those determined in the former one.

After plaintiffs rested, defendant, on his part, introduced documentary and other evidence, tending to prove that the claims and demands of plaintiffs in the present action were identical with those in issue and determined in the former action.

Defendant having rested, without asking or getting leave to reopen their case, plaintiffs were permitted to call a witness to contradict the defendant, who, as a witness in his own behalf, had testified that at the trial of the former action, evidence was given to the effect that the wood remaining at the Ophir dump had been sold, and the money or returns of sale therefor received.

To the question whether any such evidence was given at the former

trial, defendant objected, on the ground that it was incompetent, irrelevant, and immaterial, and not in rebuttal, but that it was in support of plaintiffs' main case, under a former ruling of the court. The objection was overruled, and the witness answered that, to his best recollection, no such evidence was given. The assignments of error on motion for new trial were:

1. That the court erred in permitting plaintiffs to introduce evidence in chief to negative the estoppel pleaded by defendant, and in admitting the rebutting testimony last mentioned.

2. That the court erred in giving plaintiffs' instructions 1 and 2, and in refusing defendant's first instruction.

It is not urged in argument that plaintiffs' first instruction was erroneous. We think it was correct, and shall not notice it further. Defendant's defense was the plea of estoppel. His denials were based upon that theory of the case. The court so instructed the jury, and also charged them that, if they found from the evidence that the matters in issue in this action had been litigated and determined in the former one mentioned in the pleadings, they should find for the defendant, otherwise for the plaintiffs.

On behalf of defendant the jury were told that all wood which defendant had sold, and for which he had been paid prior to the commencement of the former action, might have been embraced and included therein; and if they found from the evidence submitted to them that the whole or any part of the wood in issue had been sold, and the money received therefor by defendant, prior to the commencement of the first action, and that evidence tending to establish such fact was given before the jury on that trial, then the former suit was a bar to any recovery in this action for any wood so in issue; that it did not matter whether the issue in the former suit, if there was one as to the wood which had been sold, was properly or justly decided or not; that the only question for them to pass upon was whether such issue was made and determined in said suit against defendant.

Defendant's first instruction, refused by the court, was to the effect that before plaintiffs could recover at all, under the allegations in their complaint, the jury must find that since the former suit and judgment plaintiffs cut, split, and delivered at the Ophir dump, and on the cars of the Virginia & Truckee Railroad, the wood mentioned in the stipulation.

Defendant insisted in the court below, and such is his argument here, that under the contract the test of his liability, at the time the former action was brought, was whether he had then received returns of sales of wood, although it had not been shipped or delivered on the cars. At his request, the court so charged the jury. He can not now complain because the court adhered to that construction of the contract, which is undoubtedly the correct one.

Plaintiffs' second instruction was to the effect that the burden of proof was upon defendant, to show by a preponderance of evidence that the contract price for the wood sued for was recovered in the former action.

Counsel for defendant does not deny that immaterial averments need not be proved. He admits that it was not necessary for plaintiffs to allege that the matters in issue in this action were not included in the former one, or over facts showing that they could not have been. He concedes that if plaintiffs had alleged only what was necessary or proper

to constitute their cause of action, defendant would have been obliged to allege and prove the facts constituting the estoppel claimed. But he contends that plaintiffs undertook to avoid the effect of the former judgment by their form of pleading, and thereby assumed the burden of proof. We do not think so.

A plaintiff must prove allegations that are essential to recovery: Greenfield v. Life Insurance Co., 47 N. Y. 436; but he is not bound to prove what goes merely to support the defense: Morgan v. Waters, 69 Ind. 265.

The civil practice act provides, that "the complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language," and if the complaint be verified, the answer shall contain: "1. A specific denial to each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief:" Sec. 39.

This evidently means material allegations, that is to say, allegations essential to the plaintiff's claim, and which could not be stricken from the complaint without leaving it insufficient; allegations which the plaintiff must prove on the trial in order to maintain his action: Hubler v. Pullen, 9 Ind. 275; Baker v. Kistler, 13 Id. 63; Canfield v. Tobias, 21 Cal. 350; Fry v. Bennett, 5 Sandf. 64; Bliss on Code Pleading, 359.

The answer shall contain: "2. A statement of any new matter or counter-claim constituting a defense in ordinary and concise language:" Sec. 46.

"Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, for the purpose of the action, be taken as true. The allegation of new matter in the answer shall, on the trial, be deemed controverted by the adverse party:" Sec. 65.

"A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient:" Sec. 66.

Where a party grounds his right of action upon a negative allegation, he must prove it. It is then material, and a denial raises a material issue. But it is otherwise if he inserts in his complaint a negative allegation, which he need not prove in order to make out a *prima facie* case. Plaintiffs were not obliged to prove that this wood was not included in the former action.

If a plaintiff in an action upon a contract should allege that the defendant, when he executed it, was not an infant or a lunatic, he need not prove the allegation. It would be immaterial to his cause of action. A failure to deny it would not be an admission of its truth, and, being new matter, its mere denial would neither compel the plaintiff to prove it nor enable the defendant to establish the fact that he was one or the other. Defendant's plea of estoppel was new matter, and he was bound to plead and prove it.

Said the court, in Northrup v. The Mississippi Valley Ins. Co., 47 Mo. 444: "Under the old system, by pleading the general issue, everything was open to proof which went to show a valid defense. But the practice act, which has substituted for the general issue an answer, and requires a statement of any new matter constituting a defense, in addition to a special denial of the material allegations of the petition intended to be controverted, has marked a complete and total change in the principles of pleading. The defendant, by merely answering the

allegations in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon new matter, which goes to defeat or avoid the plaintiff's action, he must set forth, in clear and precise terms, each substantive fact intended to be so relied on. It follows, that whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial."

To the same effect, see Stevens v. Thompson, 5 Kan. 311; Benedict v. Seymour, 6 How. Pr. 299; Edson v. Dillaye, 8 Id. 274; The A. & N. R. R. v. Washburne, 5 Neb. 124; Coles v. Saulsby, 21 Cal. 50; Catlin v. Gunter, 1 Duer, 265; Allen v. Reilly, 15 Nev. 453; McKyring v. Bull, 16 N. Y. 304; Brazill v. Isham, 12 Id. 17; Moak's Van Santvoord's Pleadings, 548, 559, 582; Pomeroy's Remedies and Remedial Rights, 660; Paige v. Willett, 38 N. Y. 31; Bedell v. Caril, 33 Id. 583; Conaughty v. Nichols, 42 Id. 87.

If plaintiffs had offered no evidence that the contract price of two hundred and sixty-eight and one half cords of wood was not, and could not have been, included in the first action, they would not, for that reason, have failed. It would have been error, therefore, if the court had instructed the jury that the plaintiffs could not recover unless it appeared by a preponderance of evidence that this wood was not included in the former action, or to have granted a nonsuit if plaintiffs had failed to prove that fact.

If defendant had simply denied that the contract price of this wood was included in the first action, plaintiffs would have been entitled to judgment. A cause of action would have been conceded on the record. Nor were the material and immaterial averments inserted in the complaint so interwoven as to be incapable of separation.

We think the court properly instructed the jury as to the burden of proof. Such being the case, we must consider whether the court erred in permitting plaintiffs to anticipate the defense, by adducing evidence tending to show that the cause of action in this case was not identical with that in issue and determined at a prior date.

Although defendant's defense was the plea of estoppel, and though his denials of the material allegations contained in the complaint were based upon that theory of the case, still, by reason of such denials, plaintiffs were compelled to introduce evidence, in order to make out a *prima facie* case.

"If the record contain several issues, and the plaintiff hold the affirmative in any one of them, he is entitled to begin; as, if in an action of slander for charging the plaintiff with a crime, the defendant should plead not guilty, and a justification. For whenever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case, according to the rule above stated, and therefore is entitled to reply. How far he shall proceed in his defense, on that or the other issues, is regulated by the discretion of the judge, according to the circumstances of the case; regard being generally had to the question whether the whole defense is indicated by the plea with sufficient particularity to render the plaintiff's evidence intelligible:" 1 Greenl. Ev. 94. And see note to this text, where it is said: "In Browne v. Murray, Ry. & M. 254, Lord Chief Justice

Abbott gave the plaintiff his election, after proving the general issue, either to proceed with all his proof to rebut the anticipated defense, or to reserve such proof till the defendant had closed his own evidence—only refusing him the privilege of dividing his case into halves, giving part in the first instance and the residue after the defendant's case was proved." See also Chadbourn v. Franklin, 5 Gray, 314; Commonwealth v. Moulton, 4 Id. 40; Morse v. Potter, Id. 243; Comstock v. Hadlyme, 8 Conn. 261; Scott v. Hull, Id. 305; Lick v. Diaz, 37 Cal. 445; 1 Phill. on Ev. 642, note; R. R. Co. v. Steinburg, 17 Mich. 111.

The same authorities sustain the court in admitting the testimony of witness King. Besides, it was strictly in rebuttal, and could not have been given until after the defendant had testified.

We find no error in the record, and the judgment and order appealed from are affirmed.

Cole *v.* Richmond Mining Company of Nevada.

Filed October 16, 1883.

A Litigant is Successful, so as to Render Him Liable for the Fees of his Attorney, which were contingent upon the success of the litigation, if he gains substantially everything of value involved in the controversy, although he fails to gain everything he asked.

An Attorney is Entitled to the Compensation Agreed upon under a contract with his client, by the terms of which he was to carry on several cases, and be paid such fee if he was successful in one case, and the other cases were continued to await the result thereof in the appellate court, where he wins one case, and the other cases are continued, although the reason for such continuance does not appear.

Appeal from an order of the sixth judicial district court for Eureka county, granting the defendant a new trial. The opinion states the facts.

F. W. Cole, for the appellant.

Wren & Cheney, for the respondent.

Hawley, C. J. Appellant recovered judgment against respondent for fifteen hundred dollars, upon a contract for legal services rendered in the suit of Rose v. Richmond M. Co. The district court granted a new trial. The appeal is taken from that order.

The testimony in relation to the contract, as given by appellant, is as follows: "Some time in the latter part of May, 1881, Mr. Probert, the managing agent of the defendant, said to me that he wished to employ me in the Albion-Richmond cases, to assist in their trial in the district court. * * * He said he was willing to pay a small fee, but would not fix the amount. He told me to consider myself engaged, and Mr. Foley would see me on behalf of the Richmond company and fix my fee. I afterwards saw Foley. Foley asked me what I would charge to assist in the trial of those cases. I said twenty-five hundred dollars. He said he could not give it. 'Suppose you agree to take one thousand dollars now and fifteen hundred dollars in case the Richmond company is successful in the district court?' I said there are three cases that were tried together on the hearing for injunction, and that the same questions were involved in all; that the chances were that only one case would be tried, and that the other cases would be postponed to await the result of the one tried; that if that was the fact, the trial of one would be equivalent to the trial of all. It was then agreed between Foley and myself

that if only one case was tried, and the others postponed to await the result of the one tried in the supreme court, I was to have the fifteen hundred dollars."

In repeating the conversation appellant testified that Foley said: "'Suppose you agree to take one thousand dollars now, and one thousand five hundred dollars in case the Richmond company is successful in the district court.' I thought over the matter a little while, and agreed to it. Foley said: 'Consider that the contract.' I then said: 'Mr. Foley, there are three cases to be tried in the district court; they were all settled in one decision by Judge Rising. Now, understand, I don't think there will be but one case tried in this court, and if the other cases are removed, or are continued to wait the issue of the one tried, I will be entitled to my fee.' He said: 'Certainly.' I said, the trial of one of them will be equal to the trial of them all, and that if the Richmond company was successful in the case that was tried, I should consider that I was entitled to the one thousand five hundred dollars. He agreed to that. I said: 'Remember, this agreement only relates to the district court; if the cases are removed to the circuit court, or are appealed to the supreme court, some other arrangement is to be made.' He said: 'Of course, if the other cases are taken out of the district court, or the one tried is appealed, you earn your money.' * * * A few days afterwards he came into my office and gave me a check for one thousand dollars, in accordance with the arrangement."

M. D. Foley, in behalf of respondent, testified as follows: "I was directed by Mr. Probert to settle the fee to be given Mr. Cole in the Richmond-Albion case. Cole demanded two thousand five hundred dollars. I said I could not give it. * * * I told Cole I would pay him one thousand dollars, and one thousand five hundred dollars additional in case the Richmond company was successful. I paid him one thousand dollars. Cole said, if the Richmond company was successful in the district court he did not believe that the Albion company would try the other cases before Rives, but would remove them to the circuit court of the United States, and if the Richmond company won the Rose case, he, Cole, would be entitled to his contingent fee. I said, 'Yes.'"

Rose v. Richmond Company was tried at the June term, 1881, and was the only one of the Albion-Richmond cases tried at that term. The other cases were continued for the term. The district court, in Rose v. Richmond Company, rendered a judgment in favor of the defendant for all that portion of the mining ground in controversy "lying between the end lines of the Victoria patented claim of defendant, extended from the quartzite foot wall to the shale hanging wall, and lying south-westerly of the line 'K L,'" and in favor of plaintiffs for that portion of the ground "lying between the shale hanging wall and the quartzite foot wall, to the north-west of said line 'K L,'" and for the costs.

The Albion company appealed from this judgment. The Richmond company did not appeal. The case on appeal was argued in the supreme court at the October term, 1881, and a decision was rendered in March, 1882.

At the September term, 1881, of the district court, the other cases were continued for the term "by consent," and at the February term, 1882, were passed until the second setting of the calendar "by consent." This action was commenced in November, 1881, and was tried in February, 1882.

Did the court err in granting a new trial?

Respondent seeks to justify this action of the court upon two grounds: 1. It claims that it was not successful in Rose v. Richmond Company, in the district court. 2. It claims that the other cases were not postponed "to await the result of the one tried in the supreme court."

Neither of these positions can, in our opinion, be legally maintained. It is true that the Richmond company did not recover all it claimed in its answer; but it recovered all that was of any value. The result of the trial was, as testified to by appellant, "substantially a success in favor of the Richmond company." The judgment "gave to the Richmond company all the mining ground that was of any value which was in controversy in these three cases."

The president of respondent testified that "the Richmond company was only partially successful in the Rose case," evidently meaning that it was only partially successful because it did not gain all that it claimed. A party, however, may be successful in a suit without winning everything that is asked for. The question whether a party is successful or not depends upon the particular facts of each case—upon the issues raised, upon the contest made. The decision of the district judge in the Rose-Richmond case was not favorable to the Albion company. The trial resulted in a success, "a favorable termination," for the Richmond company. The condition of the case was such that it was not necessary for the Richmond company to gain everything it prayed for in order to be successful in the litigation. It claimed the greater portion of the mining ground in controversy by virtue of the St. George and Victoria patents. The real controversy upon the merits of the case was as to the validity of these patents. If they, or either of them, were declared valid, it would result in a victory for the Richmond company. If both were declared invalid, it would be a victory for the Albion company, although it would not, on that account, recover all the ground claimed or all that was of any value: Rose v. Richmond M. Co., 17 Nev. 25.

The district court decided that the St. George patent was void. This part of its decision was against the Richmond company. But it held that the Victoria patent was valid, and this patent embraced all the mining ground in controversy, under these patents, that was of any value. The Richmond company was successful in the Rose case, in the district court, within the meaning of the word "successful" as used and understood by the parties to the contract at the time it was made.

The other point is equally without merit. The other cases were not tried. They were continued. These facts are not denied. Why were they continued?

Appellant testified that at the June term, 1881, "when the two other cases were reached and called on the calendar, Mr. Wren, who is the president and attorney for the defendant, said to me in court: 'Had not we better continue the two cases until the Rose case is decided in the supreme court?' I said, 'Yes,' and thereupon these cases were continued for that term, and have been continued every term since." The president of the Richmond company testified that these cases "have never been continued to await the result of the case of Rose v. Richmond Mining Company." But this statement was based upon the fact that no order to that effect was made by the district court, and that no consent was affirmatively shown to have been given for such a continuance by the attorneys for the Albion company. This is apparent from his testimony

and from his argument. He testified: "There has never been an agreement between the counsel of the Richmond company and the Albion Consolidated * * * to continue them to await the result of the Rose case. At the setting of cases for trial at this term of court, the cases were passed until the second setting of the calendar."

Upon this testimony he argues that "the fact that no order of court was made continuing the two cases to await the decision of the supreme court, shows that if such a suggestion was ever made by counsel, it was never acted upon, for some reason. To continue the two cases to await the decision of the supreme court required the consent of counsel for Rose et al., as well as that of counsel for respondent, and it does not appear that consent was ever obtained." This is simply begging the real question at issue. Were the cases continued? Yes. What was the reason which induced counsel upon both sides to "consent" to the postponement of these cases? None is given by respondent. In the absence of any reason given by respondent, do not the facts of this case furnish an answer to the question? Was not the postponement of the two cases the natural course that would be pursued in the light of the history of the Albion-Richmond litigation? But one case would be tried. This would determine the questions that would necessarily control the judgments and decisions in the other cases. No benefit would accrue to either party by the trial of these cases until the one tried was finally determined.

The contract was that if but one case was tried appellant would be entitled to his additional fee. This was the plain understanding and agreement of the parties. At the time the agreement was made both parties anticipated that but one case would be tried, and that, of course, the others would be continued until the one tried was determined in the appellate court. One case was tried. The others were continued. It was not necessary, and it is not the usual practice, in cases of consent, for the record to show why a case is continued or passed. The reasons often go without stating. The merits of the question at issue is disposed of by the fact that the cases were continued, and no reason has been given for the continuance, except the one mentioned in the testimony of appellant.

Upon the undisputed testimony in this case appellant was to have one thousand five hundred dollars as an additional fee, if the Richmond company was successful in the district court in the Rose-Richmond case (that being the case tried), and the other cases were continued to await the result of that case in the appellate court. The Richmond company was successful. The other cases were continued. The verdict of the jury was in accordance with the evidence and the law. The court erred in setting it aside.

The order of the district court granting a new trial is reversed.

PHIPPS ET AL. *v.* HULLY.

Filed November 12, 1883.

ASSAY VALUE OF ORES.—In an action to recover for the reduction of ores, under a contract by the terms of which the defendant agreed to pay the plaintiff "sixty-five per cent. of the assay value of said ores, such assay to be made from said ores taken from the battery samples," evidence is admissible to show the true value of such ores, and that, by reason of fraud or mistake on the plaintiff's part, the battery samples did not correctly show such value.

THE ADMISSION OF IMMATERIAL EVIDENCE, WHICH COULD NOT HAVE PREJUDICED the beaten party, is not sufficient to warrant a reversal.

APPEAL from a judgment of the first judicial district court for Storey county, entered in favor of the plaintiffs. The plaintiffs appealed. The opinion states the facts.

M. N. Stone, for the appellants.

W. E. F. Deal and *B. C. Whitman*, for the respondent.

HAWLEY, C. J. This action was brought by plaintiffs to recover two thousand and ninety-five dollars and sixty cents, alleged to be due from the defendant on a contract for reducing certain ores at defendant's mill. The contract, as averred in the complaint, required defendant to pay plaintiffs, after deducting six dollars and fifty cents per ton for expenses of reduction, "sixty-five per cent. of the assay value of said ores, such assay to be made from said ores taken from the battery samples at said mill." It is alleged that the ascertained value of said ores, by the assays taken from the battery samples, was the sum of one hundred and thirty-four dollars per ton.

The defendant in his answer alleges that "he was to pay sixty-five per cent. of the battery sample assay, less six dollars and fifty cents for working, and less discount on the bullion produced." He avers that he reduced twenty tons of ore, and "admits that battery samples of such workings were made," but denies that they were duly or properly made, and says "that either by fraud of plaintiff Cizovich, or mistake by defendant's employees they failed to show the assay value of such ores." He "admits that such assays apparently showed the value of such ores or matter to be one hundred and thirty-four dollars per ton, but avers that the real value was not more than fourteen dollars and sixty cents per ton." He also avers "that the entire product of such ore, * * * by him carefully and properly worked at his mill, was no more than one hundred and eighty dollars."

The cause was tried before the court without a jury, and judgment was rendered in favor of plaintiffs for two hundred and sixty-five dollars, or its equivalent in gold and silver bullion.

1. We are of opinion that the averments in the answer raised an issue as to the terms of the contract, and also as to the correctness of the assays which were taken from the battery samples.

2. It was argued by plaintiffs that the assays taken from the battery samples were the only tests provided in the contract for determining the value of the ore, hence, that the court erred in admitting any other testimony for the purpose of establishing its value.

By the terms of the contract the assays from the battery samples were to be taken as a means of ascertaining the value of the ore, but this was, of course, upon the understanding of the parties that the assays would be

correct. It never was the intention of the parties that they should be bound by the assays if they did not fairly represent the value of the ore. The language of the averments in the pleadings, when interpreted with reference to the intention of the parties, is not susceptible of such a construction. It was the true value of the pulp from the battery that was to be taken as a guide for the settlement.

Contracts of this character are presumed to be made with a view of protecting both parties. The owner of the ore is guaranteed a certain per cent. of its true value, which secures to him a fair return. If the mill-owner is careful, and works the ore closely, he may be able to save more than the per cent. agreed upon, and thus secure to himself an additional profit for the working of the ore. He also avoids the necessity of a clean-up for every small quantity of custom ore that he may work, and is thereby enabled to crush and reduce the ore at less expense than if the contract called for the bullion produced by the ore. If the assays taken from the battery samples are correct, the parties are protected and bound by them, whether the clean-up, if made, amounts to the percentage agreed upon or not. But if the assays are not correct the parties are not bound by them, and may introduce any competent testimony tending to establish the true value of the ore.

3. Upon the trial plaintiffs introduced two assays taken from the battery samples. One, taken under the direction of the defendant, of one hundred and thirty-four dollars and eighty-two cents per ton; the other, taken under the direction of plaintiff Cizovich, of one hundred and twenty-eight dollars per ton. About half the ore had passed through the battery when the assay of one hundred and thirty-four dollars and eighty-two cents was obtained.

It is argued, on behalf of plaintiffs, that defendant was negligent in not then taking the necessary steps to secure himself by having other samples taken from the battery and seeing that proper and correct assays were made therefrom; or in not refusing to reduce the balance of the ore unless the mistake in the assays taken was corrected in some manner that might be agreed upon between the parties. It is also claimed that the testimony introduced, on the part of the defendant, was incompetent to prove the real value of the ore, or to show that the assay value of the ore was less than shown by the assays taken from the battery samples.

It would have been proper for the defendant to have pursued the course suggested; but it was not necessarily the only course to be pursued in order to ascertain the facts. The defendant seems to have used due diligence in notifying plaintiffs that something was wrong about the assays, and in endeavoring to find out what the true value of the ore was. He testified that after he ascertained from the assayer what the battery samples assayed, he asked plaintiff Phipps for time to settle, "because the amalgam produced by the ore showed that the ore was not of the value that the assay of the battery samples showed." When he showed plaintiff Cizovich the assay, he told him "it was too high." Phipps said: "Hully informed me that the assays went one hundred and thirty-four dollars per ton, and he then expressed some surprise that it went so high, and asked whether I was not surprised. He also said that if we were not in a hurry he would like to have us wait until he could make a clean-up before making a settlement with us." It does not appear that either of the plaintiffs objected to waiting for the clean-up.

Neither of them requested that any other assays from the battery samples should be made. Both parties had an equal opportunity to correct the mistake in the battery sample assays, and to pursue any course necessary to preserve their respective rights.

After the assay of one hundred and thirty-four dollars and eighty-two cents was made, defendant took a pulp assay from the tank "because evidences were cropping out that the battery assays were too high." He testified that he told Cizovich after he received the battery sample assays that he "did not believe that the ore was of any such value, because the gold in the ore, as shown in the battery sample assays, predominated in so much greater proportion than the gold in the bullion which the ore produced, as shown by the assays taken from the tank. The pulp from the tank assayed sixteen dollars and eighty-nine cents per ton."

The defendant worked two thousand seven hundred pounds of ore belonging to himself with plaintiffs' ore, and the entire clean-up at the mill, of all the ore, only produced a bar of bullion of the value of two hundred and sixty-five dollars. Bossell testified, on behalf of defendant, that he was an amalgamator by occupation, of fourteen years' experience; that he had charge of the working and reduction of the ore; that it was properly worked; that he took as fair a sample as he could from the tanks; that the amalgam out of the pans "represented the entire product of the ore which plaintiffs sent to the mill;" that he "did not intend to clean up, but the difference between the assays from the battery and the assay from the tank was so peculiar that Mr. Hully told me to clean up;" that the sample taken "from the tank had the results of no other ore except plaintiffs';" and that he did not think it possible that they "could have made a loss in milling this ore of the difference between two hundred and sixty-five dollars and two thousand dollars."

This testimony was competent, as it tended to show that the assays from the battery samples were not correct; and also tended to show what the true value of the ore was.

It is claimed that the court erred in allowing testimony as to the value of ore at other places in the St. John mine than that from which plaintiffs' ore was taken. We deem it unnecessary to decide whether this testimony was competent or not. It certainly was of but little, if any, value in determining the fact at issue, and it is apparent to us, from the record, that plaintiffs were not prejudiced by it, and that the judgment would have been the same if it had been excluded. The error, if any, is not of sufficient importance to justify a reversal of the judgment: Merle v. Mathews, 26 Cal. 467; Persons v. McKibben, 5 Ind. 263; Williamsburg C. I. Co. v. Cary, 83 Ill. 454; Albin v. Kinney, 96 Id. 216.

The judgment of the district court is affirmed.

Rosendorf *v.* Mandel et al.

Filed November 12, 1883.

In an Action against Sureties on an Injunction Bond, an allegation of damage is sufficient to the effect that by reason of said injunction plaintiff has been damaged in a certain amount, "no part of which has been paid."

No Demand for Payment is Necessary in Order to Enforce the Liability of Sureties on an injunction bond, conditioned for the payment to the plaintiff of whatever damages he might suffer by reason of the injunction.

WHERE A SHERIFF IS RESTRAINED FROM APPLYING any moneys that he might realize from the sale of certain property of a judgment debtor to the satisfaction of the judgment, and upon a sale thereof he consequently refuses to credit the amount of such judgment on the judgment creditor's bid, whereby the latter was prevented from purchasing such property, the damages resulting from such refusal of the sheriff may be recovered in an action against the sureties on the injunction bond.

APPEAL from a judgment of the first judicial district court for Storey county, entered in favor of the plaintiff. The opinion states the facts.

Kirkpatrick & Stephens, and *Naphtaly, Freidenrich & Ackerman*, for the appellants.

W. E. F. Deal, for the respondent.

BELKNAP, J. Plaintiff recovered a judgment at law against the firm of Meyer Brothers. Thereafter J. Baum & Co., other creditors of Meyer Brothers, commenced a suit in equity against the plaintiff and others to set aside the judgment, and obtained an injunction against the sheriff of the county requiring him to hold all moneys he might realize from the sale of property levied on in the case of Rosendorf v. Meyer Brothers until the further order of the court. Defendant in the equity suit (plaintiff here) prevailed, and the present action is brought upon an understanding entered into upon the issuing of the injunction. Trial was had upon the merits, and judgment rendered in favor of plaintiff.

The only question made arises upon the judgment roll, and is whether the complaint states facts sufficient to constitute a cause of action. It is claimed that no breach of the condition of the undertaking is assigned, in that the complaint does not state that the complainants in the equity suit have not paid the damages incurred by reason of the injunction.

The complaint alleges: "Plaintiff has been damaged by reason of said injunction in the sum of three thousand dollars, no part of which has been paid."

This averment is sufficient. The only objection that can be suggested is that it is general, and does not expressly state complainants have not paid the damages; but the suggestion is without merit, and could be raised only on special demurrer. It is also claimed that the complaint is defective in not stating a demand. Mr. Chitty says that a demand must be averred, when by the terms of the contract it is incumbent on the plaintiff to request the defendant to perform his contract, such request being, as it were, a condition precedent: Ch. Pl. 340.

But this is not a case in which a request is necessary to the right of action. The condition of the undertaking is that the complainants in the equity suit will pay to the parties enjoined such damages, not exceeding one thousand five hundred dollars, as they may sustain by reason of the injunction, and no demand or other act upon the part of the plaintiff here is contemplated. Defendants' covenanted that plaintiff should be paid. They were, therefore, in default, and no demand was necessary: Gibbs v. Southam, 5 Barn. & Adol. 911; Dyer v. Rich, 1 Met. 190; Nelson v. Bostwick, 5 Hill (N. Y.), 40.

The injunction order restrained the sheriff from applying any moneys that might be realized upon the execution sale of the property of defendants, in the case of Rosendorf v. Meyer Brothers, to the satisfaction of the judgment, and directed him to hold such moneys until the further order of the court. Upon the sale the sheriff refused to credit plaintiff's judgment with his bid; and thereby, plaintiff alleges, he was prevented from purchasing the prope[illegible]maged.

In general, the law does not require the execution creditor to pay the amount of his own bid in money, because the creditor is himself entitled to receive the money recovered upon his execution. He is not, therefore, required to pay out money which he is entitled to recover back. But the purpose of the injunction was to preserve the moneys that might be realized from the sale of the property of the judgment debtor until the rights of the creditors could be determined, and this purpose would have been disregarded, and the order of the court violated, had the sheriff credited plaintiff's bid upon his judgment. The sheriff properly refused to deliver the property until he received the money, and his refusal was made in obedience to the injunction. The damage resulting is chargeable against defendants upon their undertaking.

Judgment affirmed.

REESE *v.* KINKEAD, EX'R etc., ET AL.

Filed November 12, 1883.

A VENDOR'S LIEN EXISTS IN FAVOR OF A PARTNER on his share of the partnership real estate which he has conveyed to his copartner, and the same may be enforced against the estate of the latter, in the absence of fraud.

APPEAL from a judgment of the second judicial district court for Washoe county, entered in favor of the defendants. The opinion states the facts.

William Webster, for the appellant.

R. M. Clarke, for the respondents.

LEONARD, J. Plaintiff appeals from the judgment rendered herein in favor of defendants for their costs of suit. It is assigned as error that the court below erred in sustaining defendants' demurrer to the original complaint, and also in sustaining the demurrer of James H. Kinkead, executor, to plaintiff's amended complaint.

By the amended complaint, plaintiff alleges that the partnership of himself and Crocker until the latter's death; that he owned an undivided one half interest in the property described in the deed before mentioned, and as such owner, at the request of Crocker, and for the consideration of seven thousand five hundred dollars, sold and conveyed to said Crocker, by deed duly executed by plaintiff, an undivided one half interest in and to the lands, water rights, and privileges described therein; that no part of said sum has been paid, and the whole of said consideration is now due; that Crocker died in September, 1879, seised of said property; that defendant James H. Kinkead is the duly appointed and acting executor of the last will and testament of said Crocker, deceased; that within the time allowed by law, plaintiff duly presented his demand in the sum of seven thousand five hundred dollars to said executor for allowance, and that the same was rejected and disallowed; that the other parties defendant are legatees and heirs at law of said Crocker, deceased, and have and claim an interest in said estate because of the last will and testament of said Crocker.

Upon these facts, plaintiff prays that a vendor's lien be decreed in his favor, and against all the defendants named, for the sum of seven thousand five hundred dollars, the consideration named in said conveyance; that an order of sale be made directing the sale of so much of said prem-

ises as may be necessary to pay plaintiff's demand for the purchase price of said property.

The amended complaint was demurred to, on the ground that it did not state a cause of action. The demurrer was sustained. Plaintiff refusing to amend further, judgment for defendants' costs was rendered against plaintiff, as before stated. We think the averment of copartnership is sufficient: Reese v. Kinkead, 17 Nev. 447.

Counsel for respondent contends that if a partnership existed, and the property conveyed was partnership property, there was no lien for the purchase money; that the property would still be subject to the partnership debts, and the equitable lien of the creditors would prevail.

But the complaint does not show the existence of any partnership creditors, and if such there are, they are not made parties. The defendants have the right to protect themselves, but not the creditors of the partnership.

If the conveyance was fradulent, the fact does not appear in the amended complaint, but it does appear that plaintiff sold to Crocker the property described in the deed for seven thousand five hundred dollars, and that no part of the purchase money has been paid. Upon these facts, in the absence of fraud, which can not be presumed, the plaintiff is a creditor of Crocker's estate to that amount, and on general principles has a lien on the property sold as security for the debt: Burt v. Wilson, 28 Cal. 638; Cahoon v. Robinson, 6 Id. 226; Leman v. Whitney, 4 Russ. 427.

We think the court erred in sustaining the demurrer to plaintiff's amended complaint.

The judgment is reversed, with instructions to the court below to allow defendants a reasonable time to answer.

BROWN *v.* EVANS.

Filed November 12, 1883.

GRANTEE OF LAND BY DEED, WHICH GIVES HIM THE RIGHT TO TAKE SUFFICIENT WATER from certain ditches, "to irrigate the land conveyed and for domestic purposes, to an amount not exceeding two hundred inches," upon condition that he should "pay *pro rata* as the amount of water he uses on the land conveyed shall bear to the whole amount of water that is conveyed in said ditches, for any needed repairs of said ditches," has the option of using whatever amount of water he deems sufficient for these purposes, and is not liable for the expenses incurred in repairing the ditches beyond a *pro rata* proportion, based upon the quantity of water actually used or demanded by him.

WHERE, HOWEVER, SUCH GRANTEE SERVES THE GRANTOR WITH NOTICE THAT HE REQUIRES a specific quantity of water, and the same is furnished him, he is estopped from denying that he did not need the same and did not use it. And in an action against him to recover his proportionate share of such expenses, such notices, so long as they remain unrevoked, are admissible in evidence to show the amount of water used by him.

APPEAL from a judgment of the second judicial district court for Washoe county, entered in favor of the plaintiff. The opinion states the facts.

C. S. Varian and *P. Evans*, for the appellant.

R. H. Lindsay, for the respondent.

———, J. Respondent recovered judgment against appellant for four hundred and seventy-four dollars and four cents, for his propor-

tionate part of the expenses of keeping certain water ditches in repair, under and by virtue of a clause in a deed executed by respondent's grantor to appellant, as follows: "Said first party also hereby conveys to the second party, his heirs and assigns, the right to take sufficient water from either of said ditches above named, to irrigate the land above conveyed, and for domestic purposes, to an amount not exceeding two hundred inches, under a six-inch pressure, upon condition that the second party, his heirs or assigns, shall pay *pro rata*, as the amount of water he or they use on the land conveyed shall bear to the whole amount of water that is conveyed in both of said ditches, for any needed repairs or enlargement of said ditches, or either of them."

In respondent's complaint it is alleged: "That between the * * * first day of August, A. D. 1879, and the thirtieth day of June, A. D. 1882, the needed repairs of both of said ditches amounted to the sum of two thousand four hundred and eighty-eight dollars and seventy-five cents, which amount said plaintiff has paid, laid out, and expended for said needed repairs on both of said ditches during said period; that the quantity of water run in both of said ditches continuously during the time last aforesaid has been one thousand and fifty inches, under a six-inch pressure, and no more; that during the time last aforesaid defendant has used continuously from said ditches the full amount of two hundred inches of water, under a six-inch pressure, for irrigating and domestic purposes."

Appellant in his answer denies that the needed repairs exceeded the sum of one thousand seven hundred dollars, and denies that he used "more than fifty inches of water, under a six-inch pressure." He did not deny the averment in the complaint as to the quantity of water running in the ditches.

Upon the trial, respondent testified that the expenses of repairing the ditches amounted to two thousand four hundred and eighty-eight dollars and seventy-five cents, as alleged in his complaint, and there was no testimony to the contrary. Upon the issue of fact, as to the amount of water actually used by appellant, there was a conflict of evidence. Respondent testified that at several times, during the period mentioned in the complaint, he had seen two hundred inches of water flowing into appellant's boxes and ditches. Appellant testified that during the period mentioned "he never used for irrigating or domestic purposes more than fifty inches from plaintiff's ditches," and that that quantity was sufficient to irrigate his land.

During the trial respondent offered in evidence several notices and letters written by appellant to respondent, relative to the use of the water, the amount required by him, etc. Appellant objected to their admission in evidence, upon the ground that they were "incompetent, irrelevant, and immaterial;" that they were written prior to a settlement between the parties in 1879, and prior to the alleged causes of action; that they were too remote, and did not reflect upon the present issues; "that the deed mentioned in the complaint fixed the rights and duties of the parties, and under it the plaintiff was required to keep said quantity of two hundred inches flowing in the ditches ready for the defendant's use, and that no act or declaration of the defendant could add to or restrict that duty."

The court allowed the notices and letters to be read in evidence, "for the purpose only, as limited by the court, of reflecting upon the quantity

of land irrigated by defendant and the quantity of water used by him." At the close of the testimony the court gave to the jury the following instruction: "If you believe, from the evidence, that the defendant, prior to August, 1879, demanded of plaintiff, and notified plaintiff that he would require, two hundred inches of water (and that said demand has not been altered or rescinded) out of the ditches referred to, and that plaintiff, weather and unavoidable accidents permitting, kept the said water at the disposal of the defendant during the time mentioned in the complaint as the time for which repairs are charged, then you will find for the plaintiff for such sum as you may find reckoning as 1050 : 200:: 2488.75 to the amount to be found; provided, that you further find, from the evidence, that the plaintiff made the repairs charged for, and that such repairs were necessary on said ditches, and that the charges therefor are correct."

The questions whether the court erred in admitting the notices and letters, or in giving this instruction, will be considered together.

Appellant contends that, under the language in the deed, it is the duty of respondent to keep two hundred inches of water running in the ditches, and that appellant may use as much or as little of that amount as he pleases, and that he is only bound to pay a *pro rata* proportion for the amount of water which he actually uses. Is this interpretation correct? The grantor conveyed as much water as is sufficient to irrigate certain land, and for domestic purposes, to "an amount not exceeding two hundred inches, under a six-inch pressure." Under this provision appellant did not acquire any title to any greater quantity of water than is sufficient "to irrigate the land" mentioned in the deed, "and for domestic purposes." If ten inches is sufficient, that is all he is entitled to. If it takes two hundred inches, he is entitled to that amount, subject, of course, to the other considerations in the deed, which are not in issue in this case.

Whatever amount is required, it is the duty of the respondent to keep running in the ditches, ready for appellant's use. But respondent is only required to furnish the quantity of water sufficient to irrigate the land, and for domestic purposes.

Appellant has the option of using whatever amount is deemed sufficient for these purposes, and is not liable for the expenses incurred in repairing the ditches beyond a *pro rata* proportion, based upon the quantity of water actually used or demanded by him.

The question as to the amount of water required by appellant would be, primarily at least, determined by himself. If he notifies respondent that he needs and requires the full amount of two hundred inches, respondent would have the right to turn on that amount of water in the ditches, and to charge him for that proportion of the expenses incurred in the repairs of the ditches, whether the water was actually used or not. After giving respondent notice that he requires a specific quantity of water, appellant could not, in good conscience and fair dealing, be permitted to say that he did not need the amount demanded and did not use the same. In this view of the case, the notices and letters were admissible for the purpose of determining the quantity of water required and used by appellant.

A brief statement of the contents of the notices and letters will show that the court did not err in giving the instruction complained of.

In the letter dated March 5, 1878, appellant called respondent's attention to the fact that he had a few days previously notified him that the

water would be wanted for irrigation, and closes by demanding that the water be turned on, "at least one hundred inches in each ditch."

In the notice dated March 11, 1878, after reciting the clause in the deed with reference to his rights, he says: "You will please take further and particular notice, that on or about the first day of April, A. D. 1878 (if you do not on or before that time repair said ditches yourself and assess *pro rata*), it is the intention of the undersigned, as the grantee aforesaid, by virtue of his ownership of said two hundred inches of water, and the direct and implied authority granted to the said undersigned in said indenture to repair said ditches, as aforesaid, sufficient to obtain said two hundred inches of water for irrigation and domestic purposes, and any interference upon your part with the full and direct flow of said two hundred inches of water in either of said ditches, as the undersigned may elect, either by selling the same, or shutting the water off at the head or any intermediate point upon said ditches, or using any other means whereby the undersigned will be prevented from a full and uninterrupted use of all rights granted him by said indenture, * * * will be fully resisted according to law in such cases made and provided."

On the twenty-fourth of January, 1879, a similar notice was given, in which the following language is used: "You are hereby notified that I am ready and willing at all times, and under all circumstances and conditions, to perform the conditions devolved upon me, by virtue of said deed of conveyance, and even more when an equitable necessity shall arise, that by virtue of my rights aforesaid and the willingness specified, to fulfill any conditions devolved upon me thereby. I hereby demand for irrigation and domestic purposes, under the claim in my deed of conveyance, * * * an undivided two hundred inches of water for irrigation purposes during the irrigating season, and twenty-five inches during the fall, winter, and spring seasons, for domestic purposes. You are further notified that if said twenty-five inches of water are not furnished forthwith for domestic purposes as aforesaid, and two hundred inches for irrigation purposes as aforesaid, in due and proper time, without notice, suit will be commenced against you to compel specific performance of all conditions and rights accruing to me as grantee of Nevada Land and Mining Company, limited."

These notices are clear, positive, and explicit, to the effect that appellant requires two hundred inches of water for the irrigation of his land. He demands that that amount be furnished him for that purpose, and threatens to bring suit if any portion of it is withheld. By the giving of these notices he is estopped from denying that he "continuously used" the full amount required and demanded by him.

The other objections are without merit. The settlement referred to was a compromise made by the parties (in a similar action) for a prior period of time. Respondent accepted a less amount than he sued for, and gave a receipt for the amount paid, it being "stipulated, understood, and fully agreed that the money paid aforesaid, and the conditions under which it was paid, there having been a dispute as to the exact amount due, and the above amount having been paid as a compromise, shall in no manner or way affect any subsequent settlement that may be made between the said Evans and myself; but that all settlements hereafter entered into shall be made by virtue of and under a construction" of the deed. The fact that the notices were given prior to the commencement of this action is immaterial.

The demands for two hundred inches of water have never been withdrawn. The requests, demands, and threats of litigation were continuous in their nature. Respondent had the right to act under these notices, to furnish the water to the extent required, and to collect that proportion of the expenses for the repairs of the ditches, as long as these requests and demands remain unchanged.

He might have submitted his case upon the notices and letters written by appellant, without introducing any testimony as to the amount of water actually used, and the court did not err in withdrawing from the consideration of the jury (as it did in the instruction) the testimony of appellant to the effect that he only used fifty inches of water, and that that amount was sufficient to irrigate the land.

The purposes for which the notices were admitted in evidence were broad enough to have the effect of an estoppel as to the quantity of water needed to irrigate the land, and appellant could not have been misled or deceived by the giving of an instruction to that effect. If he had ever withdrawn his demands, or changed his requests, it was his duty, and he had the opportunity, to testify to that effect.

There is no error in the record prejudicial to the appellant.

The judgment of the district court is affirmed.

SMITH *v.* LOGAN ET AL.

Filed November 14, 1883.

ONE IN THE POSSESSION OF LAND UNDER AN UNEXECUTED CONTRACT FOR THE SALE THEREOF can not asserts the rights of a riparian proprietor in an adjoining stream.

IN AN ACTION BETWEEN CERTAIN APPROPRIATORS OF WATER, TO DETERMINE THEIR RELATIVE RIGHTS THERETO, another appropriator, higher up the stream, who returns the water taken by him, undiminished in quantity, before the stream reaches the appropriator whose rights are interfered with, is not a necessary party.

ONE TO WHOM LANDS ARE GRANTED FOR THE PURPOSE OF MAINTAINING AN ACTION connected with the ownership thereof, may prosecute such action in his own name, notwithstanding there is an oral agreement between him and his grantors that upon the termination of the litigation he would reconvey such lands to his respective grantors.

RIGHTS OF A PRIOR APPROPRIATOR OF WATER MAY BE LOST BY AN ADVERSE USE thereof by an another, for a sufficient length of time, and the prior appropriator's acquiescence therein.

APPELLANTS CAN NOT TAKE ADVANTAGE OF THE FAILURE OF THE COURT TO MAKE ADDITIONAL FINDINGS of fact, within the time required by the statute, when all of such findings were favorable to them.

RIGHTS TO THE USE OF WATER ACQUIRED BY APPROPRIATION, and used by the appropriator for the purpose of irrigating certain lands on which he was trespassing, do not become appurtenant to such lands, and pass to one in the possession under a contract for the sale thereof with the owner.

APPEAL from a judgment of the second judicial district court for Washoe county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

A. C. Ellis, for appellants.

Clarke & King, for respondent.

BELKNAP, J. This suit is brought for the purpose of determining the relative rights of the parties hereto to the waters of Steamboat creek. Their rights—whatever they may be—are based upon appropriations made by themselves and their predecessors in interest. No claim of ri-

parian proprietorship is made, save as to twenty acres of land owned in fee by the Central Pacific Railroad Company, and which the company have contracted to sell defendant Logan. The contract is unexecuted, and the conveyance depends upon the performance by Logan of the obligations imposed upon him. Since he has not acquired the fee, it is evident that the doctrine of riparian proprietorship can not be invoked in his behalf.

The joint answer of the defendants sets forth that a corporation known as the El Dorado Wood and Flume Company is a necessary party defendant to the action, by reason of the fact that it was and theretofore had been, under claim of right, diverting permanently away from the natural channel all of the waters of the creek. The corporation was made a party defendant, and answered the joint answers.

At the trial of the cause, and after the introduction of testimony touching the issues raised by the pleadings of the defendants and the corporation, the court dismissed it as a party defendant.

It was shown that the flume company diverted a portion of the waters of the stream at a point several miles above the lands owned by plaintiff or defendants. The lands of defendants are situated below the point of diversion and above the lands of the plaintiff. The waters diverted by the flume company were returned to the channel of the creek at a point below the lands of the defendants, and above those of the plaintiff. Testimony was introduced in behalf of the plaintiff and the flume company, tending to show that "the water was not diminished by the flume company's diversion and use, and that as much water was returned to the plaintiff's land by the flume company as would have reached said land if none were diverted by the flume company. Defendants introduced testimony in contradiction of this. There is no express finding upon this issue, but as the judgment was for the plaintiff, it is our duty to adopt the theory of facts which will support the ruling of the district court, and we must, therefore, assume that no water was lost to the plaintiff by the flume company's diversion. If this be so, why should the flume company have been a party to the litigation?

The suit was brought upon the hypothesis that defendants had interrupted plaintiff's enjoyment of the waters of the creek. The object in making the flume company a party to the suit was to show that the grievances complained of were produced by its, instead of defendant's, diversion of the waters. But, as the diversion by the flume company did not diminish the volume of water at plaintiff's land, his failure to receive water could not have been attributable to its acts. It was not, therefore, a necessary party to the suit.

Defendants conceded upon the trial that plaintiff was the owner, in his own right, of a portion of the land described in the complaint. Other tracts of land were conveyed to him immediately prior to the commencement of this suit, by grantors claiming to have acquired rights by appropriation to the waters of the creek, in connection with their ownership of the land. There was an oral agreement between grantors and grantee that upon the termination of the litigation the lands should be reconveyed to the grantors respectively.

Upon these facts, appellant contends that plaintiff, as to the lands so conveyed and the water rights appurtenant thereto, is not the real party in interest. The objection is founded upon the provision of the civil practice act, compiled laws, section 1067, which requires that "every

action shall be prosecuted in the name of the real party in interest." If the transactions between the plaintiff and his grantors created any trust, it was an express trust, and the trustee of an express trust may sue without joining with him the person or persons for whose benefit the action is prosecuted.

But the evidence introduced at the trial was incompetent to establish an express trust. Section 55 of the "act concerning conveyances" requires such a trust to be established by deed or conveyance in writing. The statute is as follows: "No estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereto authorized in writing:" Comp. Laws, sec. 283.

Again: the objection may be satisfactorily decided, upon the ground that the pleadings do not tender the issue whether the plaintiff holds the property in his own right or that of another.

True, the answer denies the plaintiff's ownership, but it does not set forth a state of facts requiring the district court to exercise its equitable jurisdiction, and examine into the relations of trust existing between the plaintiff and his grantors. This suit is founded upon the legal title, and when plaintiff showed that title to be in himself, he fully answered the issue of ownership presented, and there was no necessity for further evidence upon that point.

Objection is made to the apportionment of the waters of the stream established by the decree. From the year 1861 down to the year 1868, the predecessors in interest of defendant Logan used the waters of the creek for the purpose of irrigating from ten to thirty-five acres of land. This was done adversely and under claim of right, and ripened into an absolute title.

Appellant claims that this right is ignored by the decree. The findings show that during the years 1868, 1869, and 1870, there was no cultivation or irrigation of the lands of Logan; that during the years 1871 and 1872 but five acres were irrigated, and in 1873 eight acres, and that this use was by permission of plaintiff and his grantors. During these years plaintiff increased his use of the waters, and the court found as a fact, "that at all times since 1871, whenever plaintiff or his grantors were in need of water to supply their needs under their appropriations herein decreed, and water was being used for irrigation upon the new lands of defendant Logan, plaintiff and his grantors would and did many times turn off from said Logan's land the water so being used thereon, and run the same upon their own lands, all under claim of right to said water."

Several witnesses testified "that the use of water on the Logan place, prior to 1878, was by the license and permission of plaintiff and plaintiff's grantors, and that such use was interfered with and broken during the irrigating season of each year, and whenever plaintiff or his grantors required the use of water; and that Milne and Berger, defendant Logan's grantors, asked the permission of plaintiff and plaintiff's grantors to use the water, and desisted from such use whenever requested to do so by plaintiff or his grantors."

All of the evidence upon this branch of the case has not been brought here, but that referred to, in connection with the finding, is sufficient to show that plaintiff acquired a prespective right by reason of an adverse use, and defendants' acquiescence therein. In this way Logan lost the right of appropriation acquired by his grantors in 1868.

The next point made is based upon the delay of the district court in making additional findings of facts. The findings and decree were entered upon the thirty-first day of July. Upon the fifth day of August following, appellant requested the court to make certain additional findings. The record recites the fact that upon the said fifth day of August the court failed and refused to make any additional findings, and thereupon appellants filed their exceptions to the action of the court. Afterwards, and upon the fifteenth day of August, the court made its findings upon the issues covered by the exceptions.

It is claimed that the court erred in failing to make the additional findings within the time required by law. The statute relating to defective and insufficient findings provides, section 1669: "In cases tried by the court without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the court below to the findings, or to the want of a finding; and in case of a defective finding, the particular defects shall be specifically and particularly designated; and upon failure of the court to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases; provided, that such exceptions to the finding, or want of a finding, shall be filed in the court within five days after the making of the finding or decision to which exception is made." The exceptions required to be filed in the court within five days are the exceptions of the party dissatisfied with the findings. Thereafter the court may "remedy the alleged error," but it will be observed that the statute does not prescribe the time within which the court must act.

If any error could have occurred in this regard, the defendants could not have been prejudiced thereby, as all of the additional findings were favorable to them. Appellant assigns as error the failure of the district court to award defendant Logan the right to use sufficient water to irrigate the twenty-acre tract of land heretofore referred to.

Plaintiff Smith and defendant Logan each endeavored to purchase this tract from the railroad company. In the year 1880 the company entered into a contract of sale with Logan. Prior thereto Smith had occupied and irrigated the land, and appellant now claims that the waters of the stream had become appurtenant to the land and went with it when Smith lost and Logan acquired it. We can not admit this claim. Smith, as to the true owner of the land, was a trespasser. Logan has not connected himself with Smith's right to the use of the water, and he could have changed its use to other lands.

The judgment and order of the district court, overruling defendants' motion for a new trial, are affirmed.

LYON COUNTY *v.* ESMERALDA COUNTY.

Filed November 24, 1883.

LEGISLATURE MAY ENJOIN UPON A JUDGE THE PERFORMANCE OF JUDICIAL FUNCTIONS in matters outside of actions and proceedings in courts, and in such cases the provisions of the practice act in reference to appeals to the supreme court are inapplicable.

NO APPEAL LIES TO THE SUPREME COURT FROM AN ORDER OF THE DISTRICT JUDGE requiring the county assessor of Esmeralda county to file in the district court a statement of taxes, as required by section 6 of the act of March 1, 1833, although such order was made by the court instead of by the judge.

APPEAL from an order of the third judicial district court for Esmeralda county. The act referred to in the opinion was approved March 1, 1883. The further facts appear in the opinion.

D. J. Lewis, *Wells & Taylor*, and *J. F. Bolter*, for the appellant.

W. E. F. Deal and *J. C. Hazlett*, for the respondent.

LEONARD, J. At the last session of the legislature a statute was passed entitled "An act to detach a portion of Esmeralda county, and to annex the same to Lyon county," the sixth section of which is as follows:

"Sec. 6. In the event of the boards of county commissioners of Esmeralda and Lyon counties failing to agree upon and determine the amount due Esmeralda county from Lyon county, as provided in section 2 of this act, the district judge of the third judicial district shall order the county assessor of Esmeralda county to file in the district court of the third judicial district in and for Esmeralda county, a statement setting forth the amount of the entire taxable property in Esmeralda county as shown by the assessment roll for the year 1882, and the amount thereof assessed in and belonging to the territory detached from Esmeralda county and annexed to Lyon county; whereupon the district judge of the third judicial district shall, in accordance with the proportionate amount contemplated by section 2 of this act to be assumed by Lyon county, determine and declare the amount due Esmeralda county from Lyon county."

The second section provided that Lyon county should assume and pay such a proportion of the indebtedness of Esmeralda county as the taxable property in the detached and annexed territory, for the year 1882, bore to the payment of the entire indebtedness; and also that the boards of county commissioners of the counties of Lyon and Esmeralda should, prior to the first Monday of July, 1883, agree upon and determine the amount so due Esmeralda county from Lyon county, and should regulate the manner and time of paying the same.

Prior to the first Monday of July, 1883, the board of county commissioners of Lyon county made a demand upon the board of county commissioners of Esmeralda county, to fix a time and place of meeting of the two boards, and to agree upon and determine the amount due from Lyon to Esmeralda county, and to regulate the manner and time of paying the same, according to the provisions of said act of the legislature.

The board of county commissioners of Esmeralda county failed to comply with the request and demand of the Lyon county board, and the result was the event first mentioned in section 6. Thereupon, on the second day of July, 1883, at a regular meeting of the Lyon county board, said board entered upon their minutes an order instructing the

district attorney of said county "to present the matter to the district judge of the third judicial district, that he might proceed in the premises as required by the act of the legislature aforesaid."

In pursuance of that order, the district attorney of Lyon county addressed to the district judge a communication, styled in the transcript a "petition," wherein he set forth the provisions of the statute referred to, the failure of the Esmeralda county board to comply with the requirements of section 2, the consequent failure of the boards to agree upon the amount due Esmeralda county from Lyon county as provided in said section, and prayed that said judge might make such orders and take such action in the premises as might be just, and to carry out the provisions of the act of the legislature before mentioned.

Thereupon a citation was issued out of the third judicial district court in and for Lyon county, directed to S. B. Hinds, assessor of Esmeralda county, commanding him to show cause before the district judge, at the time and place mentioned therein, why he should not file in the district court of the third judicial district in and for Esmeralda county a statement setting forth the amount of the entire taxable property of Esmeralda county, as shown by the assessment roll for the year 1882, and the amount thereof assessed in and belonging to the territory detached from Esmeralda county and annexed to Lyon county.

At the hearing the district attorney of Esmeralda county filed a demurrer to the petition, and the assessor filed an answer to the citation, setting forth certain reasons why he could not furnish a statement, and why he should not be required to do so by the judge. The demurrer was overruled, and the reasons given by the assessor having been deemed insufficient, he was ordered by the judge in open court to file the required statement. The district attorney of Esmeralda county filed and served a notice of appeal, wherein it is stated that the defendant appeals from the order and judgment of the district court overruling defendant's demurrer, and from the judgment, meaning, of course, the order commanding the assessor to file his statement.

It is urged by counsel for Lyon county that no appeal lies in this proceeding. This is the first question to be considered. Section 4 of article 6 of the constitution provides that "the supreme court shall have appellate jurisdiction in all cases in equity; also, in all cases at law in which is involved the title or right of possession to or the possession of real estate or mining claims, or the equality of any tax, impost, assessment, toll, or municipal fine, or in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars; also, in all other civil cases not included in the general subdivisions of law and equity."

The statute governing appeals in civil actions provides, that "an appeal may be taken: first, from a final judgment in an action or special proceeding commenced in the court in which the judgment is rendered, within one year after the rendition of judgment." Under the practice act this court has appellate jurisdiction only in cases commenced in and tried by a court. Before the supreme court can exercise appellate jurisdiction in this case, it must appear that a final judgment has been rendered by the district court in an action or special proceeding commenced in that court, and that the judgment appealed from was rendered in an action or proceeding which the court had power to try and determine. This court has not authority to consider the case before us, on its merits, if the so-called judgment and order appealed from are

simply chamber orders, or if the proceeding before the district judge was not, in any proper sense, a proceeding in court. Nor does it alter the case that the orders were made in court, if the duties required of the judge by the sixth section do not in fact constitute court proceedings.

It is not denied that the legislature may enjoin upon a judge the performance of judicial functions in matters outside of actions or proceedings in court. In such cases the provisions of the practice act are inapplicable, and there is nothing in the statute under which the judge acted in this case that authorizes an appeal from his orders.

Examining the sixth section of this statute, it is patent that the proceedings thereby authorized are, and were intended to be, special and summary. In a certain specified event the district judge was required to do two things, viz., he was to order the county assessor to file in the district court for Esmeralda county the statement mentioned, and thereupon he was to determine and declare the amount due Esmeralda county from Lyon county. The assessor might have been required to file his statement without an order from the judge, and in that case the latter's duty would have been performed by a mere computation, as required by section 2, and a declaration of the amount found due to the proper authorities.

The order to the assessor was intended only to aid the judge in the performance of his principal duty. No pleadings or parties were contemplated or required. No petition from the district attorney or board of county commissioners of Lyon county was a prerequisite to the action of the judge. The law made his duty plain. No citation or notice to the assessor to show cause was intended or required.

If the judge had examined the records of the board, and thereby learned that the two counties had failed to determine the amount due to Esmeralda, it would have been his duty to order the assessor to file his statement. His authority in the premises did not depend upon the petition or citation.

If the sixth section is unconstitutional, if the judge had no lawful right to make the order requiring a statement from the assessor, then the latter was under no legal obligation to obey the same, and he would not have been guilty of contempt in case of refusal. He could have placed his own construction upon the legality of the proceedings and taken his chances upon its correctness, but there was nothing for him to demur to. He might have said to the judge in chambers, "You ought not to require me to make a statement for the following reasons"—stating them as set forth in the so-called demurrer and answer—and the result would have been the same as that attained by the proceedings in court.

The proceedings required by the statute were in no sense court proceedings *as such*, and the fact that the orders were made by the court, instead of the judge, does not change their character: Marty v. Ahl, 5 Minn. 34. In Hubbell v. McCourt, 44 Wis. 586, it appears that the legislature passed a law providing for appeals to the supreme court from orders made by circuit judges at chambers.

Said the court: "It becomes an important question, and one which this court must determine, whether the legislature has power, under the constitution, to compel this court to take jurisdiction of and determine appeals taken from orders made by judges or other officers out of court; in other words, whether this court has appellate power, under the constitution, in case of appeals from the acts of persons acting as judicial officers or otherwise, as distinguished from the judgments or orders of courts

created by the constitution and laws. * * * In this case the parties, by their counsel, have not seen fit to question the power of this court to hear and determine this appeal; but we are not disposed to usurp a power which is not conferred upon us by the constitution, even though the parties interested may waive their constitutional rights, and agree to accept our decision as final in the pending case. The court has an abundance of labor to perform in the discharge of those duties which are conferred upon it by the constitution, and in the laws made in conformity therewith, without assuming other burdens not sanctioned by the constitution, and which may be attempted to be imposed upon it by legislation in violation of the constitutional limitations upon its powers. * * * The constitution of this state * * * provides, that 'the supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state. The supreme court shall have a general superintending power over all inferior courts." * * *

"Without stopping to make any extended investigation, it is safe to say that it will be difficult to find that any court of last resort in any of the states had, at the time of the adoption of our constitution, ever exercised an appellate jurisdiction over orders made, in actions or otherwise, by judges at chambers or out of court, and it is equally safe to say that the framers of our constitution, when conferring appellate jurisdiction upon this court, intended such jurisdiction should be limited to the judgments and orders made by the courts of the state."

To hold that the power exists in the legislature to compel this court to take jurisdiction of appeals from orders not made by any court, would, by indefinitely extending the right of appeal, greatly embarrass its proceedings, and hinder and delay it in its determination of those strictly judicial matters which were the sole object of its creation. We must, therefore, both for the protection of this court and in the interests of justice, hold that the constitution limits the appellate power of this court to the judgments and orders of courts, and that "orders" made by judges or other officers out of court can not be the subject of review in the first instance in this court. And see Ex Parte Cosner, 4 Tex. App. 89; Arberry v. Beavers, 6 Tex. 470; Baker v. Chisolm, 3 Id. 157; Conter v. St. Paul & Sioux City R. R. Co., 24 Minn. 313; Hoffman v. Mann, 11 Id. 366; Schurmeier v. Railroad Co., 12 Id. 351; McNamara v. Minn. Cent. Railway Co., Id. 389; Sturges v. Rogers, 16 Ind. 18; French v. Lighty, 9 Id. 475; Wilmington & Susquehanna R. R. Co. v. Condon, 8 Gill & J. 418.

Without further discussion of the question, our opinion is that there is no right of appeal in this case, and the same is dismissed.

Sacalaris *v.* Eureka & Palisade R. R. Co.

Filed November 24, 1883.

Courts will Take Judicial Notice of the Authority of the Managing Officer of railway corporations, such as a superintendent, and presume that such officer has power to conduct its ordinary business transactions.

An Agent having the Oversight and Charge, with the Power to Direct, has a general and discretionary power within the scope of his agency.

Declarations of an Agent Made in the Course of the Transaction out of which the action arose are admissible in evidence against his principal.

WHERE THE EVIDENCE IN REGARD TO A FACT IN ISSUE IS CONFLICTING, the jury should determine such fact, and with their determination the court will not interfere.

OWNER OF PERSONAL PROPERTY IS NOT ESTOPPED FROM ASSERTING HIS RIGHTS THERETO, as against a purchaser from one having the ostensible ownership, if such purchaser had notice of his title.

APPEAL from a judgment of the sixth judicial court, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This was an action to recover the possession of certain wood, converted by the defendant to his own use, or the value thereof. The further facts appear in the opinion.

Wren & Cheney, for the appellant.

G. W. Baker and *R. M. Beatty*, for the respondent.

BELKNAP, J. Plaintiff was the owner of a quantity of cord-wood in the vicinity of the town of Eureka. He contracted with one Paquin to haul the wood to the town, and agreed to pay him one half of the wood he should haul for his services. Accordingly, Paquin hauled four hundred and sixty-four cords of wood. Fifty cords of this wood were deposited in the immediate neighborhood of the depot of defendant, eighty-five cords at a point in the town called "the Chinese wash-house," and the remainder (with which we are not concerned) at other places.

These two lots of wood were the property of the plaintiff, but defendant contends that it purchased them from Paquin under circumstances creating an equitable estoppel against further claim of ownership upon the part of plaintiff. This contention is resisted as to the eighty-five cords, upon the ground that defendant had notice of plaintiff's claim of ownership to this lot before it accepted it.

The only evidence tending to show that defendant had not accepted the wood were the declarations of Evarts, its superintendent, alleged to have been made after the time when this lot of wood had been deposited at "the Chinese wash-house," upon a demand therefor by plaintiff before the commencement of this action. There was no evidence of authority in the superintendent to make the declaration, except such as the title to his office implies.

Railway corporations enter so largely into the business transactions of the country, that courts should take judicial notice of the authority of their managing officers, upon the same principle that judicial notice is taken of the duties of officers of banks and other agents, whose authority is so generally understood as not to be the subject of inquiry. It is a matter of common knowledge that the superintendent of a railroad corporation is empowered to conduct its ordinary business transactions. The use of cord-wood is convenient, and, we may fairly say, indispensable, to the operations of railroads within this state. To receive such wood, and to declare whether it has been received, is, consequently, incident to the business of a railroad corporation, and the authority to determine matters of this nature must rest with some of its agents or officers. We assume that the officer charged with the conduct of defendant's ordinary business has the authority to determine so commonplace a matter as the receipt of cord-wood.

It is customary with railroad corporations to confer upon their officers and agents titles indicating and suggesting in general terms their authority to persons having business with the corporation. When an agent is clothed with a title implying general powers—as superintendent—the business public and courts may fairly presume he is what the corporation

holds him out as being. Webster says a superintendent is "one who has the oversight and charge of something, with the power of directing." An agent having the oversight and charge, with the power to direct, has a general and discretionary power within the scope of his agency. The law touching the liability of corporations arising from the acts of their agents has been greatly modified, as will be seen by reference to recent decisions.

In Adams M. Co. v. Senter, 26 Mich. 73, the court said: "The next question refers to the extent of Frue's authority, independent of specific and expressly granted powers. We are not satisfied that any testimony would be needed to show the extent of the ordinary powers of an agent in charge of such a mine. The authority of such officers must, within the usual range of business at least, be recognized judicially, like that of bank cashiers, vessel captains, and other known agents. The mining law recognizes agents by name, as known representatives upon whom process may be served. They are the persons who have the charge, personally, of the local business at the mines, and are necessarily to be treated as general agents, to do all that is fairly within the scope of corporate business in conducting the operations in that locality. The testimony of Mr. Palmer, which shows the usual range of such agencies, indicates no more than should be inferred. The business could not be conducted at all without a very wide discretionary power. There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual, in regard to the same business. A general agent needs no instructions within the range of his duties, and any limitations in his usual powers would not bind others dealing with him and not warned of the restrictions."

In Grafins v. Land Co., 3 Phil. 447, the president of an incorporated company was intrusted with the management of an enterprise. His authority was limited by the directors, and did not authorize him to render the corporation liable for the services of the plaintiff. These facts were established in defense, but the court said: "When a body, incorporated avowedly for a special object, intrusts its president, or other principal officer, with the management of the business for which its powers have been conferred upon it by the courts or the legislature, it necessarily gives him the air and aspect, and clothes him with the functions, of a general agent, and should not afterwards be allowed to say that his powers are in fact special, and not general, to the injury of those who have trusted him in the faith and credit of the assets and resources of the corporation. In general, those who deal with an agent are bound to ascertain the scope and extent of his authority, and can not go beyond it, for the purpose of charging the principal, even when they have been misled by their own credulity and the misrepresentations of the agent, that when a principal puts the agent forward as a general agent, or places him in a position where others are justified in the belief that his powers are general, the restrictions which may be imposed privately on the agent will be immaterial, except as between him and the principal, and can have no effect on the rights or remedies of third persons."

A similar question arose in Lee v. Pittsburg C. & M. Co., 56 How. Pr., and was discussed by the court:

"What general or special powers were by the board expressly conferred upon Mr. Mullin as such president and manager, or what power

inhered in those officers, we can only determine (in the absence of positive evidence) by inferences from such facts proved as throw light on this point, aided by the presumption that, as the chief executive officer and manager of the company, he must have been clothed with some powers and duties which, of necessity, pertained to these positions, as it was shown that the business for which the defendant was organized was the mining, shipping, and selling of coal; that it had mines in Pennsylvania, and large quantities for sale, which it sought to market in Buffalo and the neighboring province of Canada. We may fairly presume, further, that the defendant's president and manager had, by virtue of his offices, authority to make those contracts in defendant's behalf which it was necessary some agent should make for the prosecution of its business, and which the daily exigencies of that business might require. The hiring of operatives to carry on the work of mining coal, the making of contracts for the shipment of coal to the various markets, the employment of agents to receive and take care of coal at those markets, to attend to its sale and to collect and remit the proceeds, were necessary to the operations of the corporation; and it was also necessary that some agent should be clothed with authority to make such agreements. The public would have the right to assume that the president and manager of the company, claiming such authority, and exercising it, did lawfully possess it, and treat with him accordingly.

Upon similar presumptions all business men deal with the executive officers of banking, insurance, railroad, manufacturing, and other corporations, whose operations move the vast and complicated machinery of trade and commerce. Their boards of directors may, and no doubt often do, adopt rules and regulations defining the powers and duties of the various officers through whose agency the corporate powers and franchises are exercised. But such rules and regulations are to be found only in the minutes of the directors' proceedings, or other private records of the corporation. They are not published, nor do the public, with whom the officers of the corporation transact business, know or have the means of knowing what such rules and regulations are. And it often happens—so often as to be the rule rather than the exception—that the chief officers of a corporation exercise a very wide range of powers, virtually grasping the entire direction and control of all its operations, with the tacit consent and approval of the corporation, though it has never, by any direct vote or recorded act, defined the nature or extent of their authority.

It is therefore very difficult, if not impossible, for those having dealings with corporate bodies to determine, except by circumstances and inference, what authority such officers have, or, in case of litigation, to prove their authority by positive evidence. Ought not the same evidence upon which prudent business men ordinarily infer the existence of the authority, to be satisfactory to courts and juries? And would not the enforcement of more stringent rules embarrass and hinder the operations of trade and commerce, and prove vexatious and injurious to the interests of the corporations themselves?

These considerations led the court to the conclusion that defendant's president and manager was the officer who, in the ordinary course of business, would be expected to possess authority to employ the plaintiff, and plaintiff had the right to presume that the officer was so authorized: F. & M. Bank v. B. & D. Bank, 28 N. Y. 425; T. W. & W.

R. R. Co. v. Rodrigues, 47 Ill. 188; McKiernan v. Leuzen, 56 Cal. 61; Southgate v. A. & P. R. R. Co., 61 Mo. 89; In re the German M. Co., 19 Eng. L. & Eq. 591; Walker v. G. W. R. R. Co., 2 L. R. 228; Field v. N. Y. & A. S. M. Co., 59 N. Y. 644.

Further objection is made to the introduction in evidence of the admission of the superintendent, upon the ground that it was the statement of a past transaction, and formed no part of the *res gestæ*.

Plaintiff's theory is that the lot of wood of eighty-five cords was set apart for the defendant, but that defendant had not accepted it, and, therefore, the transaction was incomplete and continuing. In this view the declarations were made in the course of the transaction, and were admissible. Objection is also made that the evidence is insufficient to support the verdict. This objection is based upon the fact that plaintiff allowed Paquin to deal with the wood in such a manner as to lead defendant's agents to believe he owned it. This fact constitutes the estoppel pleaded by defendant.

One hundred and sixty cords of wood were in controversy. Plaintiff recovered judgment for the return of ninety-five cords of wood, or the value thereof. There was evidence tending to show that plaintiff was estopped from asserting ownership to the fifty-cord lot; that the corporation had notice of plaintiff's claim of ownership before it accepted the eighty-five-cord lot. The evidence upon these matters was conflicting. It was the province of the jury to determine these facts. With that determination we can not interfere. If defendant had notice of plaintiff's claim of ownership before its acceptance of the eighty-five cords of wood, plaintiff was entitled to recover them or their value. There was no controversy as to the fact that ten cords of other wood, belonging to the plaintiff, had been taken by defendant.

There being testimony to sustain each of these matters, it is evident that the evidence is not insufficient to sustain the verdict.

The judgment and order of the district court are affirmed.

State ex rel. Newnham *v.* State Board of Education.

Filed December 1, 1883.

State Board of Education, after It has Passed a Resolution prescribing a certain series of text-books, may reconsider its action and rescind such resolution at any time before the adoption of such books by the different school districts.

Application for a writ of *mandamus*. The opinion states the facts.

A. C. Ellis, for the relator.

Attorney general, for the respondent.

Leonard, J. Relator prays for the issuance of the writ of *mandamus* commanding respondent, the state board of education, to allow his child and all other children in the public schools of this state to use Appleton's school readers as text-books, and to take such steps as may be requisite for the introduction and use of said Appleton's school readers as text-books in the public schools of the state, and for the exclusion therefrom of Sheldon's readers.

The statute provides, that "the state board of education shall have a seal. * * * It shall be the duty of said board to hold semi-annual sessions for the purpose of devising plans for the improvement

and management of the public-school funds, and for the better organization of the public schools of the state, and such special sessions as may be called by the president. A full record of the proceedings of the board shall be kept by the secretary, and shall be embodied in the annnal report of the superintendent of public instruction:" Comp. Laws, 3322.

"The state board of education shall have power, and it is hereby made their duty, to prescribe and cause to be adopted a uniform series of text-books in the principal studies pursued in the public schools, to wit: Spelling, reading, * * * physiology; and no school district shall be entitled to receive its *pro rata* of the public school moneys unless such text-books as prescribed by the state board of education shall be adopted and used in all the public schools; * * * orthography, reading, * * * and geography shall be taught in all the public schools; and in each school above the grade of primary there shall be taught English grammar, * * * chemistry; and in such schools as the board of trustees may direct, algebra, * * * astronomy, and the elements of book-keeping, or such other studies as the board of trustees may direct; provided, that the text-books shall not be changed oftener than once in four years:" Comp. Laws, 3361.

It will be seen that by the first section of the statute quoted, the board of education has power to do at a special session any act that it may do at a regular or semi-annual session. It will be observed, also, that under the last section quoted the board has power, and it is its duty to prescribe and cause to be adopted a uniform series of text-books in the principal studies, including reading. No school district can receive its proportion of public moneys, unless it adopts and uses such text-books as are prescribed by the state board, and the text-books shall not be exchanged oftener than once in four years.

The only facts of this case necessary to be stated are these: On the first day of December, 1879, Sheldon's readers were in use in the public schools of the state. It is not shown just when they were prescribed as text-books by the state board, or when they were first adopted and used in the public schools. It does appear, however, that they had been in use six years prior to May 1, 1883, and also that, at its meeting held on the first day of December, 1879, the board did not intend any change in the readers used in the public schools until September 1, 1880. It is probable that the four years provided by the statute, during which the Sheldon readers could not be changed, did not expire, in the opinion of the board, until September 1, 1880.

To show the action of the board, we quote from its minutes:

"CARSON CITY, December 1, 1879.

"The board met, as per announcement in circular issued May 29, 1879, to consider the matter of text-books. Members all present. * * * Mr. Hatch moved to make a change of readers. Carried. Messrs. Kinkead and Hatch voted in the affirmative, and Mr. Sessions in the negative.

"Mr. Hatch next moved to select a series of readers for use in the schools of Nevada for the next four years, beginning September 1, 1880. Carried by the same vote as above. The vote was taken by means of open ballot, and Appleton's readers were adopted. * * *

"It was moved by Mr. Hatch, and carried, that the secretary be authorized to enter into a contract with D. Appleton & Co. for furnishing readers in accordance with the proposition of their agent, Mr. White,

and that in case of failure to fulfill said contract, the agreement thus entered into shall be null and void.

"It was moved and carried that the consideration of the arithmetics be postponed until the next meeting of the board, December 15th, proximo.

"The proposition of D. Appleton & Co. (which was accepted) is as follows. * * * JOHN H. KINKEAD, President.
D. R. SESSIONS, Secretary."

"CARSON CITY, December 3, 1879.

"Special meeting called to reconsider and review the action of the board at its previous session. Present, full board.

"Mr. Hatch moved to reconsider the action had in adopting the Appleton readers, and to defer any further consideration of a change of readers until next meeting. Carried unanimously.

"The board then adjourned to meet again on Monday, December 15th, proximo.

"N. B. There being no quorum present December 15, 1879, an adjournment was ordered, subject to call of the president.

"D. R. SESSIONS, Secretary."

We shall concede, for the purposes of this decision, that on the first day of December, 1879, respondent, the board of education, prescribed Appleton's readers as text-books for the public schools of the state, and that, if it did not have power to reconsider its action then had, it is now its duty to cause those readers to be adopted and used in the public schools for the period of four years.

The State ex rel. Flowers v. The Board of Education of the City of Columbus, 35 Ohio St. 368, is cited by counsel for relator as being a case on all fours with this, and we are urged to follow the decision there made as authority here.

The value of a decision of another state court depends greatly upon the reasons given in its support; but beyond this, when it is based upon a statute, before we can be influenced by the conclusion arrived at, it must appear that, as to material points, the statute there construed was similar to the one we have under consideration.

The school law of Ohio provided for a board of education for each district or city. In the case referred to, the board's powers and duties did not extend beyond the city of Columbus. These boards were required to hold regular meetings every two weeks, and were empowered to hold such special meetings as they might deem necessary: 70 Ohio Laws, 197.

The statute also provided, that "each board of education shall determine the studies to be pursued and the text-books to be used in the schools under their control, *and no text-book shall be changed within three years after its adoption without the consent of three fourths of the members of the board of education given at a regular meeting:*" 70 Ohio Laws, 209, sec. 52.

The italics are ours. By the next section the board of education of each school district was given the management and control of the public schools of the district. They had power within their district such as our law gives to the board of education of the state and the trustees of a district.

Under that law the court said: "The legal effect of the action of the board, on the twelfth of August, must be ascertained from a construction

of section 52 of the statute, 70 Ohio Laws, 209, under which its action was had. The first clause of the section, which alone bears on this question, reads as follows: 'Each board of education shall determine the studies to be pursued and the text-books to be used in the schools under their control; and no text-book shall be changed within three years after its adoption, without the consent of three fourths of the members of the board of education given at a regular meeting,' etc.

"The clause quoted is divisible into two sentences, each complete in itself. The first confers power on the board to act upon two subjects: the studies to be pursued, and the text-books to be used in the schools. The second is a conditional restriction on the power of the board over the latter subject, when it is within the condition; and when the restriction is inapplicable, the power of the board over both subjects is equal and complete. In this case the restriction was inapplicable to the action of the board on the twelfth of August, for the reason that more than twice three years had then elapsed since the board had adopted the Cornell geographies as the text-book to be used in the schools. Consequently, at the date last named, the board could legally exercise, without restriction, all the powers conferred by the first sentence in the clause above quoted. Under this, the board is to determine the text-books to be used.

"What is the meaning of the word 'determine,' as here used; or what operation and effect ought to be given to it? When taken in connection with the purposes of the law * * * and the subject-matter to which it relates, * * * it is manifest that the word 'determine' must mean something more than investigating and arriving at a conclusion by mental processes, although these are embraced. Official action is contemplated and required to give a practical effect to the word, and the injunction to do this is mandatory upon the board; and in order that those who must obey may know the will of the board, it is necessary that it should be declared in such a way that it may be known.

"The usual mode by which the board of education makes known its will on any subject over which it has control is either by motion, or by a resolution passed by the board at an official meeting, and entered upon the record of its proceedings, where it may be seen by any party interested. All this was done in the case before us. On the fifteenth of July, 1879, the committee on text-books made a report to the board on the subject; among others, of the text-books on geography then in use, and those which they recommended for use in the future, in which they give their reasons for excluding the Cornell series, then in use, and substituting in their stead the Intermediate, or No. 2, and the primary geographies of the Eclectic series. If the report, as made, had been adopted, its operation would have been to exclude the condemned series then in use, and to introduce those recommended into the schools to be thereafter used. By official action, that part of the report referring to new geographies was laid over for two weeks.

"On the twelfth of August, 1879, at a regular meeting of the board, the report was taken up, when a proposition * * * was presented, stating the terms upon which they would furnish Harper's geographies for use in the schools. On motion of a member, the name of Harper's geographies was substituted in the report of the committee for that of the Eclectic series. * * * And thereupon the report of the committee, as amended, was adopted. * * *

"Whatever the legal effect of this action may be, it at least clearly

shows that the board thereby intended to exercise the powers conferred upon it by law, in reference to the text-books to be used in the schools on the subject of geography. It appears to us that the legal effect of this action of the board, by whatever name it may be called, was the adoption of Harper's geographies as the text-books on that subject, to be thereafter used in the schools under its control, until they are lawfully changed.

"When the action of the board was consummated, on the twelfth of August, its power over the subject was exhausted for the period of three years from that date, unless the text-book so adopted should be changed within that time by the consent of three fourths of the members of the board, given at a regular meeting thereof. The three years begin to run from the date of the official adoption of a text-book, and not from the time such book is introduced and brought into actual use in the schools."

The court, therefore, decided that the bare majority vote, on the twenty-sixth of August, 1879, reconsidering the vote of August 12th, adopting Harper's geographies, was a nullity, because the action of the board on the twelfth was an adoption of Harper's, and the statute declared that they should not be changed within three years after their adoption. The last conclusion necessarily followed the first. If the determination by the board, that a text-book should be used, was its adoption, then, of course, the three years began to run from the twelfth of August, and the power of the board over the subject for three years from that date was exhausted, for the law so declared. If the action of the board on the twelfth of August constituted an adoption, as the court held, it is plain that it could not, twelve days or one day thereafter, reconsider its former action, and substitute some geography other than Harper's, in the face of a law declaring that no text-book should be changed within three years after its adoption.

But there is an important difference between the Ohio statute and ours. The reason why the Ohio court said the board could not reconsider its former vote or adoption, was because the statute prohibited further action for three years after August 12th, the time of adoption. There is no semblance of such prohibition in ours. Here text-books can not be changed oftener than once in four years. There they could not be changed within three years after their adoption, and the action of the board alone constituted an adoption.

Under our law, it is the board's duty to prescribe, and cause to be adopted, a text-book in reading. On the first of December, 1879, let us say, it prescribed Appleton's series of readers, for four years, commencing September 1, 1880. Nothing further was done prior to December 3d, when the former action was reconsidered, if the board had power to do so.

Before the reconsideration the board did nothing furthering their adoption, which must be done by the districts, and not by the board. The board can prescribe rules governing districts in the matter of text-books. It can declare a time when the different districts shall discard the old series and adopt and use the new. And if any district fails to comply with a reasonable rule in this respect, it must pay the penalty prescribed by the statute; it will not be entitled to receive its *pro rata* of public school moneys until it does comply.

The different districts must adopt the books prescribed by the board. But if, before they are adopted, the board concludes that it has made an unwise prescription, we know of nothing in the law forbidding a recon-

sideration. In saying this, we have no reference to any contract made by the board for the purchase of books prescribed, for it is admitted that such contract could not be enforced by this proceeding, in any event.

The only statutory limitation upon the board's power is, that text-books shall not be changed oftener than once in four years. The board's duty is to prescribe, and cause to be adopted, a uniform series of text-books. The statute makes the last duty as imperative as the first. The complaint made in this case is, that the board fails to cause the adoption of text-books by it prescribed. By prescribing a text-book simply, the board's duties are only half done. It must also see that the prescribed book is adopted, and thereafter, for four years, it can not be changed. This is the sensible view of the statute. The law declares no means by which the board shall cause the adoption of text-books, but the duty being enjoined, a power is given to use such reasonable means as are necessary for its proper performance. By a judicious exercise of this power, the board need not experience much difficulty in performing their entire duty.

We find no fault with the Ohio decision under the statute there in force. We only say that under ours it is not in point.

Counsel for relator refers also to People v. The State Board of Education, 49 Cal. 684, where it was held that the board could not change text-books once adopted as a part of a uniform series without giving six months' notice as required by law. The question there decided is not involved in this proceeding, but an examination of the statute there referred to shows a marked difference between it and ours.

The eighty-eighth section of the California statute provided that the state board of education should prescribe and adopt a uniform series of text-books, and that any books once adopted in the state series should be continued in use for four years. Indeed, the substance of the statute is that when the board once adopts a text-book, it should not thereafter change the same for four years: See Cal. Stat. 1869–70, p. 847.

There, as in Ohio, the board alone adopts the text-books, and thereafter they can not be changed for the period stated, except, in Ohio, by consent of three fourths of all the members at a regular meeting; while here, after the board prescribes the book, the district must adopt it as directed by the state board; and until both are done, there is no change in the text-books in the sense of our statute.

Mandamus denied.

STATE ex rel. TRUMAN *v.* MCKENNEY, Judge, etc.

Filed December 1, 1883.

DISTRICT COURT HAS NO JURISDICTION TO TRY AN INDIAN BELONGING TO A TRIBE which is recognized and treated with as such by the federal government, having its chief and tribal laws, for killing another Indian belonging to the same tribe.

NEITHER THE GENERAL LAWS OF THE TERRITORY NOR OF THE STATE, DEFINING CRIMES and providing for their punishment, were intended to apply to crimes committed by one Indian against another of the same tribe.

POLICY OF THE FEDERAL AND STATE GOVERNMENTS TOWARDS THE INDIAN TRIBES within their borders, and the status of such Indians stated and examined.

APPLICATION for a writ of *mandamus*. The opinion states the facts.

D. S. Truman, district attorney for Nye county, *W. H. Davenport*, attorney general, and *T. Coffin*, United States district attorney for Nevada, for the relator.

J. T. Lamb, for the respondent.

LEONARD, J. Relator seeks by *mandamus* to compel respondent to proceed to the trial of a Shoshone Indian, named Spanish Jim, for the alleged murder of an Indian girl in the town of Belmont, in Nye county, in March, 1883. Respondent admits that he is the duly elected and qualified judge of the fifth judicial district court; that said alleged crime was committed within the jurisdiction of said court, if at all; that the said Spanish Jim has been indicted by a lawful grand jury of Nye county, charged with the crime of murder; and that such indictment is now of record in the district court of the fifth judicial district in and for Nye county.

Respondent refuses to accept the plea of said Spanish Jim, or to try said cause, because the defendant is a Shoshone Indian, born in subjection and obedience to his own tribal laws, and, at the time the alleged offense was committed, was living with the Shoshone tribe or nation, in subjection to, and recognizing the authority of, the chiefs and laws of said tribe; and the Indian girl alleged to have been killed was a Shoshone Indian, born in subjection and obedience to said tribal laws, and was, at the time of the alleged killing, living with said tribe, in subjection to, and recognizing the authority of, the chiefs and laws thereof; that by reason of the foregoing facts the fifth judicial district court, or judge thereof, has no jurisdiction of crimes committed by one Indian against another when both are members of an organized tribe having laws for the government of their own internal affairs. Able arguments in support of relator's views of the law have been filed by the district attorney of Nye county, the attorney general of the state, and the United States district attorney for Nevada. We have carefully examined all the authorities cited, which are numerous, as well as all others which an extended research has disclosed, and will now express our views upon the question presented.

Let it be remembered that what follows is intended to apply to the case before us, where one Indian belonging to a tribe which is recognized and treated with as such by the government, having its chief and tribal laws, is accused of killing another of the same tribe; and let it be borne in mind especially that what we say does not refer to a case where one Indian injures the person or property of another, not an Indian, or *vice versa*. It does not refer to a case where an Indian leaves his tribe and joins the whites. We entertain no doubt that the state courts, if any, have exclusive jurisdiction.

In 1864, congress passed an act authorizing the inhabitants of that portion of the territory of Nevada described therein to form for themselves, out of said territory, a state government, and providing that said state, when formed, should be admitted into the Union "upon an equal footing with the original states in all respects whatsoever:" Enabling Act of Congress, 13 Stats. at Large, 30.

The state was formed in pursuance of the provisions of the enabling act, upon an equal footing with the original states.

Upon these facts the United States courts, at least, have not jurisdiction: United States v. John Ward, McCahon, 199; United States v. Ward, 1 Woolw. 21; United States v. Yellow Sun, 1 Dill. 272; United States v.

Cisna, 1 McLean, 254; United States v. Stahl, 1 Woolw. 192; United States v. Martin, 8 Saw. 473; United States v. Bridleman, 7 Id. 243; United States v. McBratney, 14 Otto, 621; United States v. Leathers, 6 Saw. 17.

Nor have we any doubt, should such a course be deemed advisable by the legislature, that the state courts may be given jurisdiction over crimes committed by one Indian against the person or property of another Indian, by extending the criminal laws over them: Caldwell v. The State, 1 Stew. & P. 327; State v. Foreman, 87 Yerg. 256; United States v. Yellow Sun, 1 Dill. 272; State v. Tassels, Dudley (Ga.), 229.

This, then, is the principal question presented for our consideration: Do our general laws upon crimes and their punishments apply, or were they intended to apply, to Indians in the situation of the accused? or is it true that Indians so situated are not amenable to those laws until they are made so by an affirmative act of the state legislature? Although a state has the right and power to take jurisdiction in a given case, it can not be exercised by courts, except in pursuance of a provision of the constitution that is self-acting, or an act passed by the legislature.

The duty of courts is to expound and enforce laws: they can not make them. Is there any law of this state to which the accused is amenable for the offense charged? There is no statute extending the criminal laws over the Indian tribes, or the individuals thereof. The statute under which the indictment was found is the general act concerning crimes and punishments, Stat. 1861, p. 58, which is as follows:

"Murder is the unlawful killing of a human being with malice aforethought, either express or implied."

"Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the state prison for a term not less than ten years, and which may be extended for life."

An Indian is a human being and a person. The Indian girl alleged to have been murdered was a human being, and the accused is a person. If we stick to the letter of the law, we must find that the fifth judicial district court has jurisdiction. Our duty, however, is to ascertain the intention of the legislature in passing this law.

In doing this we must follow certain well-settled rules of construction that are peculiarly applicable to the present case:

"The court should put itself in the position of the legislature—stand in contemplating the statute where the makers stood—the better to discover the reason and scope of the provision. They who voted for the measure must have had in mind a meaning for the enacted words; and the meaning thus perceived must be given them by the court. If the statute is old, or if it is modern, the court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meaning which the language, as then used, and the other considerations require. The court knowing the present law knows also its history and the prior law. Such prior law, the legislature, being presumed to know it, must have had in mind in enacting the statute; therefore, in the construction the court should take it into account."

"They do not close their eyes to what they know of the history of the country and the law, of the condition of the law at the particular time, of the public necessities felt, and other like things:" Bishop on the

Written Law, sec. 75 *et seq.* "The exercise of even doubtful power will not be attributed to the legislature; therefore construction will lean against it:" Id. 82. "The courts will presume the legislature intended its acts to be reasonable, constitutional, and just; and when possible, consistently with any fair rendering of the words, will so construe them as not to make them otherwise. But this rule will not be carried to the extent of giving the enactment a meaning plainly repugnant to its terms:" Id. 90.

The last sentence quoted is explained by the author under section 145, where he says: "Interpretation can not, without sufficient indications in the words employed, aided by such surroundings as the law permits the court to look into, import words into the statute."

Says the court, in United States v. Kirby, 7 Wall. 482: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exception to its language which would avoid results of this character. The reason of the law in such cases should prevail over the latter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edw. II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'"

Tested by the above and other well-settled rules of construction, let us endeavor to ascertain whether in the passage of the general criminal statute, under which the accused was indicted, the territorial legislature intended to include within its scope Indians in his situation. If we find that such intention did not exist, then it will not be necessary to consider the question of power on the part of the legislature to do so, except so far as an examination of the latter question may assist us in arriving at a proper solution of the former.

If the legislature did not intend to legislate concerning acts committed by one tribal Indian against another, then the courts of this state have not jurisdiction of the present case, unless by the constitution or some subsequent legislation jurisdiction has been extended so as to include it. In other words, unaffected by any valid subsequent proceeding giving jurisdiction, if the legislature of 1861 did not so intend, the statute must be construed as though Indians like the accused had been excepted in terms.

The Indian question was deemed of such importance by congress, when Nevada was admitted as a territory, in March, 1861, that in the organic act it was provided, "that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unquestioned by treaty between the United States and such Indians, * * * or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never been passed."

It also provided that the governor of the territory should perform the duties and receive the emoluments of superintendent of Indian affairs; that the several counties should have representatives in the legislature in the ratio of their population, "Indians excepted." Section 6 provided that the legislative power of the territory should extend to all rightful subjects of legislation, consistent with the provisions of that act; and by section 16 it was provided that the constitution, and all laws of the United States which were not locally inapplicable, should have the same force and effect within the territory as elsewhere within the United States.

The conditions stated in the organic act were accepted by the territory, and the legislature had no right to pass laws in violation of their spirit. Courts must presume there was no intention to do so. Examining the organic act, we call attention, first, to the provision retaining the authority in the government to make any regulations respecting the Indians in the territory, their lands, property, or other rights, by treaty, law, or otherwise, which it could have made if the act had not been passed; or, in other words, if the territory had not been organized.

Expressed in a few words, the government, in terms, retained the right to conduct Indian affairs, among themselves at least, in its own way, as has been its custom in forming temporary governments, and as it was bound to be under the law: R. S., secs. 1839, 1840. If this power was retained as stated, it need not be said that the territory did not possess it. It could not be in both governments at once: The Kansas Indians, 5 Wall. 755.

It is not necessary to restate history here in relation to the Indian tribes. It is enough, perhaps, to say that, from the beginning, the government has pursued a policy concerning them that has been an exception to all other people of the earth. We may admit that they might have been subjected to the same laws as have been passed for the government of other persons, but such has not been the policy adopted. They claimed the right of self-government in matters appertaining to themselves, and did not desire to become a part of the body politic. They have had laws and chiefs of their own making and choosing, and their right to have them has been recognized by the constitution, the laws and treaties of congress, and the decisions of the courts.

Such was their condition when our organic act was passed; and under the circumstances stated, if congress intended to permit the territory to do away with their cherished customs, to declare, as to themselves, what acts should constitute crimes, and prescribe punishments for the same, then it inserted in a most important document words which utterly failed to express its meaning. It said that all rights of persons and property then pertaining to the Indians of the territory should not be impaired so long as such rights should remain unextinguished by treaty, and that the government of the United States should have authority to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it might have made if the territory had not been formed.

What rights of person and property did congress intend to preserve unimpaired? Evidently not those alone which had been established by treaty, because all the Indians in the territory were included in the protecting clause, and not all the tribes had treaty rights. So far as we are advised, the first treaty with the Shoshones in Nevada was concluded in

October, 1863. Congress could not have referred to treaty rights only. It did not intend to guard Indians against lawlessness on the part of the territory.

Surely it could not have been considered necessary to provide against the commission of acts of violence upon their persons or property, for congress was dealing with a free people, capable of governing themselves, possessing intelligence and humanity, which are prerequisites in the formation and sustainment of enlightened governments.

In 1870, the senate judiciary committee, of which Mr. Carpenter was chairman, were instructed by resolution "to inquire into and report to the senate the effect of the fourteenth amendment to the constitution upon the Indian tribes of the country, and whether, by the provisions thereof, the Indians are not citizens of the United States, and whether thereby the various treaties heretofore existing between the United States and the various Indian tribes are, or are not, annulled." The report is No. 268, and is found in senate reports of the third session, forty-first congress.

It commences by saying: "That in the opinion of your committee the fourteenth amendment to the constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States, and does not annul the treaties previously made between them and the United States. The provisions of the amendment material to this question are as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. Representation shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' The question is, whether the Indians are subject to the jurisdiction of the United States, within the meaning of this amendment, and the answer can only be arrived at by determining the status of the Indian tribes at the time the amendment was adopted."

The report is lengthy, learned, and exhaustive; but we must content ourselves with short and unsatisfactory extracts therefrom. The committee say: "The principle must now be recognized and acted upon that the Indians, after the European discovery and settlement of their domain, lost all sovereignty over it, retaining only the right of occupancy until their title should in some way be extinguished, and the right to regulate, without question, their domestic affairs, and make and administer their own laws; provided, in the exercise of such right, they should not endanger the safety of the governments established by civilized man. Beyond this limit the pretensions of European settlers never extended; but to this extent the principle referred to was recognized and enforced; and, although the Indians were thus overshadowed by the assumed sovereignty of the whites, it was never claimed or pretended that they had lost their respective nationalities, their right to govern themselves, the immunity which belongs to nations in the conduct of war, or any other attribute of a separate political community."

They then quote from treaties, acts of congress, and decisions of United States and state courts, to prove that the policy of our government has been the same, and say: "In the opinion of your committee, the constitution and the treaties, acts of congress and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never

been subject to the jurisdiction of the United States, in the sense in which the term 'jurisdiction' is employed in the fourteenth amendment to the constitution. The government has asserted a political supremacy over the Indians, and the treaties and laws quoted from present these tribes as 'domestic, dependent nations,' separated from the state of the Union within whose limits they are located, and exempt from the operation of state laws, and not otherwise subject to the control of the United States than is consistent with their character as separate political communities or states. Their right of self-government, and to administer justice among themselves, after their own fashion, even to the extent of inflicting the death penalty, has never been questioned; and while the United States have provided by law for the punishment of crimes committed by Indians upon white men lawfully within the reservations, the government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country. Volumes of treaties, acts of congress almost without number, the solemn adjudications of the highest tribunal of the republic, and the universal opinion of our statesmen and people, have united to exempt the Indian, being a member of a tribe recognized by and having treaty relations with the United States, from the operation of our laws and the jurisdiction of our courts. Whenever we have dealt with them it has been in their collective capacity as a state, and not with their individual members, except when such members were separated from the tribe to which they belonged; and then we have asserted such jurisdiction as every nation exercises over the subjects of another independent sovereign nation entering its territory and violating its laws."

And in report No. 367, forty-third congress, first session, the committee on Indian affairs, to whom was referred the bill conferring exclusive jurisdiction upon the United States courts, and for the punishment of crimes committed by and against Indians, reported as follows: "That it is doubtful whether congress has power to confer exclusive jurisdiction upon the courts of the United States over Indian reservations within the several states without their consent. This difficulty does not exist in the territories, where the authority is ample and undisputed. Your committee are further of opinion that the attempt to confer jurisdiction upon the courts of the United States over offenses committed by one Indian against the person or property of another, might lead to interminable litigation, and subject the government to great difficulty and expense in the determination of disputes which could more readily be adjusted by the agents and superintendents having the Indians in charge. The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecutions for their violation." See also 2 Story on Const., sec. 1933.

Mr. Wharton, in his Conflict of Laws, under the head of "Adoption in a North American Indian tribe," sec. 252, says: "He [the person adopted] may be indicted, it is true, in state or territorial courts for crimes committed by him on persons not of his tribe; but for offenses against members of his tribe, he is only justiciable before the tribal authorities. So far as concerns his domestic relations, he is governed not by

territorial, but by tribal, law. * * * In short, while he retains his subjection to the territorial government (state or federal, as the case may be), in all that relates to transactions outside of the tribe, so far as concerns transactions within the tribe, his allegiance is to the tribe, and he is governed exclusively by tribal law."

The organic act for Idaho territory is precisely like ours upon this question. It contains the same provisos for the protection of Indian rights, the retention of the right of the government to make any regulations respecting the Indians, their lands, property, or other rights; and also that no territory shall be included therein which, by treaty with any Indian tribe, is not, without consent of the tribe, to be included within the territorial limits or jurisdiction of any state or territory.

In Langford v. Monteith, 12 Otto, 147, after referring to the organic act, the court said: "This court, in Harkness v. Hyde, 98 U. S. 476, relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones, like that with the Shawnees, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this, it seems, we were laboring under a mistake. Where no such clause, or language equivalent to it, is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the territory, and subject to its jurisdiction, *so that process may run there, however the Indians themselves may be exempt from that jurisdiction.*" The italics are ours.

In Boyer v. Dively, 58 Mo. 529, the court say: "The constitution of the United States, and the statutes passed in pursuance thereof, undoubtedly recognized the Indian tribes as a peculiar people, having relations to the government totally different from citizens of the states. Although located within the state lines, yet so long as their tribal customs are adhered to, and the federal government manages their affairs by agents, they are not regarded as subject to the state laws, so far, at least, as marriage, inheritance, etc., are concerned. * * * The customs and laws of the Indians, then, prevailed among the remnants of tribes in 1829 and 1830, and would continue unless positively changed by the legislature of the state. No such legislation was attempted, and it is useless to inquire, if it had been, whether it would have been valid." To the same effect are Wall v. Williamson, 8 Ala. 51; Jones v. Laney, 2 Tex. 348; see also Fisher v. Allen, 2 How. (Miss.) 611; Dole v. Irish, 2 Barb. 642; Morgan v. McGee, 5 Humph. 14.

Again: the governor, by the organic act, was made superintendent of Indian affairs throughout the territory. Under the law he performed such duties as were, or might be, assigned to him: R. S., sec. 2050.

There were Indian agencies in the territory. The limits of each agency were established by the secretary of the interior, either by tribes or geographical boundaries: R. S., sec. 2066. It was each agent's duty, within his agency, to manage and superintend the intercourse with Indians agreeably to law, and execute and perform such regulations and duties, not inconsistent with law, as might be prescribed by the president, secretary of the interior, the commission of Indian affairs, or the superintendent of Indian affairs: Id., sec. 2058. The president was empowered to discontinue any agency, or transfer it to such other place or tribe as the public service might require: Id., sec. 2059. All persons employed in Indian affairs were prohibited from having any interest or concern in any trade with the Indians, except for or on account of the United States: Id., sec. 2078; see also sec. 1840.

Without making further references or quotations, we have shown, we think, that upon the admission of Nevada as a territory, the United States did not intend to yield or divide its authority over the Indians in their domestic affairs; that the territorial legislature had no right to exercise it, and the presumption is that it did not intend to do so. That there was no such intent is indicated by the history of the country at the time and subsequently. In 1861 the Indians here were savages, in name and fact. They were entirely unacquainted with the laws of civilized countries; they were governed by their own. Their wishes were not consulted in the making or execution of the laws. They eked out a miserable existence by hunting, fishing, begging, and sometimes stealing. They neither wanted nor had intercourse with the whites. Some were peaceable, others aggressive and warlike. At times, subsequent to the passage of the crimes act, they stole bands of cattle, and drove them away. They killed inoffensive white men. For these acts, even, they were not apprehended and dealt with according to our laws, so far as we know, although they might have been: See Memorial to Congress by the Legislature of 1862, Stat. 1862, p. 196. It admits of serious doubt, at least, whether it would be good policy even now to subject Indians, as to their own matters, to our laws; but it would be less open to objection now than it would have been in 1861. To have done so then would have been "cruel and absurd:" Wharton's Confl. L., sec. 9.

Mr. Otis, in his book on the Indian question, published in 1878, concludes that we should sweep away the tribal organizations and subject the Indians to territorial law. But he admits that the codes of civilized states will not answer for this purpose. Continuing on his conclusions, Mr. Wharton, in a note at sec. 253, says: "Waiving the question of our rights to destroy, under the constitution, tribal sovereignty, it will be a task exceedingly difficult to frame a code to which Indians can be properly subjected."

It is a well-known fact that from 1861 to the present time, as to crimes committed against each other, Indians have not been subject to our criminal laws. Eleven legislatures have met without endeavoring to change the practice. If petitioner's theory is correct, is it not strange that during all these years courts and grand juries have neglected to perform a sworn duty? Is it not rational, at least, to conclude that their understanding has been that the general criminal laws were not intended to apply to such cases? And if this is so, should not the contemporaneous and continuous construction of the statute by courts, grand juries, and legislatures have great weight with courts in deciding the question now before us?

The Shoshone Indians, like other tribes, had and have their own laws and customs in constant exercise in relation to marriage and divorce. Polygamy among them is common. If so inclined, they may have as many wives as their circumstances justify: Bancroft's Native Races, vol. 1, p. 436. Did the legislature of 1861 intend to bring them within the laws of marriage and divorce, husband and wife, and bigamy? We can not think so.

Our opinion is, that congress intended to and did protect the Indians in the right, there pertaining to them, of self-government in their domestic affairs. At any rate, as to any follies among themselves, or crimes committed by one against another, it proposed to pursue its own course in its own way. The territory had a right to subject tribal Indians, like

other persons, to punishment for crimes against its own citizens: Wharton's Confl. L. 252. This was necessary for its own protection, and the organic act did not forbid its exercise. Their right to self-government did not extend beyond acts among themselves.

Undoubtedly, as before stated, the words of the statute under consideration are broad enough to include tribal Indians; but the words "all" and "every" are often restrained in meaning by their context or by the general object of the provision: Bishop on the Written Law, sec. 102.

In Phillips v. The State, 15 Ga. 519, it is said: "True, it [the statute] says that in all cases where a levy is made, etc. One is amazed, in casting a glance over our statute book, to find how often this form of expression occurs, frequently signifying, as here, not absolutely all, but all of a particular class only. Indeed, it seems to be common to all writings, lay as well as legal, sacred as well as profane. And the generality of the phrase is frequently to be restrained in the act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the legislature. Here it means in all cases where the claimant is in possession of the property he shall not be deprived of it, but it shall be left with him." Without quoting therefrom, we make particular reference, in this connection, to Kennedy v. Gris, 25 Mich. 84; and see Davis v. M. O. & R. R. Co., 27 Ark. 565.

Here the word "every," as used in the general crimes statute of 1861, as to their domestic affairs, should not be held to include Indians living in tribes recognized by the government, and under the dominion of tribal laws.

It is now necessary to consider whether or not the law remained the same at the time of the alleged homicide in this case. We have seen that the statute under which the indictment was found remains as it was when passed, and that we have no statute extending the laws of the state, civil or criminal, over the Indians. At most, to the above statement, there is, so far as we know, but one exception, and that is the statute of 1881, p. 29, permitting all persons of sound mind to become witnesses.

It must be true, then, that prior to the adoption of our constitution the criminal laws did not embrace offenses charged against Indians in the situation of the accused. Was any change wrought by the constitution? Section 2 of article 17 provides, that "all laws of the territory in force at the time of the admission of this state, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." The laws mentioned were to remain in force. They continued as they then were, having the same scope, force, and effect; and there is no repugnancy between the statute, as we interpret it, and the constitution.

There is nothing in the constitution indicating a desire on the part of the framers to bring tribal Indians within the purview of the crimes act. They knew that the domestic affairs of the Indians had not been interfered with under the territorial government, and they expressed no dissatisfaction thereat; but, on the contrary, they said this statute should remain in force until the legislature should change it. And should we look into the constitutional debates we should find nothing indicating such a desire. But see Const. Debates, 145.

Nor has anything been done by the state legislature. In 1873 the legislature authorized certain state officers to contract for the purchase

of Bonnifield and Healy's compilation. The object and effect of the compilation was merely to collect and arrange, in convenient form, the statutes then in force. No legislative action was taken upon each law contained therein, or upon the whole as collected and arranged. This is evident from the compilers' preface, the arrangement of the statutes, and the law authorizing a purchase: Comp. Laws, 4240. Such has been the understanding of courts and attorneys, and it is correct. Constant reference is still made in practice to different statutes prior to 1873, as well as to the complied laws.

Before closing this opinion, it is proper to consider certain decisions relied on by counsel for petitioner in support of this application. With one exception, none of them will be found to conflict with this opinion. The many cases cited wherein Indians were accused of committing crimes against white men, or the reverse, are not in point, of course, and in reading them this fact must be kept in mind.

In passing, let us remark that if, under the facts of this case, the theory of petitioner is correct, it is a little strange that in all the books, in the multitude of cases that have arisen out of the Indian question, only four have been found by the industry of court and counsel where one Indian has been prosecuted for an act committed against the person or property of another. The first is an able and exhaustive opinion in State v. Foreman, 8 Yerg. 256; but there is nothing in that which conflicts with the views here expressed. The state of Tennessee was admitted into the Union in 1796, "on an equal footing with the original states, in all respects whatever." In 1833 the legislature extended the civil jurisdiction of several counties, so as, by the extension of the limits thereof, to include the country within the occupancy of the Cherokee Indians which lay within the boundaries of the state.

The statute also gave the courts jurisdiction of three crimes committed within the Indian territory—murder, rape, and larceny—but allowed to the Indians their usages and customs in all other respects. The question before the court was, whether the state legislature had power, under the treaties and laws of the United States, to pass the statute, and the court held that it had.

There, there was a state law which, in terms, extended the state's jurisdiction over the Indians, in a state admitted on an equal footing with the original thirteen, without any restrictions in the act of admission. Here, there is no such law, and the general law was not intended to include tribal Indians, like the accused. That case would be authority if our state legislature had extended the territorial crimes act, and the validity of the extending statute was now questioned.

In State v. Tassels, Dudley (Ga.), the facts were the same, substantially, as in Foreman's case. It simply involved the validity of an act of the state of Georgia, one of the original thirteen, extending the laws of the state over the territory inhabited by the Cherokee Indians and the Indians themselves: See the Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. The State of Georgia, 6 Id. 515.

In State v. Ta-cha-na-tah, 64 N. C. 614, the defendant, a Cherokee, was convicted of manslaughter, in 1870, for killing another Indian, and the supreme court held that Cherokee Indians were subject to the criminal laws of the state. The point was disposed of in these few words: "*Prima facie*, all persons within the state are subject to its criminal laws, and within the jurisdiction of its courts; if any exception exists it must be

shown. On examination of the treaty of New Echotah, Georgia, on the twenty-ninth of December, 1835, between the United States and the Cherokee Indians, we find that by article 12 it was provided that individuals and families who were averse to moving west of the Mississippi river might remain and become citizens of the states where they resided. Our civil laws have been extended over these Indians, at least ever since 1838: Rev. Code, c. 50, sec. 16; and this statute applies as well where the contract is between two Indians as where one of the parties is white: Lovingood v. Smith, 7 Jones, 601. Unless expressly excepted, our laws apply equally to all persons, irrespective of race."

North Carolina was one of the original thirteen. When the revised code of that state was passed in 1838, under which the defendant was convicted, Rev. Code, 203, 619, the state had power, we presume, to include Indians within the scope of its laws. No facts are stated showing that the legislature did not intend to do so; but on the contrary, section 16, chapter 50, referred to in the opinion, shows affirmatively that contracts with Indians and between Indians might be enforced if made in writing and subscribed by two witnesses. In 1838, the state was old, and the Cherokees were intelligent in comparison with our Indians in 1861 or now.

If the legislature of this state, having the right so to do, should now pass a crimes act, like the one in force, we might hesitate, at least, before declaring that the general words were not intended to include all persons. But in ascertaining the legislative intent in enacting a law, there is a marked distinction between a statute passed when the legislative power so to do is unrestricted, and a similar one enacted while that power is curtailed. In one case the words used would be construed, ordinarily, according to their natural import, while in the other it would be presumed, if possible, that the legislature did not intend to violate in spirit or letter the restricting provisions. The organic act provides that no tax shall be imposed upon the property of the United States. The legislature of 1861, in the revenue law, exempted such property from taxation. But if it had not done so, courts must have presumed that, in using the words, "all property * * * shall be subject to taxation," it was not intended to tax the property of the United States, because such action would have been illegal.

We do not think the North Carolina decision, rendered under the circumstances stated, militates against our views. The same is true of State v. Doxtater, 47 Wis. 278. Restrictions substantially like those in our organic act concerning Indians were placed upon Wisconsin when a territory, but they were taken off in admitting the state in 1846. In 1849 the state legislature repealed the territorial crimes act, and passed the one contained in the revised statutes of Wisconsin for 1849: See pp. 682, 747. Besides, in Doxtater's case, although he was an Indian, the woman with whom he was accused of committing the crime charged was a white person.

It must be conceded that the conclusion reached by the court in Hunt v. The State, 4 Kan. 59, decided in 1866 (before the decisions in the Kansas Indian cases, 5 Wall. 735), is opposed to ours. In that case, the defendant, a member of the Wea tribe, killed another member of the same tribe. This tribe, with others constituting what was known as the "United Tribes," had a tribal government and maintained treaty relations with the United States. The organic act admitting the territory

of Kansas, in 1854, as well as the act of admission as a state, in 1861, contained provisos substantially like those concerning Indians in our organic act; although the last-named act also declared that Kansas was admitted into the Union on "an equal footing with the original states."

The statute under which Hunt was convicted was a general law enacted by the territorial legislature, and the constitution contained a provision continuing territorial laws in force until they should expire by limitation or be repealed by the state legislature.

In 1860 all Indians in Kansas territory, to whom lands had been set apart in severalty or by families, and who had received patents therefor from the United States, were, by legislative enactment, declared to be citizens of the territory; provided nothing in said act should be construed as conferring the right of suffrage on any Indian. They were, however, authorized to sue and be sued in all courts of law and equity: Acts of 1860, c. 74. The Wea Indians held their lands as stated in this statute: Kansas Indians, 5 Wall. 757. To what extent, if any, the statute referred to influenced the court we are unable to say. But, at any rate, the decision was based solely upon the proposition that Indians, even as to acts affecting themselves only, were subject to the general criminal laws of the state, just like people coming from foreign countries like France, Spain, and Portugal.

With all respect to the learned tribunal that rendered the decision, we suggest, that whether this proposition is true or not depends upon many facts and circumstances before referred to, which apparently were not considered, and certainly not discussed.

In the case of Blue Jacket v. The Commissioners of Johnson county, 3 Kan. 299, the court decided that lands held by the Kansas Indians, including the Wea tribe, in severalty, under patents from the government, were taxable. The case went to the United States supreme court, where the judgment of the state court was reversed: The Kansas Indians, *supra*. This decision is referred to in Doxtater's case, 47 Wis. 243, where the court says: "There is, perhaps, some general language used by Justice Davis in his opinion in the case of the Kansas Indians which seems to be in conflict with the opinion above expressed, but this was a case simply involving the right of the state of Kansas to tax the lands of these Indians; and the only point decided was that the state had no right, under the treaties with these Indians, to tax their lands, and what was said outside of this question was *obiter*, and entitled only to that respectful consideration which the opinion of the learned and experienced judge demands of the court. The conclusion that Indian lands are not subject to taxation by the state does not, by any means, prove that Indians themselves may not be subject to its criminal laws."

We admit that the only question before the court was whether the lands held in severalty by the united tribes, under patents from the government, could be taxed. But in solving this question, the court was compelled to consider, and did consider, the condition of the tribes, their tribal rights under and outside of treaties, and the rights of the state under the act of admission. What the court said of the status of tribal Indians, p. 755, regardless of the guaranties of any treaty, was by no means outside of the case. It was stating a second reason why the Indians in Kansas could not be taxed.

The case shows that there had been two treaties with these Indians: that of 1831, which provided that their lands should never be included

within the boundaries of any state or territory, or subject to its laws, p. 739; and that of 1854, which was silent upon this point, p. 753.

We quote from the opinion: "Prior to the ratification of this treaty [1854], although not before it was signed, the organic act for the territory of Kansas was passed, and on the twenty-ninth of January, 1861, Kansas was admitted into the Union; but the rights of the Indians, the power of congress over them, their lands and property, and the stipulations of treaties, were fully preserved and in the same words, both in the organic act and the act of admission of Kansas. * * * It is insisted, as the guaranties of the treaty of 1831 are not, in express words, reaffirmed in the treaty of 1854, they are therefore abrogated, and that the division of the Indian territory into separate estates so changes the status of the Indians, that the property of those who hold in severalty is liable to taxation. It is concluded that those who hold in common can not be taxed."

The court then expresses the opinion that it could not have been in the contemplation of the parties that such a distinction should exist, and says: "But it is not necessary to import the guaranties of the treaty of 1831 into that of 1854 in order to save the property of the entire tribe from state taxation. If the necessities of the case required us to do so, we should hesitate to declare that, in the understanding of the parties, the promises under which the treaty of 1831 were made, and the guaranties contained in it, were all abandoned when the treaty of 1854 was concluded. The tribal organization of the Shawnees is preserved intact and recognized by the political department of the government as existing; then they are a people 'distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of congress, from necessity, there can be no divided authority. If they have outlived many things they have not outlived the protection afforded by the constitution, treaties, and laws of congress. It may be that they can not exist much longer as a distinct people in the presence of the civilization of Kansas, but until they are clothed with the rights and bound to all the duties of citizens, they enjoy the privilege of total immunity from state taxation.

"There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired, and the general government at liberty to make any regulations respecting them, their lands, property, or other rights which it would have been competent to make, if Kansas had not been admitted into the Union. * * * While the general government has a superintending care over their interests, and continues to treat with them as a nation, the state of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians can not affect their situation, which can only be changed by treaty stipulation or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws."

If, by reason of the tribal organization of the Shawnees, recognized by the government, Kansas, under her act of admission, could not subject their property to taxation because she accepted her admission on

condition that the existing Indian rights should remain unimpaired, and the general government be at liberty to make any regulations respecting rights of person and property, how can it be said, that under the same restrictions, rights of far greater value may be interfered with?

It is said by the United States district attorney, that the first section of the civil rights bill, revised statutes, section 1977, gives the state courts jurisdiction in this case, independently of adjudicated cases. He admits that this statute was passed in pursuance of, and to carry out, the provisions of the fourteenth amendment to the constitution. It is as follows: "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It has never been decided, and probably will not be, that within the meaning of the fourteenth amendment, Indians are "subject to the jurisdiction of the United States," and consequently citizens. See senate report No. 268, before referred to. This statute, passed for the purpose of carrying out the provisions of the amendment, was not intended to include persons other than those referred to in the constitution. This is a sufficient answer to the claim made, regardless of the recent decision of the United States supreme court upon the civil rights bill, which is not before us.

Our opinion is, that the fifth judicial district court has not jurisdiction to try the accused.

Mandamus denied.

SUPREME COURT OF OREGON.

DAVIDSON *v.* OREGON & CALIFORNIA R. R. CO.

Filed, October, 1883.

ASSIGNMENT OF ERROR ON THE GROUND OF VARIANCE between the facts alleged and those proved must specify the grounds of objection.

EVERY MATTER WHICH WOULD HAVE BEEN ADMISSIBLE IN EVIDENCE BY WAY OF AMENDMENT to the complaint will be deemed to have been added, or its absence waived or cured, after verdict.

RAILROAD COMPANY MUST CONSTRUCT ITS WORKS, SUCH AS DITCHES FOR DRAINING WATER, with proper skill and care, having due regard to the features of the ground over which it passes, and must keep the same in repair; and it is liable for injuries resulting to an adjoining owner of land from failing so to do, although such injuries do not happen immediately after the completion of the work.

APPEAL from a judgment of the circuit court for Marion county, entered in favor of the plaintiff. The opinion states the facts.

Dolph & Simon, for the appellant.

Bonham & Ramsey, for the respondent.

LORD, J. This was an action for damages alleged to have been occasioned to plaintiff's land by the negligent act of the defendant. The first error assigned is a variance between the facts alleged and proved by the plaintiff. This variance is claimed to consist in the want of an

allegation of previous possession, to make the complaint conform to the facts proved. While it would have been easy to have avoided the criticism suggested, by a more specific allegation of previous possession, yet we think, construing the pleading within the meaning of section 83 of the civil code, such previous possession is clearly indicated, and in fact alleged. It is the lands of the plaintiff during the past six years which have been injured by the alleged negligent acts of the defendant. But if this view were unsatisfactory, the form in which the objection comes to this evidence is not available—it does not specify any ground of objection.

We must consider, then, the question of variance between the facts alleged and proved, as if none had been made. Under the general power of amendment provided by section 99 of the civil code, with the duty imposed upon the court by section 104, to disregard errors and defects not affecting the substantial rights of the parties, no judgment will be reversed because of any defect so amendable. It is not doubted under these sections but what the plaintiff might have amended his pleading so as to make it conform to the facts proved. The rule in such case is, that every matter which would have been admissible in evidence by way of amendment to the complaint will be deemed to have been added, or its absence waived or cured, after verdict: Bliss on Code Pl., secs. 438–442; Pomeroy's Remedies, secs. 435, 566, 576. The reason of this rule is obvious. When made at the trial, there is opportunity for removing it at once.

The next alleged ground of error is in refusing to give the instructions to the jury asked for by the defendant, and in giving the instructions excepted to by the defendant. These matters may be considered together. The point mainly to be noticed, and upon which the defendant chiefly relies, was that the court, by the instructions, held the defendant liable on a different state of facts than was alleged in the complaint. The gist of the action is that the defendant, in the construction of its road-bed across plaintiff's land, and along the line of its road, so carelessly and negligently constructed its ditches and drains above and below and across plaintiff's lands, as to unnecessarily and wrongfully turn streams of water out of their natural channels into the line of said railroad, whereby the lands of the plaintiff were overflowed, to his damage, etc.

Without incumbering this opinion with the substance of the evidence offered by the plaintiff, it is sufficient for present purposes to say it tended to sustain the allegations of his complaint, although it appeared by such evidence that no injury by overflow had occurred to the lands of the plaintiff for several years after such ditches had been dug. To negative and obviate the effect of this evidence, to show that other causes than those alleged had contributed to increase the volume of water flowing in the ditches, the defendant introduced evidence tending to show that Thomas Cross and others, whose lands bordered along and sloped toward the line of the railroad, constructed dams and ditches for the purpose of draining the surface-water lying upon their lands into these ditches of the railroad, which materially contributed to produce the result or overflow complained of. Upon this state of the evidence, the defendant claimed exemption from liability by the instruction asked, upon two grounds: first, that if the water which caused the ditches to overflow and flood the lands of the plaintiff was occasioned by the ditches of other persons drained into the company's ditches, the defend-

ant was not liable; and, second, that if the ditches were originally properly dug, and for seven or eight years no damage was caused by them from overflows, and that if within the last four years the ditches have been cut deeper and wider by the action of Mill creek during excessive floods, whereby the lands of the plaintiff have been overflowed, the defendant is not liable.

Probably the best reasons why these instructions were not given are furnished by those portions of the charge, although excepted to, applicable to their objections. The court says: If in the construction of these ditches the defendants cross a natural watercourse, it is their duty to let this water course under their road, and if they do not, they must take care of the water so that it will not result in injury to persons along the track who are below. They would not have a right to turn water into this ditch and let it come along the track and injure other persons, because it was their duty to let it go down the natural channel; and whatever water comes into their ditch, it is their duty to take care of it in an ordinary workmanlike manner so it will pass away and not injure the owners of land along the ditch.

If they caused more water to come from Mill creek, or these swales that have been spoken of, than naturally belongs there, they ought to have taken care of that water, and seen that it did not do damage. It would be carelessness to let such water flow down there and do damage.

This is a question raised about the water coming from Mill creek by the action of Mr. Cross, by which it is claimed that more water is turned there out of Mill creek than would naturally flow there. This is a question of fact for the jury. If it came down into these ditches and caused them to be worn out—to become larger at the upper end, and let in a larger amount of water, and they became permanently enlarged in that way, so that more water came down the ditch—this ditch belonged to the company, and it was their duty to take care of that water. But if these ditches had been deepened by it, so as to carry additional water, it is the duty of the company to take care of it whenever it got there, or became a permanent thing. It is their duty to take care of the race. Davidson had no right to repair this race, and it is their duty to do it.

If any other law prevailed, a man might be completely ruined in his property by a nuisance brought there by another person's ditch. So it is the duty of the parties owning these ditches that run down on each side of their road, to control the water that comes through these ditches excepting when it comes in an extraordinary flood.

The evidence showed the road-bed was made in part by excavations along the line which formed these ditches, which approaches within a few feet of Mill Creek, by reason whereof a portion of the water of that creek during the wet season, instead of flowing in its channel, was diverted into these ditches, and although it produced an increased flow of water in the ditches, the injury did not make itself apparent until some time afterwards. It thus appears that no precaution was taken at the time or since to prevent the necessary consequence of said overflows from the creek into the ditches, which, by gradually growing larger and deeper, contributed to produce a greater volume of water than the ditches could carry, with the result complained of. It is the plain duty of a railroad company to construct its works with proper skill and care, and with due regard to the features of the ground over which it passes: Pittsburg R. R. Co. v. Chicago R. Co., 56 Pa. St. 445. The fact that

the injury from turning these waters into the ditches did not occur immediately, furnished no justification or exemption from liability, and such was the effect of the instruction. The court even goes to the extent of saying that although water from the creek and swales may have been unnecessarily diverted into the ditches, the plaintiff could not complain until some injury resulted from it. Reference to the instruction in respect to other parties draining their land in these ditches is alike answered by the instruction, and needs no further comment.

The judgment must be affirmed.

SUPREME COURT OF UTAH.

WHITMORE *v.* HARDEN.

Filed February 11, 1882.

THE ACT OF THE TERRITORIAL LEGISLATURE OF 1852, IN SO FAR AS IT GRANTED TO THE PROBATE COURTS jurisdiction in cases of divorce for statutory causes, is valid.

NO JUDICIAL TRIBUNAL IN THIS COUNTRY CAN TAKE JURISDICTION OF DIVORCE CASES without the authority of a statute. Such cases are *sui generis*, and are neither intrinsically actions at law nor suits in equity.

THE GRANTING OF DIVORCES IS NOT NECESSARILY A JUDICIAL ACT, and consequently the legislature may grant divorces, in the absence of express constitutional provisions to the contrary, although all judicial power has been conferred upon another department of the government.

AFTER THE HAPPENING OF THE CONTINGENCY UPON WHICH THE INTEREST OF A DIVORCED WIFE in the property of her husband set apart to her has ceased, the court can not so modify the decree of divorce as to cut off the lien of a mortgage which has attached against the property of the former husband, subsequent to the happening of such contingency.

APPEAL from a judgment of the third district court, entered in favor of the defendant. Prior to 1862, Emma Harden and John W. Jenkins were husband and wife. In that year a decree of the probate court of Salt Lake county was rendered, purporting to divorce them, and granting the wife the right of possession of part of the homestead premises so long as she remained single. The divorced wife again married, in 1873, having meantime abandoned the possession so decreed to her. On May 18, 1875, John W. Jenkins and another wife, Eliza, mortgaged the said premises to plaintiff Whitmore, the mortgage being duly recorded the nineteenth of May, 1875. This mortgage is sought to be foreclosed by the suit at bar. In October, 1875, said Emma Harden applies to the probate court for further relief by modified decree against her former husband, Jenkins, and by appeal to the district court succeeded, in November, 1877, in getting a judgment for one thousand five hundred dollars, personally, against said Jenkins, and also declared a lien upon said premises in lieu of her former allowance as alimony. The further facts appear in the opinion.

E. D. Hoge, for the appellant.

Sutherland & McBride, for the respondent.

EMERSON, J. The appeal is from the judgment, and only the judgment roll is before this court. It is claimed on the part of the appellant that the conclusions of law are radically wrong, and that upon the facts found, she was entitled to a decree of foreclosure.

The first point made by the appellant is that the decree of the probate court of August 30, 1862, is a nullity, and John W. Jenkins and Emma Harden are yet husband and wife. This decree was made by the probate court in the exercise of a jurisdiction given to it by an act of the territorial legislature passed in 1852, to grant divorces for statutory causes. For more than twenty years the courts named had exercised this jurisdiction. It was many years before their authority to do so was even questioned. In the case of Kenyon v. Kenyon, decided in this court in 1861, and not reported, this jurisdiction was recognized and affirmed. In Cast v. Cast, 1 Utah, 112, the real question before the court related to the jurisdiction of the district courts in divorce proceedings for statutory causes. A majority of this court as then constituted decided that they had, and that the probate courts had not, and that as much of the territorial act referred to as attempted to confer it upon the probate courts was void.

An act of congress entitled "An act in relation to courts and judicial officers in the territory of Utah," approved June 23, 1874, in express terms confers this jurisdiction upon the probate courts concurrently with the district courts, so that now the question is no longer important, only so far as it affects marital and property rights arising out of the action of the probate courts in such cases prior to its passage. Because this jurisdiction had been so long and so universally exercised, and so many marital and such vast property rights have grown up under it, and also for the reason that the decision of this court in Cast v. Cast seems to be in conflict with that in Kenyon v. Kenyon, we have determined to give this subject more consideration than we otherwise should.

We are all of the opinion that the act of the territorial legislature referred to, in so far at least as it granted to the probate courts jurisdiction in cases of divorce for statutory causes, was valid, and that this jurisdiction was rightfully exercised by those courts.

The proposition contended for in Cast v. Cast, that the idea of a probate court necessarily excludes authority in matters of divorce, sounds strangely enough, when it is borne in mind that our institutions come to us from a country where jurisdiction in matrimonial causes has always been exercised by the same judges to whom the law has confided authority in probate matters. It is true, the ecclesiastical courts, which until recently have been the probate courts in England, were not empowered to grant divorces from the bonds of matrimony, but neither were any other courts; and so far as divorce was a matter of judicial cognizance at all, it was left exclusively to the ecclesiastical tribunals: Bishop's Mar. & Div., c. 3. Indeed, Blackstone, speaking of the jurisdiction of these courts, which in many other particulars had been frequently questioned, adds, that "matrimonial causes, or injuries respecting the rights of marriage, are another and much more undisturbed branch of the ecclesiastical jurisdiction;" and that causes matrimonial are now so peculiarly ecclesiastical that the temporal courts will never interfere in controversies of this kind, unless in some particular cases, as when a marriage is called in question after the death of the parties, and when it would tend to bastardize and disinherit the issue: 3 Bla. Com. 92, 93. And so thoroughly was the propriety of a union of probate and divorce jurisdiction fixed in the English mind, that when, recently, it was deemed best to confer authority to grant divorces from the bonds of matrimony upon the courts, the probate court was the court selected to exercise that juris-

quoted, awarded the use of a portion of the property included in the mortgage which it is now sought to foreclose to the respondent, until the happening of a certain contingency, namely, her marriage. This contingency, it is found, did happen on the first day of December, 1873, and which without further proceedings terminated her right to and interest in the property. No change in the distribution made on the granting of the divorce was sought until long after the giving of the mortgage to appellant. Then a judgment was obtained against John W. Jenkins for a definite amount, and unless paid in a certain time this property was ordered sold to satisfy that judgment. This could not and ought not to have the effect of postponing the lien created by the mortgage to the appellant, in favor of this judgment.

It is true the court is authorized to modify any order for the distribution of property, but this does not necessarily apply to the identical property held at the time of granting the divorce, but generally to any property held by the party against whom the modification is sought, or rather to his ability to answer any such modification. Otherwise, a decree of divorce, and any distribution of property thereon, would operate as a perpetual injunction against the absolute disposition of the remainder. Whatever real estate a party might own at the time a decree was obtained against him, modifying a former order in divorce, could be subjected to any such decree, the same as in the case of any other decree or judgment. The right of one party to procure the modification of such an order against another does not create a lien upon the property of the latter without the proper proceedings in court. The statute giving the right to have the order modified does not of itself create a lien.

The lien arising out of the appellant's mortgage is anterior to any arising out of the proceedings supplementary to the divorce, and should be first satisfied. If any right of dower existed prior to the act of 1872, which declared that it should not exist, the respondent's right was barred by the absolute divorce from her husband.

This is the result of a divorce *a vinculo* by the common law. That the common law, so far as it is suited to our condition, and is consistent with the constitution and laws of the United States, is in full force here, "and that it is to be resorted to as furnishing to that extent the measure of personal rights and the rule of judicial decision," has been repeatedly decided by this court.

Upon the facts as found by the court below, the appellant is entitled to a decree of foreclosure against all the defendants.

The judgment of the third district court is reversed, and the cause is remanded, and the third district court is hereby directed to enter a decree of foreclosure in favor of the appellant and against all the defendants for the amount that shall then be found to be due on said note and mortgage.

VICTOR SEWING MACHINE CO. *v.* CROCKWELL ET ALS.

Filed March 14, 1882.

AN ACTION AGAINST SURETIES ON A BOND GIVEN TO SECURE the faithful performance by their principals of a written contract, by the terms of which the latter agreed to make stated returns to the plaintiff on account of certain sewing machines consigned to them for sale, is an action founded on a written contract, and is not barred by the statute of limitations until four years have elapsed after the cause of action accrued.

SURETIES ON A BOND, GIVEN TO SECURE AN OBLIGATION OF THEIR PRINCIPAL, by which the latter agreed to pay the plaintiff all moneys which they might receive under a certain contract, "or which should arise therefrom by notes, renewals, or extensions of notes, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of protest, and diligence," are liable upon the failure of their principals to pay such notes, so received by them under such contract, when the same became due.

APPEAL from a judgment of the third district court, entered in favor of the defendants, and from an order denying the plaintiff a new trial. On the first hearing in this court the judgment of the district court was affirmed, but a rehearing was granted. The opinion states the facts.

Bennett & Harkness, for the appellant.

Sutherland & McBride, for the respondents.

TWISS, A. J. The plaintiff seeks to recover judgment upon a bond signed by the defendants Crockwell and Bassett as principals, and the other defendants as sureties, upon the breach of a contract between the plaintiff and Crockwell and Bassett. The condition of the bond is, "that if said Crockwell and Bassett shall pay unto said Victor Sewing Machine Company all moneys due or which shall become due said Victor Sewing Machine Company, under or pursuant to the within contract, whether by notes, renewals or extensions of notes, or accounts or acceptances, indorsements or otherwise, hereby waiving presentment for payment, notice of non-payment, protests or notices of protests, and diligence upon all notes now or hereafter executed, indorsed, transferred, guaranteed, or assigned, and shall well and truly keep and perform, in all respects according to its true intent, the contract or agreements to which this obligation is attached, * * * then this obligation to be void, otherwise to remain in full force and virtue."

The contract is voluminous, containing stipulations directing in detail the performance of the business therein proposed or contemplated by the parties, which was the consignment of sewing machines by the plaintiff, a corporation having a place of business in Chicago, to Crockwell and Bassett at Salt Lake city, and the sale thereof by them as consignees, who were to devote their entire time to the introduction and sale of the Victor sewing machines, for cash on delivery if possible, but were allowed, under certain restrictions, to sell upon time, taking notes therefor, payable to the plaintiff. All promissory notes so taken were to be guaranteed by the consignees, and delivered to the consignor. The blank indorsement thereof by the consignees, before delivery to the plaintiff, was by the terms of the contract made and understood to be a guaranty of the payment of such notes. That the consignees were to report, within the time mentioned, all sales, whether for cash or for notes, and remit all moneys received, and that the plaintiff should sell parts of machines and attachments to Crockwell and Bassett, which were to be settled for with cash every thirty days, unless otherwise mutually agreed, and that the consignees might give their personal notes for such machines as they might dispose of otherwise than for cash or note.

The complaint charges, that under and in pursuance of said contract the defendants Crockwell and Bassett gave their orders to the plaintiff for machines and parts of machines; that said orders were received and accepted, and the machines and parts of machines ordered were accordingly delivered, and that Crockwell and Bassett failed and refused to remit to the plaintiff an alleged balance of the proceeds of such machines,

and to pay an alleged balance for parts of machines and attachments, sold and delivered by plaintiffs to them or their order. The plaintiff asks for judgment for the aforesaid balances, as shown by the detailed and itemized accounts referred to in and annexed to the complaint.

The defendants in their answers pleaded the statute of limitations as a defense to that part of the plaintiff's claim arising upon a breach of bond by reason of the failure of the principals thereof to remit money to the plaintiff for machines consigned or to pay for parts of machines or attachments sold by plaintiff to Crockwell and Bassett. This plea raises the question of the liability of the defendants upon the bond for the alleged unpaid balances for the machines consigned and parts of machines and attachments sold by the plaintiff to Crockwell and Bassett. The court below ruled that the statute was a bar, of which the appellant complains, and assigns it as an error.

Under the statute, an action upon a contract obligation or liability not founded upon an instrument in writing is barred, unless commenced within two years from the time the right of action accrues, but if founded upon an instrument in writing, is barred, unless commenced within four years.

By the record it seems to be admitted that the right of action accrued more than two years before the action was commenced. Is the action on the bond, charging as a breach of contract the non-payment of the itemized accounts, founded upon an instrument in writing? If it is, the statute is not a bar; but, on the contrary, if it is an action upon a contract obligation or liability *not* founded upon an instrument in writing, it is barred.

The contract was not, and was not intended to be, a consignment of machines and attachments, and no indebtedness on the part of Crockwell and Bassett was created by its execution and delivery. But it did contemplate and provide that Crockwell and Bassett should give their orders to the plaintiff for machines, upon which plaintiff was "to ship, from time to time, such machines as in the judgment of the consignor might be necessary for the consignees to do a satisfactory business," and that the consignees should sell the same, and after deducting their commissions, remit the money or proceeds received therefor to the consignor. All of these things were done by the parties, under, in accordance with, and pursuant to the written contract.

Although the indebtedness on the part of the consignees to the consignor was created by the receipt of the proceeds of the order for the machines consigned and delivered, and the record fails to show any acknowledgment by the consignees, by reports or otherwise, in writing, of such sale and receipt of proceeds, yet all of this business was provided for and directed in detail by the contract, which contains the promise in writing of the consignees to remit to the consignor the proceeds of all sales within the time therein named. A failure on the part of the consignees to remit the proceeds of sales of machines consigned, and to pay for the parts of machines and attachments sold, is a breach of the written contract, the faithful performance of which the bond sued upon was given to secure. The accounts annexed to the complaint for machines consigned, and for parts of machines and attachments sold, are not the basis or the meritorious cause of action, but only a means of ascertaining the amount of indebtedness, if any, due from one party to the other under the written contract.

We are therefore of the opinion that the action upon the bond, alleging as a breach thereof that Crockwell and Bassett failed and refused to remit the proceeds of the sales of the machines consigned to them by the plaintiff, and to pay for the parts of machines and attachments sold to them, is an action founded upon a contract or obligation in writing, and therefore not within the provision of the statute barring an action brought upon a contract or obligation not founded upon a written contract or obligation, and that the statute of limitation is not a bar.

It is claimed by the respondents that the agreement of Crockwell and Bassett to guarantee, and that their blank indorsement should constitute a guaranty of all notes taken by them, is not an agreement that such notes shall be paid; or that Crockwell and Bassett guaranteed the notes in the very terms of the contract, and having done that, their obligations under the contract ceased.

The contract required that Crockwell and Bassett should in certain cases sign, and in other cases guarantee, the notes taken by them for the machines consigned to and sold by them; in this respect they complied with the contract, but they failed to pay the notes thus signed or guaranteed. Is this failure a breach of the bond? I am of the opinion that the condition of the bond requiring Crockwell and Bassett to pay all moneys which should become due, "under or pursuant to the within contract or which shall arise therefrom by notes, renewals or extensions of notes, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of protest, and diligence, upon all notes now or hereafter executed, indorsed, transferred, guaranteed, or assigned," clearly implies if not expressly asserts an undertaking in the bond, that the failure to pay any note made or guaranteed to the plaintiff by Crockwell and Bassett, under or in pursuance of the contract, was a breach of the bond, and that the obligation of the bond is to be taken and construed together with the contract, and when so construed there is no doubt as to the obligation of the sureties on the bond, to the obligee thereof, upon the failure of the makers and guarantors to pay any of the notes made or guaranteed by Crockwell and Bassett to the plaintiff under and by virtue of the contract. For these reasons, the case is remanded to the district court for a new trial.

EMERSON, A. J., concurred, and HUNTER, C. J., dissented.

BOOK REVIEWS.

COLEBROOKE ON COLLATERAL SECURITIES. A treatise on the law of collateral securities as applied to negotiable, quasi-negotiable, and non-negotiable choses in action. By WILLIAM COLEBROOKE. Chicago: Callaghan & Co. 1883.

No text-book which has heretofore been published on the law of the contract of pledge discusses in so exhaustive a manner that particular branch of the subject which treats of the pledge of negotiable and quasi-negotiable instruments, as the one now before us. Mr. Colebrooke's treatise does not cover so large a field as the well-known work of Mr. Justice Story on pledges, nor the recent book of Mr. Jones on the same subject. Mr. Colebrooke confines his attention exclusively to a discussion of the contract of pledge, where the thing pledged consists of negotiable or quasi-negotiable instruments, or of non-negotiable choses in action. To contracts of this nature the term "collateral securities" has been recently very generally applied. At the time Sir William Jones wrote his admirable essay on bailments, such contracts formed but a small part of the subject-matter of his discussion. Even Mr. Justice Story hardly refers to such contracts in his work on pledges. Since such time the changes which have taken place in the modes of transacting business, and especially the vast increase in the number and extensive operations of corporations, have rendered such contract by far the most important of any kind of pledges. Mr. Colebrooke has divided his subject into three general classes. The first class includes the pledge of negotiable instruments, bills of exchange, and promissory notes, bonds and coupons, notes and mortgage securities, and the rights, duties, and liabilities of the holder, creditor, surety, accommodation acceptor or indorser, or guarantor, holding collateral securities from the principal. The second class discusses the pledge of documents of title, which by commercial usage are quasi-negotiable, including certificates of stock, bills of lading, and warehouse receipts. Under this head the rights and liabilities of the parties to the contract, as affected by the local usage and customs of business men, are considered at length. The third class includes the pledge of non-negotiable choses in action, and equitable assignments of funds as collateral. This brief synopsis of the contents of Mr. Colebrooke's work will furnish some idea of the importance of the subject of which he treats. The manner of treatment, and the facilities for ready reference, such as the index and head-lines to sections, are admirable. The number of cases cited is very large, amounting to over four thousand, and includes all the latest authorities, both English and American. The book is handsomely printed, and reflects credit on its enterprising publishers.

WEST COAST REPORTER.

No. 5. JANUARY 31, 1884. VOL. I. No. 5.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

IT has already been shown that the prior appropriation of water wholly upon the public lands of the United States is good against subsequent grantees or patentees of tracts upon the same stream or lake deriving their titles from the federal government.[1] It follows, by necessary implication from this statute, as well as on general principle, that if a person has acquired title from the United States to a tract bordering upon a stream or lake lying within the public domain, before an appropriation has been made of its waters, any subsequent appropriation of its waters, made by another person, in pursuance of the local customs or laws recognized by the legislation of the state and of congress, must be subject to such prior title, and to the riparian rights belonging to the holder thereof.[2] When does a person thus acquire a title from the United States, within the meaning of this rule, so that any subsequent appropriation of water shall be subject thereto? The legislation of congress provides for various modes of acquiring title to public lands by different classes of persons—by ordinary actual purchasers, by pre-emptors, by homestead settlers, and the like. In all these instances the claimant is required to do certain preliminary acts—to file a declaration or notice, to make a location, to pay the purchase price, and the like; and after all these acts have been duly performed by him, including the payment of the price, if necessary, he is entitled to receive a patent from the government, which is executed and delivered to him by the proper officer, usually after some lapse of time. In all cases these steps must be taken in respect to land which has been surveyed by the government, or else the whole proceeding is nugatory. Wherever a patent is required by the legis-

[1] See *ante*, No. 3, p. 181; Act of Cong. of July 9, 1870.

[2] Union Mill & M. Co. v. Ferris, 2 Saw. 176; Union Mill & M. Co. v. Danberg, Id. 450; Vansickle v. Haines, 7 Nev. 249; and see Crandall v. Woods, 8 Cal. 136; Leigh v. Independent Ditch Co., Id. 323.

lation, no *legal* title passes to and vests in the purchaser, occupant, or other grantee, until the patent is executed and delivered; the patent alone is the final conveyance of the legal estate. If, however, the settler, pre-emptor, or purchaser has duly complied with all the requirements of the statute, including, if necessary, the payment of the purchase price, so that nothing is left to be done by him in order to entitle him to a patent, he certainly acquires an equitable estate in the tract of land—an equitable estate which the courts will and do protect. When a person has thus done all that he is required to do, and all that he can do to perfect his title, and must await the convenience or leisure of the proper governmental official in obtaining the conveyance which clothes him with a complete legal estate, it would be in the highest degree unjust and inequitable if his rights, as a prior purchaser or grantee from the government, could be postponed, or endangered, or in any way prejudiced or affected by a delay in the actual execution and delivery of the patent to him. We thus reach a conclusion which is in accordance with the plainest principles of equity, that the rights of a prior purchaser or grantee of public land from the government, as against any subsequent appropriator of water, become vested and perfect, *at least* from the time when he has duly performed all the statutory requirements, including, if necessary, the payment of the purchase price, which entitle him to a patent or other final conveyance or evidence of his legal title, and not merely from the time when he actually receives his patent or other final conveyance. Whether his rights are not even more extensive; whether, after he has duly performed all the statutory requirements, and has perfected his title by obtaining a patent—his rights as a prior grantee, purchaser, or owner do not relate back to the date of the first or initiative act in the whole continuous proceeding, is another question which will be separately examined.

The above proposition, that the prior rights of the grantee, purchaser, or private owner under the government are at least vested and complete, as against any subsequent appropriator of water, by the due performance of all the preliminary steps, including payment, which entitle him to a patent, and do not originate solely from the patent nor attach only from the date of its delivery, seems to be fully settled by the decisions. In Union Mill & Mining Co. v. Danberg,[3] the court held that one who has entered a tract of the public lands, under the provisions of the statutes of congress, and has fully paid for it, and has received the certificate of purchase from the governmental official,

[3] 2 Saw. 450; and see Union Mill & M. Co. v. Ferris, 2 Id. 176.

becomes vested with the equitable title, and as such equitable owner is entitled to all the water rights of a riparian proprietor, even though he has not yet received a patent. Also, that one who has duly entered a tract of land in conformity with the requirements of the homestead act, and continues to reside thereon, becomes entitled to the water rights held by any riparian owners. And, in general, a person who entered and paid for a tract of the public lands before the act of 1866, holds his land unaffected by that act, since his patent will relate back to the date of his entry—the inception of his title.

In the very important case of Vansickle v. Haines,[4] the supreme court of Nevada decided the following general propositions: As the United States has an absolute and perfect title to, and unqualified property in, the public lands; and as running water is an incident to or part of the soil over which it naturally flows; a patent given to a private person—in the absence of any special limitations or exceptions or easements contained in the instrument itself, or created by statute —carries not only the unincumbered fee of the soil, but the stream naturally flowing through it, and the same rights to its use, or to recover for a diversion of it, as the United States or any other absolute owner could have. An owner of land over which a stream naturally flows has a right to the benefits which the stream affords, independently of any particular use; that is, he has an absolute and complete right to the flow of the water in its natural channel, and the right to make such use of the water, *when he chooses*, as will not damage others located on the same stream and entitled to equal rights with himself. A patent to land from the United States, in the absence of any statutory or other limitations, carries with it a natural stream running through the land as an incident thereto, together with the right to have it returned to its channel if diverted. It follows, therefore, in the absence of special legislation to the contrary, that a pre-emptioner, while occupying and improving one quarter-section of the public land, has no right to enter upon another quarter-section, to which he makes no claim, and divert from it a valuable stream of water for the benefit of the land which he is claiming. In regard to the general doctrine of riparian rights among the various proprietors of private lands on the borders of a stream, the court holds, that the territorial statute adopting the common law of England was ratified and embraced by the state constitution. That the common-law doctrine as to running water allows all riparian proprietors to use it in any manner not incompatible with the rights of others; so that no one can absolutely

[4] 7 Nev. 249.

divert all the water of a stream, but must use it in such a manner as not to injure those below him. That the early decisions of Nevada, and those of California, holding that priority of appropriation gave a right to the use of water, were made in cases where there was no title to the soil, *and have no bearing in cases where absolute title has been acquired.*

In Leigh Co. v. Independent Ditch Co.,[5] the complaint alleged that the plaintiffs were owners and in possession of a certain tract of mining land through which a natural stream flowed, and that defendants had diverted the waters thereof to their injury, and prayed relief. Defendants demurred to this complaint, on the ground that it did not allege any appropriation or use of the waters by the plaintiffs. The court said: "The demurrer was properly overruled. The allegation that the plaintiffs were the owners and in the possession of the mining claims [the tract of land], was sufficient. And the ownership and possession of the 'claims' draw to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was, therefore, an injury to the plaintiffs, for which they could sue. The principle involved in this case was expressly decided by this court, in the case of Crandall v. Woods.[6] In that case it was said: 'One who locates upon public lands, with the view of appropriating them to his own use, becomes the absolute owner thereof, as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired.'"

The conclusion heretofore reached, that the rights of a prior grantee or purchaser from the United States, as against subsequent appropriators of water, must be regarded as complete and perfect, at the latest, from the time when he has fully performed all of the statutory requirements, including payment, which entitle him to a patent, and not from the time of his receiving the patent, may appear, perhaps, to

[5] 8 Cal. 323 (1857).

[6] 8 Cal. 136 (1857). The point actually decided in this case is, of course, athoritatively settled by the later utterance of the same court made in the subsequent case, as quoted above in the text. A perusal of the opinion in Crandall v. Woods would leave it doubtful, to say the least, in the absence of the subsequent interpretation, whether such a point was *decided.* Some portions of the opinion seem to intimate—even if they do not expressly hold—that the mere prior *ownership* and *possession* of a tract of land upon a stream do not render the proprietor's rights to the waters thereof perfect, or at least do not entitle him to any relief against a diversion of such waters by another person; that even the prior *owner* of the land must have made some actual appropriation of the water to his own uses, before he can maintain an action against the diversion by another person whose claim is subsequent to his own. In other words, that *mere prior ownership* of riparian lands does not confer full and perfect riparian rights to the water. See also to the same effect, Nevada County & Sac. Canal Co. v. Kidd, 37 Cal. 282.

conflict with the recent decision in Osgood v. El Dorado etc. Co.;[7] but a careful examination of that case shows that no such conflict was intended, and none could legitimately arise upon the facts. The plaintiff relied upon the doctrine of relation, in order to carry his right back to his *first* proceedings, which were earlier than those of the defendants, and the court simply held that on the facts the doctrine of relation did not apply. The plaintiff's *first* step was taken while the lands were unsurveyed; and his earliest legitimate proceeding was subsequent to the date at which defendants' rights of appropriation accrued.

In Farley v. Spring Valley Min. etc. Co.,[8] the plaintiff, a pre-emptor, had settled on public lands of the United States, and filed his declaratory statement on February 27, 1871; he had proved up and paid the purchase price in 1877; and he received his patent on January 23, 1879. The defendants made an appropriation of water after 1871, but before 1877. The court held that the plaintiff's rights as a private proprietor only accrued in 1877, when he had proved up and paid the price; and he was therefore a subsequent purchaser as against a prior appropriation of the defendants. This case clearly recognizes the doctrine that the rights of a grantee or purchaser from the United States, as against another party claiming under the government, do not accrue from the time of executing and delivering his patent alone; but are complete when his equitable estate is perfected by his performing all of the requisites which entitle him to receive a patent.

The rights of the prior owner of a tract bordering on a stream, as against a subsequent appropriator of its waters upon the public domain,

[7] 56 Cal. 571, 578. My reference to this decision in a previous number (*ante*, No. 3, p. 182) does not describe it with perfect accuracy, and needs some correction. It is true that the reporter's head-note represents the court as laying down the following general rule: "In a question of priority of right between an appropriator of water on the public lands and a pre-emptor, the rights of the latter date from the issuance of his patent." It is also true that Mr. Justice Ross says, in his opinion: "The plaintiff's rights must, therefore, be held to have attached on the twenty-fifth of October, 1871, the date of the issuance of his patent." But this language can not have been intended to lay down a general rule applicable to all pre-emptors; it must have referred entirely to the particular facts of that case. This plainly appears from the sentence immediately preceding, and from the cases which he cites in support of his conclusion—these very cases recognizing the rule that a grantee's right *may* relate back to a date before that of his patent. He says: "The plaintiff seeks to invoke the doctrine of relation; but for obvious reasons no case was made for the application of that doctrine." The plaintiff took possession of his land several years before it was surveyed. It was surveyed in 1865. In June, 1868, he filed his first declaration as a pre-emptor; in 1870 he had paid up, and in 1871 he received his patent. But the defendants had taken their first step, from which their rights of appropriation arose, in March, 1867. It thus appears that even if the plaintiff's title did relate back to the date of his declaration in 1868, it was still subsequent to defendants' right of appropriation, which accrued in 1867. The remark that plaintiff's title attached at the date of his patent was not, therefore, essential to the decision actually made on the facts.

[8] 58 Cal. 142.

are impliedly, even if not expressly, recognized by other decisions. In Gibson v. Puchta,[9] the court held that when the title of two parties to public mineral lands is based on possession alone, the older possession gives the better title as between the two, even though the elder possessor uses his land for agriculture and the younger for mining. In such a case, their rights, as against each other, depend upon the common-law doctrines applicable to adjoining land owners. The agricultural occupant has a right to use the water for the purpose of irrigating his own land in a proper and reasonable manner, and no cause of action can arise against him for such use, even though the mining occupant may sustain some injury therefrom; he would only be liable for a negligent or willful injury done to the other occupant by means of his irrigation. What is thus true of an occupant whose title to a riparian tract of the public lands rests wholly upon a prior possession, must certainly be true of an owner, whose title to such a tract rests upon a prior patent, conveyance, or other grant from the United States.

J. N. P.

(TO BE CONTINUED.)

[9] 33 Cal. 310.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

IN RE ROBB.

Filed January 19, 1884.

FUGITIVES FROM JUSTICE ARRESTED AND RETURNED UNDER LAWS OF THE UNITED STATES.—The governor of a state in issuing a warrant for the arrest of a fugitive from justice, the officer who makes the arrest, and the party commissioned to receive the fugitive and deliver him to the authorities of the state where the offense is charged to have been committed, in pursuance of the provisions of sections 5278 and 5279 of the revised statutes of the United States, act under the authority of the laws of the United States, and *pro hac vice* are officers or agents of the United States.

WRIT OF HABEAS CORPUS—JURISDICTION.—Where a petition for a writ of *habeas corpus* presented to a state judge or court by a party in the custody of one claiming, in good faith, to be authorized to deliver him to the authorities of another state, as a fugitive from justice, in pursuance of the provisions of said sections, shows upon its face that the petitioner is so held in custody, under such claim made in good faith, the state judge or court has no jurisdiction to issue the writ. The jurisdiction, in such case, is exclusively in the courts of the United States.

ID.—DUTY OF CUSTODIAN.—Where a writ of *habeas corpus* has been issued by a state judge or court, and been served on the party having the custody of such alleged fugitive, it is the duty of such custodian to make full return to the writ as to the authority under which he holds the prisoner, and to exhibit to the court the original papers evidencing his authority, and respectfully decline to produce the body of the prisoner; and if it appears from said return, or said petition and return, that the prisoner is claimed to be held in good faith, in pursuance of the provisions of said statute, the judge or court issuing the writ has no jurisdiction or authority to proceed further, and no jurisdiction or authority to compel the production of the body of the prisoner, or to commit the party holding him for contempt in thus respectfully declining to produce the prisoner.

THE EFFECT OF THE PRODUCTION OF THE PRISONER would be to place him in the physical control of the court, and to deprive himself of all power to execute the superior commands of the laws of the United States, to which he owes obedience.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts. Before Sawyer, circuit judge, and Sabin, district judge.

Alfred Clarke, for the petitioner.

J. D. Sullivan, district attorney, for the city and county of San Francisco, for sheriff.

W. M. Fitzmaurice, of counsel.

By the Court, SAWYER, Circuit Judge. W. L. Robb filed his petition in the circuit court for a writ of *habeas corpus*, in which he states "that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by P. Connolly, sheriff of the city and county of San Francisco, at the city and county of San Francisco, in the state of California. That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to wit: that petitioner is the duly appointed agent of the state of Oregon to convey to said state Charles H. Bayley, a fugitive from justice from said state, who is in the custody of this petitioner under a warrant issued by the governor of California, a copy of which warrant is hereto annexed and made a part of this petition. That on the twenty-first day of November, 1883, this petitioner was served with a writ of *habeas corpus* from the superior court of the city and county of San Francisco, commanding him to produce in said court said Charles H. Bayley. That petitioner respectfully informed said court by his return that he held said Bayley under the authority of the United States, and refused to produce said Bayley, and said superior

court committed petitioner therefor for an alleged contempt of its authority. Wherefore, petitioner is in custody for an act done in executing a law of the United States, and for refusing to do an act contrary to a law of the United States."

The warrant annexed to the petition, and made a part thereof, is the same, a copy of which, with the return thereon, is hereinafter set out in the commitment as a part of the judgment for contempt.

A writ of *habeas corpus* having been issued according to the prayer, and duly served, P. Connolly, sheriff, on January 11, 1884, made return, as follows:

"Now comes P. Connolly and makes this his return to the within writ, and shows that he holds the within named W. L. Robb under a commitment, a copy of which is hereto annexed and made a part hereof.

"P. CONNOLLY,
"Sheriff City and County of San Francisco.
"By M. F. CUMMINGS, Under-sheriff.

"Dated January 11, A. D. 1884."

The following is a copy of the commitment annexed to the return:

"In the superior court of the city and county of San Francisco, state of California, Department No. 1, Wednesday, November the 21st, A. D. 1883. Present, Hon. T. K. Wilson, judge. In the matter of the application of Charles H. Bayley, for a writ of *habeas corpus*.

"The application of Charles H. Bayley for a writ of *habeas corpus* coming on regularly to be heard, and it appearing to my satisfaction that a writ of *habeas corpus* was duly and regularly issued, directed to, and served upon one W. L. Robb, commanding him, the said W. L. Robb, to have and produce before me, the undersigned, one of the judges of the superior court of the city and county of San Francisco, at the court-room of Department Number One of said court, at the hour of half-past one o'clock P. M. of said day, the body of Charles H. Bayley, and at the time and place last aforesaid.

"The said W. L. Robb appearing by his counsel and submitting his return to said writ, *from which it appears that the said W. L. Robb holds the said Charles H. Bayley under the authority of the United States, under and by virtue of the following warrant:*

"'State of California, executive department. [Vignette.] The people of the state of California, to any sheriff, constable, marshal, or policeman of this state, greeting:

"'Whereas, it has been represented to me by the governor of the state of Oregon that C. H. Bayley stands charged with the crime of embezzlement, committed in the county of Clatsop, in said state, and that he has fled from the justice of that state, and has taken refuge in the state of California; and the said governor of the state of Oregon having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said C. H. Bayley to be arrested and delivered to W. L. Robb, who is authorized to receive him into his custody and convey him back to the state of Oregon; and whereas, the said representation and demand is accompanied by a certified copy of the information filed in the office of the justice of the peace of the precinct of Astoria, Clatsop county, state of Oregon, whereby the said C. H. Bayley stands charged with said crime and with having fled from said state and

taken refuge in the state of California, which is certified by the governor of the state of Oregon to be authentic;

"'You are, therefore, required to arrest and secure the said C. H. Bayley wherever he may be found within this state, and to deliver him into the custody of the said W. L. Robb, to be taken back to the state from which he fled, pursuant to the said requisition, he, the said W. L. Robb, defraying all costs and expenses incurred in the arrest and securing of said fugitive. You will make return to this department of the manner in which this warrant has been executed.

"'In witness whereof, I have hereunto set my hand and caused the great seal of the state to be affixed this the twentieth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal.] "'GEORGE STONEMAN,

"'Governor of the State of California.

"'By the governor:

"'THOS. L. THOMPSON, Secretary of State.'

"'SAN FRANCISCO, CAL.

"'I hereby certify, that I have this day arrested the within-named C. H. Bayley, and delivered him to W. L. Robb, as herein demanded.

"'November 20, 1883. P. CROWLEY, Chief of Police.'

"And the said W. L. Robb has in his custody and possession the body of the said Charles H. Bayley, and is able to and can produce the said Charles H. Bayley before me at the time and place specified in and in accordance with the directions contained in said writ; and it further appearing that the said W. L. Robb willfully neglects and refuses to obey said writ of *habeas corpus*, or to have or produce the said Charles H. Bayley before the undersigned as above mentioned, and that no good or sufficient cause has been shown or exists for said refusal;

"It is, therefore, ordered and adjudged that the said W. L. Robb is guilty of contempt of this court, in refusing to obey said writ of *habeas corpus*, and refusing to have and produce the body of Charles H. Bayley before me at the time and place specified in said writ. And further ordered, that the sheriff of the city and county of San Francisco do forthwith arrest the said W. L. Robb, and confine him in the county jail of the city and county aforesaid until he, the said W. L. Robb, obeys said writ and produces the body of the said Charles H. Bayley before me, or until he be legally discharged.

"Given under my hand this twenty-first day of November, 1883.

"T. K. WILSON,

"Judge of Superior Court of the City and County of San Francisco, Cal."

At the hearing, a copy of the record of proceedings in the superior court, in which the judgment and commitment for contempt were had, was put in evidence, and it was agreed by counsel that this was the authority under which petitioner Robb is restrained of his liberty.

The record shows: 1. A petition to T. K. Wilson, judge of the superior court of the city and county of San Francisco, for a writ of *habeas corpus* by Charles H. Bayley, in which he alleges: "That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by W. L. Robb, at the old city hall in the city and county of San Francisco, in the state of California. That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof con-

sists in this, to wit: that petitioner *is held under a warrant of arrest, a copy of which is hereto annexed and made a part hereof.* That said warrant is issued without authority of law and against the law in this, that no copy of an indictment found, or affidavit made before a magistrate charging petitioner with any crime, has been produced to the governor of California."

The warrant of arrest issued by the governor of California, annexed to and made a part of the petition, is the same warrant hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon, and need not be repeated.

2. A writ of *habeas corpus*, in the usual form, addressed to W. L. Robb, requiring him to produce the body of said Bayley, etc.

3. The return to the writ made by said Robb, petitioner herein, which is as follows:

"In the superior court of the city and county of San Francisco, state of California. Ex parte Charles H. Bayley. *Habeas corpus.*

"Now comes W. L. Robb, and makes this his return to the annexed writ, and shows that he holds the within-named prisoner under the authority of the United States, as will more fully appear on inspection of the warrant of the governor of California and a commission from the governor of Oregon, a copy of which is hereto annexed and made a part hereof, and the originals produced. Respondent respectfully refuses to produce said C. H. Bayley, on the ground that under the laws of the United States he ought not to produce said prisoner, because the honorable superior court has no power or authority to proceed further in the premises. W. L. ROBB.

"Subscribed and sworn to before me this twenty-first day of November, 1883. J. F. CARPENTER, Deputy County Clerk."

The warrant of the governor of California, annexed to said return and made a part thereof, is the same hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon. The commission of the governor of Oregon, also annexed to said return and made a part thereof, is as follows:

"State of Oregon. [Vignette.] Executive department. To all to whom these presents shall come:

"Know ye, that I have authorized and empowered, and by these presents do authorize and empower, Walter L. Robb to take and receive from the proper authorities of the state of California one C. H. Bayley, fugitive from justice, and convey him to the State of Oregon, there to be dealt with according to law.

"In witness whereof, I have hereunto set my hand and affixed the great seal of the state, at the city of Salem, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"[Seal.] (Signed) Z. Z. MOODY,
"Governor of the State of Oregon.

"By the governor:
"R. P. EARHART, Secretary of State."

The original of said commission of the governor of Oregon under the seal of the state of Oregon, and the original of the said warrant of the

governor of California under the seal of the state of California, were also produced and exhibited to the court at the time of making said return.

The constitution of the United States provides, that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime:" Art. 4, sec. 2.

The last clause of section 8 of article 1 confers upon congress power "to make all laws which shall be necessary and proper for carrying into execution * * all * * powers vested by this constitution in the government of the United States." And article 11 provides that "this constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Thus any laws passed by congress under those constitutional provisions for the arrest of fugitives from justice found in any state, and their delivery to the state from which they fled, are a part of the supreme law of the land, to which all state laws upon the subject must be subordinate. This power, like the power conferred in the same section to return fugitives from labor, the power to regulate foreign and interstate commerce, to declare war, raise armies, provide for a navy, make peace, etc., it was thought ought not to be intrusted to the states. State jealousies, and diverse state interests and policies, might prevent the return of fugitives from justice and labor, and to guard against inconvenience in these matters, the power was conferred upon the general government over these subjects, and it is supreme. So, also, the constitution provided for courts to administer the laws of the United States. In pursuance of the provisions cited relating to the return of fugitives from justice and labor, congress, in 1793, passed an act for the return of both classes of fugitives: 1 Stat. 302. Sections 1 and 2 of that act, relating to fugitives from justice, have been carried into the revised statutes of the United States, and constitute sections 5278 and 5279, which, so far as applicable to this case, read as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody, *shall be empowered to transport him to the state or territory* from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent, while so transporting him, shall be

fined not more than five hundred dollars, or imprisoned not more than one year."

When the governor of a state, acting under this statute, upon the demand of the authorities of another state, issues his warrant for the arrest of a party charged with a crime, and that party is arrested by any proper officer, and delivered over to the party empowered by the state where the offense was committed, to be carried to that state and delivered to its proper authorities, we have no doubt that the governor issuing the warrant, the officer executing it, and the party to whom he is delivered are acting by virtue and under the authority of the act of congress, and no other, and *pro hac vice* are officers or agents of the United States: Ex parte Smith, 3 McLean, 129; Prigg's Case, 16 Pet. 539. From the time of arrest till he is delivered to the authorities of the state demanding his surrender, the party is in the custody of the law—and that law a law of the United States, and the supreme law of the land. In this case Bayley had been arrested upon a warrant issued by the governor of California, on a demand by the governor of Oregon, and delivered into the custody of the petitioner, Robb, who was duly commissioned and authorized by the governor of Oregon to receive him and convey him to Oregon, which duty he was engaged in performing in pursuance of the provisions of the act of congress, when he was served with the writ of *habeas corpus* from the superior court, to which he made the return hereinbefore set out, stating that he held Bayley for the purpose of conveying him to Oregon, under and in pursuance of the laws of the United States, by virtue of the commission from the governor of Oregon, and the warrant of arrest of the governor of California, and arrest under it, annexing thereto copies of said documents, and exhibiting the originals, and respectfully declined to produce the body of Bayley on the expressed ground, that it appearing to the court that Bayley was in custody under the laws of the United States, the court had no jurisdiction to proceed further, or to require him to produce the body of said prisoner.

The court took a different view on this point, adjudged petitioner to be guilty of contempt in declining to produce the body of Bayley, and to be imprisoned until he should comply with the commands of the writ in this particular. If the court, after being informed of the cause of restraint, had jurisdiction and authority to proceed further, and compel the production of the body of Bayley, notwithstanding the facts shown, then the judgment for contempt is lawful, and petitioner must be remanded; but if it had no authority to proceed and compel the production of the body of Bayley, then it had no power to punish petitioner for contempt, and he could not be in contempt in not producing him, and the authority of the court to proceed, is the question to be determined. As we understand the decisions, this very question has been distinctly determined by the supreme court of the United States, under circumstances that compelled the most deliberate and mature consideration, in the cases of Ableman v. Booth, and United States v. Booth, 21 How. 507. In the first case, Booth had been arrested for an offense against the laws of the United States, and held to answer by a court commissioner and committed to the custody of the marshal of the district. A justice of the supreme court of Wisconsin discharged Booth from custody on *habeas corpus*, on the ground that the act under which Booth was held was unconstitutional and void, and his action was affirmed by the state supreme court. Booth was then indicted and tried and con-

victed in the United States district court for the district of Wisconsin, and sentenced to imprisonment, whereupon the same justice of the supreme court of the state discharged him again on *habeas corpus*, on the same grounds as before; which action was also affirmed by the supreme court of the state. This action of the justice of the supreme court, and of the supreme court of the state, was reversed by the supreme court of the United States, upon the ground that the court and justice were wholly without jurisdiction to consider these matters. So earnest was the supreme court of Wisconsin in its determination to maintain its authority, that it even disobeyed the writ of the United States supreme court, commanding it to send up its record, and peremptorily ordered its clerk not to send a transcript of the record, which order was obeyed; and the cases were heard upon copies of the records, permitted by the supreme court to be filed, upon affidavits stating the facts.

In discussing the powers of the state and national courts, the court, speaking by its chief justice, says: "If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts without the permission and according to the judgment of the courts of the state in which the party happened to be imprisoned; for if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows, that they must have the same judicial authority in relation to any other law of the United States; and consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest, including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

"It would seem to be hardly necessary to do more than state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its *own tribunals*, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

"The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear, it was not in the power of the state to confer it, even if it had attempted to do so: for

no state can authorize one of its judges, or courts, to exercise judicial power by *habeas corpus*, or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned:" 21 How. 514. Again: "Questions of this kind must always depend upon the constitution and laws of the United States, and not of a state. The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad, and to accomplish this purpose it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the states then possessed, should be ceded to the general government, and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its *own laws by its own tribunals*, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interest, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice, by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals:" 21 How. 516, 517.

After showing the relation of the state and national courts to each other, and to the laws of the United States passed within the scope of the powers of the national government, the court, in language so clear and precise that it can not well be misunderstood, lays down the rule directly applicable to this case, as follows: "We do not question the authority of the state court, or judge, who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, *provided it does not appear, when the application is made, that the person imprisoned is in custody under authority of the United States.* The court, or judge, has a right to inquire, in this mode of proceeding, for what cause, and by what authority, the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or *other person* having the custody of the prisoner, to make known to the judge, or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and

the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. *But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States.* If he has committed an offense against their laws, their tribunals alone can punish him. *If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.* And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, *it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge, or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.* And if the authority of a state, in the form of judicial process, or otherwise, should attempt to control the marshal, or *other authorized officer or agent* of the United States, in any respect, in the custody of his prisoner, *it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume,* can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; *and an attempt to enforce it beyond these boundaries is nothing less than lawless violence:*" 21 How. 523.

This decision was fully affirmed nearly twenty-five years afterward, in Tarble's Case, 13 Wall. 397. Tarble had enlisted in the United States army, deserted, and been arrested; and he was restrained of his liberty on that ground, by Lieutenant Stone, in charge of the station. A writ of *habeas corpus* having been issued by a state commissioner having jurisdiction to issue such writs, and served, Lieutenant Stone made return that the petitioner had enlisted, deserted, and been captured, and he claimed to hold him rightfully as a soldier under the laws of the United States. It was replied that he was a minor under eighteen years of age; that he had been inveigled into enlisting without the consent of his father, and that the enlistment was void, on this and other grounds set out, and it was claimed that the petitioner was unlawfully restrained of his liberty. The commissioner took testimony, heard the case, and discharged him. The proceedings of the commissioner were affirmed by the supreme court of Wisconsin. The judgment of the state supreme court was subsequently reversed by the supreme court of the United States, after an elaborate review of the questions involved, not on the ground that the state commissioner and court had erred on the facts, or the unlawfulness of the imprisonment, but upon the ground that they had no right, or jurisdiction, to examine or determine the question as to the lawfulness of the imprisonment at all, after the fact was brought

to the attention of the court issuing the writ that the officer, in good faith, claimed to hold him under authority of the laws of the United States—that upon these facts appearing the jurisdiction was ousted. Said the court upon this question: "State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect.* His return should be sufficient, in its detail of facts, *to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States*, and to exclude the suspicion of imposition or oppression on his part. And the process, or orders, under which the prisoner is held, should be produced with the return, and submitted to inspection, in order that the court, or judge, issuing the writ, may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority."

An attempt was made, upon other authorities cited, to distinguish the case from Booth's cases, and to *limit* the application of the doctrines established by them; but the court emphatically repudiated any such limitation, as appears by the following explicit language: "Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman v. Booth, and The United States v. Booth, to cases where a prisoner is held in custody under *undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident, that the decision does not admit of any such limitation.* It would have been unnecessary to enforce, by any extended reasoning, such as the chief justice uses, the position that when it appeared to the judge, or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No *federal* judge, *even*, could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the state judge, or state court, *should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States;* that is, *an authority, the validity of which is to be determined by the constitution and laws of the United States.* If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." The court concludes: "It follows, from the views we have expressed, that the court commissioner of Dane county *was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States under claim and color of the au-*

thority of the United States, as an enlisted soldier mustered into the military service of the national government; *and the same information was imparted to the commissioner by the return of the officer.* The commissioner *was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government; and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.* The conclusion we have reached renders it *unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.*"

Now the case of the petitioner in this proceeding, except that the officer or agent of the United States having Bayley in charge is neither a judge, commissioner, nor military officer, acting under the judiciary or military laws of the United States, but a person expressly authorized to act by other statutes of the United States, is precisely in the condition of Tarble's case. The petition of Bayley on its face showed that he *was claimed*, at least, to be held in custody in pursuance of the laws of the United States. It was so explicitly stated in the petition, and a copy of the warrant showing the authority was annexed to and made a part of the petition for the writ; and this being so, if the doctrine asserted in the Booth and Tarble cases is correct—and whether correct or not it is controlling in this court—then in the language of the court in Tarble's case, already quoted, the judge who issued the writ to the petitioner "*was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case*, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer," or agent, "of the United States, under claim and color of authority of the United States," as a fugitive from justice, to be delivered over to the authorities of the state of Oregon. But if it were necessary to go further, the petitioner did exactly what the supreme court of the United States said he was bound to do under such circumstances, and made return to the writ showing his authority, giving copies of his commission from the governor of Oregon, and warrant from the governor of California, and return of the chief of police; and exhibited the originals under the seals of the respective states, his authority thus appearing upon the representations of both the petitioner and the party restraining him of his liberty; and this state of facts satisfactorily appeared to the court, for the court itself so adjudged in its judgment for contempt. And the petitioner further did exactly what the supreme court of the United States said he must do, respectfully declined to produce the body of the prisoner. Fortunately, he did not have occasion to go further, as the court said he must do, if necessary, and resist by all the force at his command any attempt to compel a production of his body, other than to defend himself in the courts in response to the writ of *habeas corpus* issued to and served upon him, and to the proceedings for contempt now under consideration.

Now if it was lawful for petitioner to decline to produce the body of Bayley upon the facts disclosed to the court upon the face of the petition itself, or upon the face of the petition and the return made to the writ; if it was lawful to resist by force, with all the power at his command, any attempt to compel him to produce the body of the prisoner; if, upon the facts of the case appearing, as they did appear, the judge had no jurisdiction to proceed further or examine at all into the regularity of the proceeding under which Bayley was held—then there certainly was no

jurisdiction or lawful authority to force a production of Bayley through proceedings for contempt. The two propositions are incompatible, and their co-existence legally impossible.

There is strong reason for maintaining this position. If a judge of a state court—another sovereignty as distinct from the national sovereignty as if it ruled over a different territory—can, under the circumstances indicated, compel the production of a prisoner held under the laws of the United States—the supreme law of the land—he has the physical power to discharge him when produced, however lawless the discharge may be, as was done, in fact, in the Booth and Tarble cases. The production of the body in court, by means of which the court has the physical power to assume control, is equivalent to a surrender of a prisoner. And if one person can be discharged by a state officer, so can all, and it would be impossible for the United States, in some contingencies, to discharge the duty imposed upon them by the national constitution relating to fugitives from justice, as well as to fugitives from labor; or to execute the laws of congress passed to give effect to those constitutional rights of the several states, as between themselves. It would be as difficult to perform their duties as the supreme court in Booth's cases said it would be to execute the criminal laws of the United States under similar conditions.

By producing the body as required by the writ, the petitioner necessarily places his prisoner within the control of the court issuing it, and deprives himself of all power to perform the requirements of his commission, enjoined by the superior authority of the laws of the United States. He can not, and he does not, owe a divided duty to two distinct sovereignties. He can not serve two masters. He can not produce his prisoner, which is equivalent to his surrender, in obedience to the commands of the writ of *habeas corpus*, and at the same time retain power to obey the mandate of the laws of the United States and deliver him to the authorities of the state of Oregon. He must obey one command or the other, and the command to be obeyed is the one which is superior or supreme in its authority.

But whether these reasons and others given are sound or not, the rule as to the jurisdiction of the state courts, under the circumstances indicated, appears to us to be clearly established by the highest tribunal in the land, and are not open even to question here, and can not be disregarded by us.

We are of opinion, under the authoritative decisions cited, that the judge of the superior court on the petition of Bayley, as presented, had no jurisdiction to issue the writ, and certainly, upon the petition and the return made to the writ by Robb, that neither the judge nor the court over which he presides had jurisdiction or authority to proceed further, or to compel the production of the body of Bayley, or to punish him for contempt for respectfully declining to produce the body under the circumstances of the case, in pursuance of the commands of the writ.

We should not have thought it necessary to go into the case so fully, or to have done anything beyond referring to the Booth and Tarble cases, but we found ourselves in the delicate, embarrassing, and very unpleasant position of reaching a conclusion different from that attained by the supreme court of the state in this case, for whose judgment we entertain the very highest respect. That tribunal held, on a writ of *habeas corpus* heretofore issued on petition of Robb, that the superior court

had jurisdiction and authority to compel petitioner, by imprisonment for contempt, to produce the body of his prisoner, Bayley: In re Robb, 1 W. C. Rep. 255. Had there been no decisions of the supreme court of the United States settling the question, as we conceive there are, we certainly should have hesitated long before declining to follow this ruling of the supreme court of the state. But where that court differs from the supreme court of the United States as to rights depending upon the statutes of the United States, over which the latter court has final jurisdiction, and we must follow one or the other, as we must do in this case, our duty is to yield obedience to the latter.

As no reference is made to the Booth and Tarble cases in the opinion of the supreme court of the state, those cases may not have attracted the attention of the court.

The prisoner is entitled to be discharged from imprisonment, and it is so ordered.

CIRCUIT COURT, DISTRICT OF COLORADO.

CRŒSUS MINING, MILLING, AND SMELTING COMPANY *v.* COLORADO LAND AND MINERAL COMPANY.

Filed January, 1884.

LOCATION OF MINING CLAIM—END STAKES.—The statute of Colorado, R. S. 630, affords no support to one who, in locating his claim, fails to set the proper stakes at the end of the claim, when the proper position for them was not inaccessible, but merely difficult of access, or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are subsequently set.

SAME—CHANGE OF LINES.—The locator of a mining claim can not, after the location, change the lines of his claim so as to take in other ground, when such change will interfere with the previously accrued rights of others.

ACTION FOR REALTY—DEFENSE.—A defendant in an action for the possession of real estate, when he claims only a part of the tract sued for, must show what part he claims.

ALIEN—RIGHT TO LOCATE MINING CLAIM.—Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands.

SAME—STATE COURT MAY NATURALIZE.—The necessary oath declaratory of intention by an alien to become a citizen of the United States, may be administered in the courts of record of the state. One who has so declared his intention to become a citizen may make a valid location of a mining claim.

MOTION to set aside a verdict. The opinion states the facts.

L. B. Wheat, for the plaintiff.

W. P. Thompson and *T. M. Patterson,* for the defendant.

HALLETT, J. This controversy arises out of conflicting locations of mining claims on the public mineral lands. At the trial plaintiff had a verdict, which defendant now moves to set aside, on various grounds. The errors alleged with reference to defendant's title will first be mentioned.

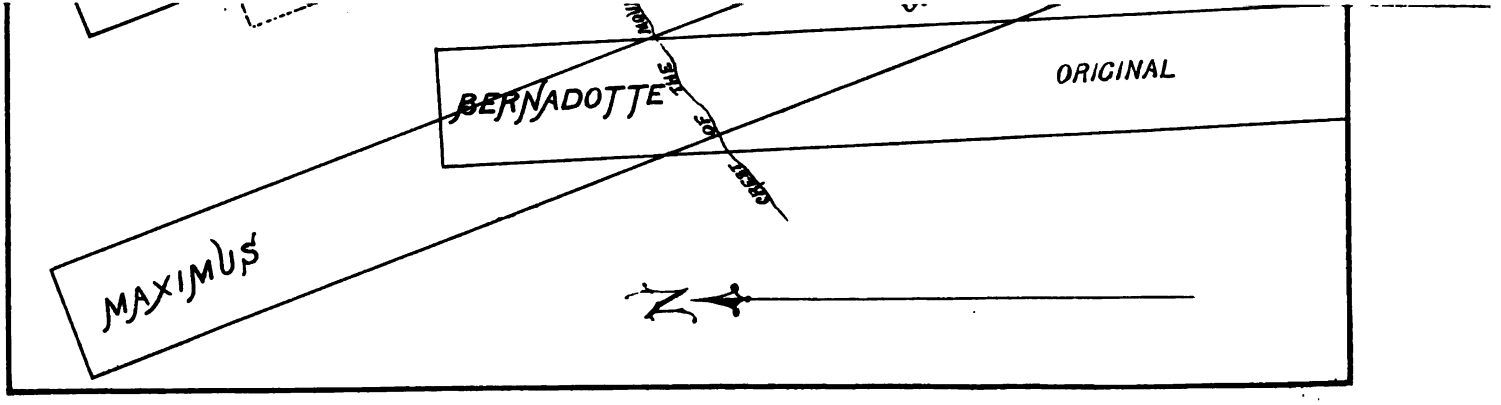
Defendant's Title.—May 12, 1881, D. E. Huyck and C. M. Collins located the Maximus lode, in Pollock mining district, Summit county, Colorado. July 8th, in the same year, they filed a certificate of location. The lode was discovered on the eastern or south-eastern slope of a very steep mountain, and about one hundred and sixty feet below the crest of

the mountain. The locators intended to lay the claim across the mountain, so that one half or more should be on the north-western slope. At that point the mountain is almost impassable at any season of the year, and on the eighth of July, when the survey was made, it was thought to be wholly so. What was done towards setting stakes at the north-western end of the claim is described by the surveyor by whom the work was done as follows:

"We then went back to the discovery cut and chained up the mountain some distance, when we came to a perpendicular precipice, or cliff of solid rock, over or around which we could not climb, owing to its precipitous nature, and the fact that the crevices in the rock, and places where a foothold might have been had by one active enough to climb up the cliff, were filled with snow and ice, and it was both impracticable and dangerous to life and limb to get at the points where the stakes should be set. The side posts or stakes were set on the boundary lines of the survey somewhat short of or below the middle of the claim, and the end posts were placed farther on, in conspicuous places, as near the side boundary lines as we could find places to put them. With my instrument I took the direction of the proper places of the upper end and side posts, and calculated the distances between the places where we did set them and their proper places, and marked its distance and direction from its proper place on each stake. The two middle side stakes and the two end stakes were set in such a way as to be evident and most likely to attract the attention of any one going up the gulch, and were within plain view of any one coming to the edge of the precipice above and looking down."

At the time of this survey there was a practicable trail at no great distance south, and a wagon road some miles north, upon either of which it would have been possible to go to the other side of the mountain for the purpose of setting the north-western end stakes. And later in the season it was possible to pass over the mountain at the place where the Maximus claim was located, or very near that place. The same surveyor surveyed another location, called the Bernadotte, which covered a part of the Maximus territory, for the same parties on the thirtieth day of August in the same year. With reference to the matter of getting over the mountain at that time, he testified as follows: "This survey was made much later in the season than the other, and the difficulties of snow and ice which we had encountered in surveying the Maximus did not then exist, and we were able to climb up to the top of the ridge and set the end stakes in their proper places."

Because of the difficulty or impossibility of getting over the mountain on the line of the Maximus claim on the eighth of July, when the survey was made, no stakes were set at the north-western end of the claim. In lieu thereof, witness stakes were placed on the south-eastern slope of the mountain, as described by the surveyor in his testimony quoted above. The north-western end of the claim was not inaccessible from that side of the mountain. The stakes were properly set at that end of the claim in August, 1882, and it is not claimed that the point was then or at any time inaccessible, except as to the matter of getting over the mountain in a direct line from the discovery cut. Upon these facts a question was presented at the trial whether the Maximus claim was properly marked on the surface at the north-western end in July, 1881, or at any time before August, 1882, when a survey for patent was


MAXIMUS
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made, and stakes were properly set. Defendant relies on a statute of the state, R. S. 630, in these words:

"Where in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place."

But the act affords no support to the defendant's position. It relates to the matter of setting stakes where the point or place where they should be set is inaccessible, and not to such circumstances as were shown in the evidence. The locators of the Maximus claim could have reached the north-western end of the claim, at the date of the location, by routes which, although circuitous, were entirely practicable; and later in the season they could have passed over the mountain at the very place where the claim is located. To hold such marking of boundaries to be sufficient would be to disregard the act of congress, section 2324, and of the state, R. S. 630, which manifestly require something more. Upon full argument and mature consideration, the ruling at the trial that the Maximus claim can not have effect on the north-western side of the mountain before the date of the patent survey in August, 1882, when the stakes were properly set, seems to be correct. Defendant also asserts title to some part of the ground in dispute under another location called the Bernadotte, made in the latter part of August, 1881. No question was made as to the manner of setting the stakes on this location, but there was a controversy as to the situation of the discovery cut with reference to the side lines of the claim, the existence of a lode therein, and perhaps some other matters. During the trial but little attention was bestowed on that location, but at the close counsel for defendant proposed to discuss its validity before the jury, and to ask a verdict for some part of the ground in dispute on that title, and he now complains that he was not permitted to do so.

The ruling of the court in respect to that matter was founded on a change in the location at the time of the survey for a patent in August, 1882, which, as to the ground in dispute, was supposed to defeat the earlier location in 1881. In the first location of the Maximus and Bernadotte, in the year 1881, they were relatively to each other and the crest of the mountain in the position shown in diagram A.

In the survey for patent in August, 1882, the Maximus was carried something like one hundred and ninety feet in a south-easterly direction, so as to give it greater length on the south-eastern slope of the mountain, and less on the north-western slope; and the general direction of the claim was changed, so as to carry it over on plaintiff's claim a distance of thirty feet more than was previously covered by it. The Bernadotte claim was changed to the north-easterly side of the Maximus, and parallel with the latter, so as to make them uniform in length and direction. The relative position of these claims thus changed is shown in diagram C.

And the position of the claims as originally located, and in the survey for patent, together with plaintiff's claim, the Nova Scotia Boy, is shown in diagram B.

The most that can be demanded on behalf of the Bernadotte claim is, that the territory embraced in the original and amended locations of that claim, and which is also within the lines of plaintiff's location, shall be

regarded as subject to and held by defendant under the first location certificate. Where rights have accrued to others in respect to some part of the territory covered by the location, and the change of lines is radical and complete, as in this instance, that proposition may be open to discussion. But conceding it to be indisputable, there was no evidence that any part of the ground in dispute was in that situation. It is true that in some of the plats used by the witnesses, a small triangular piece of ground appeared to be covered by the original and amended locations of the Bernadotte, and in plaintiff's location called the Nova Scotia Boy No. 2. It is so represented in the diagram last above mentioned. But no description of the place was given, and the jury would not have been able to define the tract if required to do so. A party must always show the nature and extent of his demand, and where, as in this case, it is real estate, and a part of a larger tract claimed, he must show what part. Failing in that respect, defendant was not entitled to go to the jury on the first location of the Bernadotte; nor on the first location of the Maximus for want of boundary stakes, as already explained.

The jury was correctly instructed that the Maximus and Bernadotte locations could have no earlier date than that of the survey for patent in August, 1882, and the question to be determined was, whether the plaintiff's title to the Nova Scotia Boy No. 2 had then accrued by the previous performance of all acts necessary to a valid location.

Plaintiff's Title.—The first work on the Nova Scotia Boy No. 2 was done in 1879 by Benjamin T. Vaughn, the locator of the claim, who was an alien. A discovery shaft or cut, as required by the statute, was not made in that year, however, and it became a question throughout the trial whether such work was done at any time before suit. Plaintiff offered evidence tending to prove that the work was completed in 1880, and annual work was done on the claim in the years 1881 and 1882. This was denied by witnesses for defendant, and the matter was contested before the jury in the usual way. As already stated, Vaughn, who located the claim, was an alien, and it was shown that he declared his intention to become a citizen in a district court of the state, May 30, 1881. Defendant objected that he was not qualified to make a location in the year 1880, when the claim was said to have been located; nor was he so qualified at any time before the discovery of the Maximus lode by defendant's grantors on the twelfth day of May, 1881. As to the declaration of Vaughn of his intention to become a citizen, a court of the state was not competent to receive it. Defendant maintained that authority to naturalize an alien could not be exercised by any state tribunal, and it resides only in the federal courts. To this plaintiff replied, that any one, citizen or alien, may make a location, and the competency of the latter can not be questioned except by the government. A location by an alien who has not declared his intention to become a citizen shall be maintained until the government avoids it. These propositions, renewed with some energy on the motion for new trial, do not demand much consideration. If Vaughn was not qualified to make a location before May 30, 1881, his declaration of that date made him so. And as defendant's right, whatever it may be, to the ground in controversy, accrued long after that time, Vaughn's prior incompetency can not avail. The only doubt touching that matter is whether, on declaring his intention to become a citizen, Vaughn could have advantage of what he had previously done towards locating the claim; and as to that, assuming that no other

claim to the ground had intervened, no reason is perceived for denying his right to the fruits of his labor. Indeed, it may be contended that he should hold from the first act done, his qualification to locate a claim beginning with his declared purpose to enjoy the bounty of the government. But we are not concerned with that inquiry in this case. It is enough to say that Vaughn became qualified under the act of congress in May, 1881, and that what he had then done towards locating the claim should accrue to him as of that date.

The authority of courts of record in the several states, under the act of congress, R. S. 2165, to confer the right of citizenship, has been accepted in practice and recognized without discussion by courts since the act was passed: Campbell v. Gordon, 6 Cranch, 176; Stark v. Chesapeake Ins. Co., 7 Id. 420; Lanz v. Randall, 4 Dill. 425.

A discussion of the question in a court of original jurisdiction at this time would seem to be unnecessary. If defendant wishes to deny the power of congress to confer such jurisdiction on courts of states, the supreme court is a more appropriate forum for the discussion. The position of the plaintiff, that an alien who has not declared his intention to become a citizen may make a valid location of a mining claim, finds no support in the statute: R. S. 2319. But this also was an immaterial question at the trial, since Vaughn was held to be qualified after his declaration of intention to become a citizen, in May, 1881, and the jury supported his title as having become full and complete prior to August, 1882.

The motion will be overruled.

CIRCUIT COURT, DISTRICT OF OREGON.

GILMORE *v.* NORTHERN PACIFIC RAILWAY COMPANY.

Filed January 4, 1884.

INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANTS.—The rule first suggested in Priestly v. Fowler, 3 Mee. & W. (1837) 1, that a master who has exercised due care and skill in the employment and retention of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision, so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions, under the direction and control of local bosses, superintendents, or heads of departments, who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen, and to provide the necessary material and appliances for their convenient and safe employment.

WHEN FELLOW-SERVANT STANDS FOR MASTER.—It seems well established that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow-servant: 1. When the latter, having authority over the former, orders him to do an act not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and he is injured in so doing. 2. Where the master has charged the latter with the duty of providing proper material and appliances for carrying on a work in which he is personally engaged with the former or not, and by the neglect to do so he is injured.

CASE IN JUDGMENT.—In February, 1883, the Northern Pacific Railway was engaged in constructing its road through western Montana, and had many gangs of men, numbering not less than fifty each, at work on the line of the route, at from three to five miles

apart, under the control and direction of foremen or local bosses, with the power to employ and discharge, subject themselves to the control of a general superintendent and assistant, who passed along the route and inspected the camps at certain periods; some of these gangs used giant-powder for blasting the rocks and frozen earth, and in such case the foreman was charged specially with the duty of handling the powder and thawing it when frozen; the general superintendent was aware of the danger of thawing powder before a fire, and had given general notice not to do it, and provided a safe appliance, called a "heater," for the purpose, subject to the requisition of the local boss; the plaintiff was employed as a common laborer in one of these gangs where powder was always thawed without a "heater" before the fire, and while assisting in so thawing powder by direction of the local boss, was injured by its explosion. *Held*, that the local boss, so far, stood in the place of the defendant, and that the neglect of the former to obtain and use the proper appliance for thawing powder, and his directing the plaintiff to assist in thawing powder without the security of such appliance, were wrongful acts, for which the defendant is responsible to the plaintiff so far as he was injured thereby.

ACTION for injuries to the person. The opinion states the facts.

William H. Effinger and *Arthur C. Emmons*, for the plaintiff.

Rufus Mallory, for the defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of Oregon, against the defendant, a corporation formed under a law of the United States, to recover the sum of twenty-five thousand dollars damages, for serious bodily injuries, sustained by him on February 13, 1883, at Horse Plains, Missoula county, Montana, while in the employ of the defendant as a laborer in and about the construction of its railway, by reason of the negligence and unskillfulness of the defendant in attempting to thaw a quantity of giant-powder before an open fire, whereby the same was suddenly exploded; and without any negligence or fault on the part of the plaintiff.

The answer of the defendant contains a denial of all the allegations of the complaint, and a plea or defense that the injury suffered by the plaintiff "was caused and occasioned" by his own "fault, carelessness, and negligence," and that of "his co-laborers and fellow-servants;" and without the fault of the defendant. The case was tried with a jury on November 21st, and there was a verdict found for the plaintiff in the sum of four thousand five hundred dollars.

The defendant now moves for a new trial, on the grounds: 1. Insufficiency of the evidence to justify the verdict; and, 2. Error in law occurring at the trial.

On the argument of the motion, the first ground was abandoned, it being admitted that the injury to the plaintiff was the direct result of the negligence of the foreman, and the only point made in support of it is that the court erred in not instructing the jury, as requested by the defendant, that if the defendant exercised reasonable care in the employment and retention of Cortin as foreman, and provided him, or placed at his control, a safe appliance for thawing giant-powder, of the most approved kind, and one that is in general use for that purpose, the plaintiff is not entitled to recover; or in other words, that Cortin, the boss of the gang in which the plaintiff was at work, was only his fellow-servant, and therefore the defendant is not responsible for any injury sustained by the plaintiff through or by means of such foreman's fault or negligence.

On the trial it appeared from the evidence that the plaintiff is a man about forty-three years of age, accustomed to labor with a pick and shovel, and that he was in the employ of defendant as such laborer from

April 7, 1882, to the date of his injury; that a great many gangs of men, numbering fifty or more each, were at this time in the employ of the defendant, in this region, engaged in the construction of its road, at points from three to five miles apart, under the direction and control of local bosses, who had the power to employ and discharge the men as they saw proper; that the whole line of work was in the charge of a general superintendent, Mr. J. L. Hallett, and assistants, who traveled along the route at intervals and inspected the condition of the gangs or camps, and the character of the work being done by them, and gave such directions to the several bosses concerning the same as were needed; that by some of these gangs giant-powder was used for blasting rock and frozen earth, and that in such case the handling of this powder, and particularly the thawing of it, was committed to the special charge of the local boss, who was supposed to have some special qualifications for the trust, and received extra compensation for the skill and risk involved therein; that it being known to the superintendent that it was dangerous to thaw giant-powder by placing the sticks or canisters before an open fire, notice was given generally to the bosses not to do it, but to use a "dug-out" or drift in the ground, in which the powder was placed and subjected to a gradual and uniform heat from a fire at the mouth of the cave, which warmed the air within; or a device called a "heater" or "thawer"—the same being a galvanized iron kettle weighing from fifty to seventy-five pounds, with double walls—whereby the powder placed in the body of this vessel and hung over a fire—the space between the walls being filled with water—was subjected to a gradual and uniform heat, so as to prevent a partial or unequal thawing or softening of the mass, and thereby setting a portion of the nitro-glycerine in its composition free from the earthy or other non-explosive matter, wherein it was held in absorption, in which state it was very liable to explode from handling or any slight disturbance or concussion; that these "heaters" were provided by the superintendent and stored at a convenient place at the end of the road, from whence they could be obtained by a local boss whenever he desired one; but none was ever furnished to or used in the camp or gang where plaintiff was employed, and Cortin always thawed his powder before an open fire; that on the morning of February 13th, Cortin's gang were engaged in cutting a ditch about a half mile from the line of the road for the purpose of taking water to the tank, when Cortin said to the plaintiff, "Jack, we have to thaw some powder," to which he answered, "Where is 'Old Billy,' the powder thawer?" when Cortin replied, "I forgot that; do you get some wood and make the fire;" and thereupon the plaintiff cut and carried wood from the vicinity and made and kept up the fire, while "Old Billy" and Cortin attended to the thawing of the powder until some time in the afternoon; and just as the plaintiff was walking away from the fire in the direction of where the rest of the gang were working on the ditch, Cortin picked up a stick of the powder, and, as he turned his face from the fire, said, "Is this anyway near thawed?" when it exploded in his hand, killing himself and "Old Billy" outright, and injuring the plaintiff severely, as by breaking his ribs, severely lacerating the muscles of his arm, breaking the drum of his ear, injuring the sight of one of his eyes, and otherwise affecting him, so that he is reduced from the condition of a strong, well man to that of an invalid, who will probably never be able to labor again, or be altogether free from physical pain and inconvenience; that a short time

before the explosion Thomas Finnegan, an assistant superintendent, passed along the route, and, as he testifies, "saw the powder being thawed before the fire, and told Cortin to have it removed; that he knew it was contrary to orders, and he would discharge him in the morning," and then passed on without stopping to see that the powder was removed, or taking any other measures to have it done.

The court instructed the jury, as requested by the defendant, that if the foreman, Cortin, and the plaintiff were both employed in the same gang, in a common employment or service, under the same or a common boss or superintendent, they were fellow-servants, and the defendant is not liable for the negligence of Cortin, in the course of this employment, causing injury to the plaintiff; and the fact that Cortin was foreman of the gang does not make the defendant responsible for his acts as to the plaintiff or other employees in such gang; and added:

"If Cortin was simply the foreman of the gang in which the plaintiff was employed, both working together side by side, the former merely leading in the work and giving the immediate direction to it, in the presence or near vicinity of a common boss or superintendent, then Cortin and the plaintiff were fellow-servants, and the defendant is not responsible for an injury to either caused by the negligence of the other. But if the work which this gang of men was engaged at was under the practical direction and control of Cortin, subject only to the directions received by him personally from time to time, as the local boss, from an absent or distant superintendent and the occasional and casual oversight of his traveling assistants; if Cortin had the authority to employ and discharge the men in his gang and direct and control their movements, so far as the work in his charge was concerned; and ordinarily there was no one else present and authorized to superintend or direct the work or the laborers—then he represented the company for the time being. He stood, so far as it or they are concerned, for the defendant, and his negligence is so far the negligence of the defendant; and the latter is responsible to the plaintiff therefor to the extent he was injured in consequence thereof."

Upon this statement of the law, the case was submitted to the jury, to say whether Cortin was a mere fellow-servant of the plaintiff or not, with the further instruction that if they found he was, their verdict must be for the defendant, but if not, then it should be for the plaintiff, in such sum as they might find he was entitled to upon the evidence, under the instructions and suggestions of the court.

Beginning with Priestly v. Fowler, 3 Mee. & W. (England, 1837) 1; and Murray v. Railway Co., 1 McMull. (South Carolina, 1845) 385; and Farwell v. Boston R'y Co., 4 Met. (Massachusetts, 1842) 49, the rule was established that a master or employer was not responsible for an injury sustained by his servant or employee in consequence of the negligence of a fellow-servant, as to the employment and retention of whom the former had exercised due diligence and care; but that the liability to injury by such means was one of the risks incident to the employment, and that a "fellow-servant," within the meaning of the rule, were all persons employed or engaged in the same common service, from the highest to the lowest, and who are subject to the same general control:" Wood's Master and Servant, sec. 427.

But in the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of

former times, in the form of corporations engaged in varied, detached, and wide-spread operations, as in the construction and working of long lines of railway, it has been seen and felt that the universal application of the rule often resulted in hardship and injustice.

Accordingly, the tendency of the more modern authorities appears to be in the direction of such a modification and limitation of the rule as shall eventually devolve upon the employer, under these circumstances, a due and just share of the responsibility for the lives and limbs of the persons in its employ.

In the supreme court of the United States the rule has not only been materially limited but sharply questioned: Packet Co. v. McCue, 17 Wall. 508; Railway Co. v. Fort, Id. 553. And in several of the states it has been much relaxed: Louisville R'y Co. v. Collins, 2 Duv. 114; Flike v. The B. & A. R'y Co., 53 N. Y. 549; Lanning v. N. Y. C. R'y Co., 49 Id. 521; Brickner v. N. Y. C. R'y Co., 5 Lans. 506; S. C., 49 N. Y. 672; Lalor v. Chicago etc. R'y Co., 52 Ill. 401; Nashville etc. R'y Co. v. Carroll, 6 Heisk. 348; Ford v. Fitchburg R'y Co., 110 Mass. 240; Cleveland R'y Co. v. Keary, 3 Ohio St. 201; Mullen v. Steamship Co., 78 Pa. St. 26.

By reference to these and other like cases it will be seen that at least two points in qualification of this rule may be considered well established: 1. That when a servant is directed by a fellow-servant, having authority over him, to do an act beyond the scope of his employment, which exposes him to a danger not contemplated in the contract of service, and while so doing he is injured without fault of his own; or, 2. Where a servant is authorized and required by his employment to furnish or provide suitable material or appliances for the work in which his fellow-servants are engaged, whether under his special direction or otherwise, and one of them is injured by reason of his neglect or omission in this respect, the common master or employer is responsible in either case.

The evidence in this case shows that the defendant had committed to Cortin the authority to employ, direct, and discharge the men in his gang, and had also conferred on him the authority and trusted him to perform the duty of procuring or ordering from its stores of material a "heater" for the purpose of thawing giant-powder in his camp whenever needed. The evidence also tends to show that it was known to the general superintendent and his assistants that it was highly dangerous to thaw giant-powder before a fire in this way, where, from the irregular application of the heat, it was liable to soften and relax unequally, and that therefore notice had been given to the local bosses generally not to attempt to thaw it in such manner.

It is not clear that this notice ever directly reached Cortin, but it is quite certain that no "heater" was ever seen or used in his camp, and that the powder used there was always thawed before a fire, as on this occasion.

The plaintiff is comparatively an unskilled man, from the humbler walks of life, and appears to have been altogether ignorant of the danger incident to thawing giant-powder in this manner. And, indeed, it is safe to say, that the occult eccentricities of this material, when frozen or being thawed, are not well understood, by even the scientific world: Am. Cyclo., Explosives.

It is not clear that Cortin had a right, under the circumstances, to order the plaintiff, a common pick and shovel laborer, to assist in thawing powder, even with the aid of an appliance like this "heater;" but

to do so without it was clearly wrong, because it subjected him to a serious danger, not within the scope of his employment, and not contemplated in his contract of service. And, for the injury sustained by the plaintiff, by means of this wrongful act, by one who, according to the better rule of law, stood, so far, in the place of the defendant, the latter is liable to respond to the former in damages.

Again: the work in which Cortin was engaged involved the use of giant-powder for blasting, and as incident to this, in that climate, the operation of thawing it when frozen. The evidence of the defendant tends to show that the handling of this powder, including the thawing of the same, was generally committed, as a sort of personal trust, to the local boss, who was supposed to be selected with some reference to his qualifications therefor; and who might select some persons from the gang to assist him thereabout. In selecting persons for this purpose, as a rule, only those who were willing were thus employed. But, if any one refused, as he might, he was liable to be discharged, and probably would be. A part of the duty of the local boss, in this respect, was to provide the appliance of a "heater" wherein to thaw this powder. In this matter, also, he stood in the place of the defendant, and the latter is responsible to the plaintiff for the injury caused by his negligence therein.

If Cortin was not aware of his duty in the premises, as he may not have been, he was not qualified for the employment, and if he was aware of it, he willfully disregarded it; and being, in either case, so far the representative of the defendant, it is equally responsible for his conduct, whether attributable to ignorance or willfulness.

On the argument it was further contended by counsel for the defendant that, admitting the plaintiff's theory of the law as to the local boss being the representative of the defendant, yet while the assistant superintendent was at the camp on the day of the explosion, he superseded such boss as such representative, and that said assistant having then and there rebuked Cortin for attempting to thaw powder before the fire, and at the same time gave him an order to remove it, accompanied by a threat that he would discharge him on his return the next morning, the defendant did its duty in the premises, and is not responsible for the consequences of Cortin's disobedience or neglect to obey its order made through the assistant superintendent.

Granting that the assistant was the representative for the time being of the defendant, he should not have left the camp until he saw the powder removed from the fire and the threatened danger averted; instead of which he went his way, leaving the powder before the fire in charge of Cortin, as before he came. If he had even warned the plaintiff of the danger, it might have been sufficient, but his communication with Cortin appears to have been out of the hearing of the men, and only occupied a moment or two as he passed by.

Besides, it is not to be forgotten, that on account of the improbability of some material elements of this statement, and the manner of the witness while making it, the jury may well have doubted its correctness, and probably did.

In my judgment, the presence or conduct of the assistant did not affect the character of the transaction, so as to change or modify the right of the plaintiff or the liability of the defendant.

If he stood for the defendant while at the camp, he was as negligent then as Cortin was before and afterward, so that instead of relieving the defendant from responsibility for the plaintiff's injury, he probably enhanced it by adding the weight of his negligence to that of the local boss.

The motion for a new trial is denied.

McCUNE *v.* NORTHERN PACIFIC RAILWAY COMPANY.

Filed January 9, 1884.

DEFENSE OR QUESTION NOT MADE TO JURY.—Where a party has a defense to an action arising out of the testimony in the case, and omits to present it to the jury, but relies upon a defense involving a different, if not inconsistent, conclusion from the testimony, a new trial will not be granted to enable him to submit the case to another jury upon this untried question, unless it clearly appears from the evidence that he is entitled to a verdict on that ground, and then only upon the payment of the costs of the first trial.

MOTION for a new trial in an action for injuries to the person. The opinion states the facts.

William H. Effinger and *Arthur C. Emmons*, for the plaintiff.

Rufus Mallory, for the defendant.

DEADY, J. The plaintiff, a citizen of Indiana, brought this action against the defendant, a corporation formed under a law of the United States, to recover ten thousand dollars damages, for an injury to his person occasioned by a fall from an unfinished bridge, on which he was at work for the defendant, which fall was caused by the negligence of the defendant in providing the scaffolding, whereon the plaintiff, in the course of his employment, was required to work; and without any negligence on the part of the plaintiff. The answer of the defendant contains a denial of any negligence in the premises on its part, and a plea or defense that the injury complained of was caused by the negligence of the plaintiff.

The cause was tried with a jury on November 15th and 16th, and there was a verdict for the plaintiff for two thousand five hundred dollars. And now the defendant moves the court for a new trial on the grounds: 1. That the evidence is insufficient to justify the verdict; and 2. For errors of law occurring at the trial.

On the argument of the motion the second ground was not pressed, and the only point relied on is that the verdict should have been for the defendant because the testimony did not warrant the conclusion that the injury to the plaintiff was caused by the negligence of the defendant; but that upon the whole evidence the reasonable conclusion is, that the injury, if not caused by the plaintiff's carelessness, was the result of accident, for which no one is to blame.

The evidence given on the trial goes to show that the plaintiff was injured while working on the defendant's bridge at the second crossing of Clarke's fork of the Columbia river, in Missoula county, Montana, on March 2, 1883; that he had been in the employ of the defendant for nearly three years prior thereto—most of the time with the engineers—and about half a month on the bridge, during which period he had, by overwork, put in nineteen days' labor; and that two bents of the bridge,

of two stories each, of about twenty feet across, and the same distance apart, were then raised on the west bank of the river.

When the two lower of these bents were raised, they were kept in position by means of a gang-plank and three or four pieces of timber, called stay-laths, laid across from bent to bent, and spiked down to the caps. This plank was four by sixteen inches in size, and placed somewhat to the left of the middle of the caps, while the stays were laid on either side of the plank, and about three feet apart.

These stays were poles or green fir-trees, from four to six inches in diameter, and had been cut in the woods near by, within two weeks, by the plaintiff and others, under the direction of the foreman of the work. Both they and the plank were intended primarily to hold the lower bents in position while the upper ones were being raised and the girders put in place; but they were also necessarily used as scaffolding during these operations, particularly the plank, and none other was furnished.

When the plank and stays were spiked upon the lower bents, the top bents were then raised upon them—the cap of the former serving as the sill of the latter. The top bents consisted of a cap and four posts, each about twelve inches square. When the bents were in position and stayed, two girders were laid across the lower story, from cap to cap, next to the outer post, and spiked down as a permanent stay or tie.

On the occasion in question, the first girder was being placed on the two bents next to the river. Several men were engaged at the work, including the plaintiff. The girder was put upon a dolly and pushed along from the direction of the bank on the gang-plank until the farther end was pretty well across the space between the bents, when it was swung diagonally around and turned over on its edge—the men standing on either side of it on the gang-plank, cap, and stays, as they could or was convenient—then taking hold of it with their cant-hooks and launching it along in the direction required. When the farther end of the girder was upon the farther cap, and just to the left of the post next to the outside one, the plaintiff, who was on the right of the girder, and the farthest man forward on that side, stepped from the cap around and outside of the inner post, onto the end of the stay, which projected beyond the cap some three or four feet, for the purpose of making room for the man immediately behind him, and taking hold of the girder near the end with his hook, and helping put it into place. As he stepped upon it, and before he put his hook to the girder, the stay broke and let him fall onto the stones and frozen ground beneath, a distance of about twenty feet, whereby his left hip was temporarily injured, and his left arm permanently disabled by the fracture of the olecranon, or elbow.

The case was tried by the defendant upon the theory that the stays were not sufficient for scaffolding, and were not intended to be so used, and that the plaintiff was guilty of negligence in stepping upon the stay, as he did, which negligence was the cause of his injury. But the weight of the evidence is directly contrary to this theory. Nor is it apparent how the defendant could escape the charge of negligence in the matter of providing sufficient scaffolding whereon to do this work, unless these stays were fit for the purpose. No proof was offered on either side as to the probable strength of such timbers, but I think it common knowledge, upon which the court and jury may act without further evidence, that a sound fir-tree, from four to six inches in diameter, would support the weight of the plaintiff (one hundred and sixty-five pounds),

and much more. The only apparent danger in using these stays as scaffolding arose from their shape, and not their want of strength. Being round and comparatively small, a person was liable to lose his balance and fall from them, and if any one had been injured by such means it is not apparent how the defendant could have escaped liability therefor on the ground of not having provided sufficient scaffolding. And in my judgment there ought to have been at least three planks thrown across the opening between the bents—one in each space between the posts—before any work was attempted thereon. On his examination in chief, the plaintiff said that after his fall he examined the broken stay at a distance of twenty feet from it, meaning, as I suppose, from the the ground where he fell to the top of the bent where it broke, and that it broke nearly square off, and appeared to be a fresh break; but upon re-examination by his counsel, and in answer to a direct question, he said that he looked at it "afterward" and he thought "it had a crack on top."

It does not appear from the evidence whether this impression, that the stay was cracked on top, was received at the examination when he thought it was a fresh break or "afterward," and if so, how long; nor does it appear whether the end of the stay fell to the ground with the plaintiff, as it would if it had broken square off, or whether it was simply split down and remained attached to the stay at the bent.

The plaintiff appears to have been removed from the locality to a hospital immediately after the injury, and it does not appear that he was ever on the ground again. And supposing, as is probable, that his only examination of the break in the stay was a cursory glance upward, as he lay on the ground, to the top of the bent, where the fracture occurred, I do not think much reliance can be placed on his impression as to whether the break was altogether a fresh one or not. The defendant was in the possession of the stay when it broke and ought to be able to produce it or account for it, or produce a witness who had examined it carefully and could testify as to its condition. But it offered no evidence on the subject nor any excuse for not doing so.

The foreman was on the ground at the time of the occurrence, and in justice to both parties, ought to have looked into the circumstances of the case with a view of ascertaining how the casualty occurred and who was to blame for it, if any one; and presumably he did so. But although he was called as a witness by the defendant, no question was asked him on the subject. No question was made on the trial but that Mr. Anderson, the foreman or superintendent of this work, stood in the place of the defendant, and that his negligence, if any, was the negligence of the defendant; but the same was tacitly conceded, and the court so instructed the jury. The defendant did not ask for any special instruction to the jury, nor take any exceptions to the charge as given them by the court, but was content with the presentation and argument of its case to the jury upon the question of fact, that the stay-laths were not used nor intended to be used for scaffolding, and therefore the plaintiff was guilty of negligence in attempting, as he did, to use one of them for that purpose.

And in this connection the court said to the jury: "This case must turn upon the question, Was the negligence in regard to the stay-lath the negligence of the defendant or the plaintiff, or was the injury the result of an accident for which neither party is to blame? If you find that the

injury sustained by the plaintiff was caused by the negligence, in this respect, of the defendant, your verdict should be for the plaintiff; but if you find that such injury was caused by the negligence of the plaintiff, or that it was the result of accident, then your verdict should be for the defendant."

On the proposition that the stays were not used or intended to be used as scaffolding, the case, on the evidence, was clearly against the defendant, and a verdict for the plaintiff on that issue ought not to be disturbed by the court. But it appears to me that the question of whether this injury was the result of accident, is not so clear. And if the defense had been made to the jury on that ground, the verdict might have been different.

But in the consideration of the question, weight must be given to the fact that the defendant, with the apparent ability to show the actual condition of the stay at the time of the fall, failed to do so, or give any excuse therefor. And then, ought the court to grant a new trial to enable the defendant to submit the case to another jury upon the proposition that the injury was the result of accident, notwithstanding it might have done so on the former trial? It may be, if there was no room for doubt or difference of opinion on this question, that the court ought to grant a new trial upon the condition that the defendant pay the cost of the former one, in which it was fairly cast upon the case as then presented by it.

But it does not appear that the case is so clearly one of accident that it would be the duty of the court to instruct the jury to find a verdict for the defendant on that ground.

For, if possible, it is highly improbable that a fir pole or tree, at least four inches in diameter, broke off or split down close to the cap of the bent simply with the plaintiff's weight, unless it was originally defective or had since been injured in some way; and in either case, the injury might be the result of accident, or the negligence of the plaintiff or defendant. For instance, if the defective condition of the stay could not have been known and provided against by the defendant, by the exercise of ordinary prudence and diligence, the fall of the plaintiff therefrom was so far an accident, for which the defendant is not responsible. But if the defendant could by such means have prevented the injury, then it is liable therefor. And if the defect was so apparent that the plaintiff, by the exercise of ordinary prudence and diligence, under the circumstances, ought to have observed it and not gone upon the stay, then his negligence contributed to the result, and the defendant, however negligent, is not liable to him for the injury.

So that it can not be said upon the evidence that this is a clear case of accident. The most that can be said is, that a jury might find it so, but probably would not. And upon the consideration of the defense of accident, the further question would arise, Ought not the defendant to have provided a safer and better kind of scaffolding than it did? In my judgment, there ought at least to have been a timber or plank, like the one called the gang-plank, laid across from bent to bent in each of the three spaces between the posts, instead of only one, and those few round poles or stays. This would have given only four feet in width of scaffold to twenty feet in width of operation.

I know the witnesses said that this bridge was scaffolded, in this respect, in the same way that the other bridges were that were built on the road.

But that does not settle the question, by any means, of what is sufficient scaffolding. And in as simple a matter as this, the court and jury can see for themselves that the scaffolding in this case was insufficient in both character and quantity.

The only ground upon which this motion can be allowed was correctly stated on the argument by the counsel for the defendant. It is this: The motion must be allowed, if upon the trial the court, at the request of the defendant, would have been bound to instruct the jury to find for it for the reason that it appeared beyond a question, from the evidence, that the injury to the plaintiff is the result of accident, and not the negligence of the defendant. But in my judgment the case is open to question on this point, and the court must have refused the instruction and submitted the question to the jury.

The defendant having chosen to put the case to the jury on the ground that the plaintiff was guilty of negligence in attempting to use the stay-lath as a scaffold under any circumstances, and it not appearing certain that a different result would follow from a trial in which the defense would rely on the proposition that the injury to the plaintiff was the result of accident, the motion for a new trial is denied.

SUPREME COURT OF CALIFORNIA.

JONES *v.* SNOW ET AL.

Department Two. Filed January 19, 1884.

EVIDENCE OF PAYMENT OF A PROMISSORY NOTE IN A MANNER AGREED UPON by the maker and payee at the time of the execution thereof, is admissible in an action thereon by a transferee, under a plea of payment. Such agreement as to the manner of payment is not void for want of consideration.

WHERE THE RECORD SHOWS THAT THE LOWER COURT EXCLUDED EVIDENCE WHICH SHOULD HAVE BEEN ADMITTED, an appellate court will not presume that it was considered by such court in arriving at its decision.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Van Ness, Gardiner, and *Stephenson*, for the appellant.

Robert W. Scott, for the respondents.

THORNTON, J. This action was brought by the assignee of the payee on a promissory note dated January 20, 1880, for one thousand and seventy-eight dollars and twenty cents, payable one day after date, without grace, with interest at the rate of one and one quarter per cent. per month until paid. The defendants, who are the makers of the note, pleaded payment in full before its assignment, which assignment was made after its maturity. Judgment was rendered for plaintiff for five hundred and seventy dollars and fifty cents, and costs, whereupon defendants moved for a new trial, which was denied. Defendants thereupon appealed from the order denying their motion and from the judgment.

A bill of exceptions found in the record shows that the plaintiff made out a *prima facie* case, whereupon the defendants, to establish their plea

of payment, offered in evidence the deposition of defendant H. W. Snow, regularly taken, to which plaintiff's counsel objected, on the ground that it was irrelevant and immaterial, and on the further ground that the answers were evasive. The court admitted the deposition in evidence, with the exception of what follows here:

"Question. State what if any payments you made upon that note; to which witness answered: When the second note was given [meaning the note on which this action was brought], it was agreed between Jones and myself that I should pay the interest and such principal as I could, by orders on me, and by paying the premium due from Jones on certain insurance policies. This I did by paying orders drawn on me by Jones, and paying premiums upon insurance policies held by Jones. The total amount of payments so made by me was five hundred and twenty-two dollars and forty-seven cents."

This ruling is assigned for error, and we are of opinion that the point is well taken. We can not see by what canon of evidence the ruling could be sustained. It did not in any manner vary the contract as embodied in the note. The note, in all its terms, was admitted by it as existing and effectually binding the makers. It was not offered to show that the payment of the note was to be postponed until it was made in the way stated in the agreement.

It was offered in connection with testimony tending to show actual payment of five hundred and twenty-two dollars and forty-seven cents. The agreement was made with Jones, the payee, and was substantially this: that payments made in the mode designated should be regarded as payments made on the note, as long as the note remained unpaid and under the control of Jones, the payee, and assignor of the plaintiff. Without such agreement, the sums making up the five hundred and twenty-two dollars and forty-seven cents, when disbursed even at the request of Jones, the payee, only created the relation of debtor and creditor, and did not constitute, as between the payee and defendants, payments on the note. In an action brought against defendants by the payee, they might have been set up as a counter-claim; and if they might have been set up in the same manner against the plaintiff, they were not so pleaded. But they were admissible in evidence under the defense of payment, and ruling them out was error.

But it is urged that as there was no proof that they were made before assignment to the plaintiff, there should be no reversal. We can not concur in this view. The very ground on which they could be sustained as payments, viz., the agreement, was put out of the case by the ruling of the court below, and proving that they were made at any time would not have sustained the plea of payment, for the reasons above given.

It is further urged that the agreement was void by reason of want of consideration. This we do not admit, for there was promise for promise; but conceding that the agreement was, in its inception, without consideration, Jones had the benefit of it when the money was paid by Snow, and ought not now to be heard to say that there was no consideration. If A. proposes to B. that if he will render a certain service for him in a given period he will pay him a sum of money, and B. makes no promise to render it, yet if he does render the service within the period, we do not think that A.'s plea of *nudum pactum* would or should receive much consideration in a court of law.

A still further contention is put forth why there should be no reversal.

It is said that the court allowed payments amounting to nine hundred and thirty dollars; and as every intendment must be made to sustain the rulings of the court *a qua*, therefore it must be presumed in this court that the five hundred and twenty-two dollars and forty-seven cents were included in the sum allowed. But we are powerless to persume anything which would contradict the record. And as the record shows that these payments were excluded from its consideration by the court, we could hardly be justified in presuming that they cut any figure in the conclusions reached by it. We should go far astray, to hold that the trial court, in making up its judgment, considered evidence which it excluded.

It follows from the above, that the judgment and order must be reversed and the cause remanded for a new trial, and it is so ordered.

MYRICK and SHARPSTEIN, JJ., concurred.

ESTATE OF CURTIS.

Department One. Filed January 19, 1884.

AN APPEAL WILL BE DISMISSED WHERE NO TRANSCRIPT IS FILED in accordance with the rules and practice of the supreme court.

MOTION to dismiss an appeal from a judgment of the superior court for Yolo county. The opinion states the facts.

Freeman & Bates, for the appellant.

Charles F. Hanlon, for the respondents.

The COURT. No transcript on appeal having been filed in this cause according to the rules and practice of the court, the motion made by respondents G. L. Curtis and W. C. Curtis, to dismiss the appeal from the judgment is sustained; and as to them, the appeal from the judgment is dismissed.

HARRIS *v.* CAREAGA.

Department One. Filed January 19, 1884.

NOTICE OF MOTION FOR A NEW TRIAL IN AN ACTION TRIED BY A REFEREE, and subsequent proceedings instituted thereon, are ineffectual for any purpose if made before the date of filing the decision and judgment of the referee.

APPEAL from an order of the superior court for Santa Barbara county, granting the defendant a new trial. The opinion states the facts.

Metcalf & Metcalf, for the appellant.

R. B. Canfield, for the respondent.

MCKEE, J. The appeal in this case is from an order granting a new trial. The motion for a new trial was heard and determined upon an authenticated statement of the case. At the hearing appellant's attorney objected to the motion, and moved to dismiss it, upon the ground that no notice of it had been given according to law. The objection was overruled.

It appears that the case arose out of an action for the dissolution of a

partnership and a settlement of the partnership affairs. By an order of the court the case was sent to a referee to take the testimony and an account, and report the same with his decision and judgment to the court. On January 9, 1882, the referee, after having taken the testimony and stated an account, which showed a balance due to the plaintiff, prepared his finding of facts and conclusions of law and a judgment thereon, which he presented with his report to the clerk of the court, to be filed under the provisions of section 644, code of civil procedure. But the attorney for the defendant appeared and objected to the filing of the same, and at the same time applied to the court for time to prepare and serve objections to the decision and judgment. The court granted him until January 23, 1882, to prepare and file such objections, and ordered the clerk to retain the custody of the report, decision, and judgment, and not to file the same until the further order of the court. Eight months thereafter, namely, on September 8, 1882, the court ordered that the report, decision, and judgment of the referee be filed, and the same were indorsed by the clerk and filed on that day. After filing, no notice of intention to move for a new trial was served or filed; but nearly seven months *before* the filing, namely, on February 13, 1882, the defendant served and filed such a notice, and preceded it by service of a document styled "Statement of evidence introduced and proceedings had before the referee herein, with exceptions taken on the trial before him, proposed by defendant to be made part of the report of the referee hereinafter to be filed."

And on the twenty-third day of February, 1882, the attorneys of the parties stipulated in writing to the effect that the statement, with exceptions taken on the trial before the referee, and served February 3, 1882, stand also as a proposed statement on motion for a new trial, and that the motion shall be heard April 25th, unless defendant's attorney shall be absent on that day from the county of Santa Barbara; the plaintiff's attorney "reserving the right to make any legal objection and exception to the proposed statement." On March 13th an extension of time for thirty days from that date was obtained for presentation of the statement for settlement. In fact, however, the statement was not presented until May 1, 1882; and on that day the attorney for the plaintiff objected to the settlement, on the ground that the statement had not been presented in time. It was settled, however, over his objections, and as settled and engrossed it was ordered to be filed, and was filed on September 8, 1882, with the decision and judgment reported by the referee.

On that day the case was considered as tried to a legal intent: Hastings v. Hastings, 31 Cal. 95; the decision and judgment were then rendered, and for the first time had a legal existence upon which the right to move for a new trial could be put in motion. But the attempt to exercise the right before the decision was ineffectual for any pupose, and the proceedings under it were wholly insufficient as a basis for the motion. In Mahoney v. Caperton, 15 Id. 314, it was so held of a notice of intention given one day before the rendition of the judgment. And in Flateau v. Lubeck, 24 Id. 364, it was held that a stipulated statement could not be made the foundation of a motion for new trial where no notice of intention to move had been served and filed. So in Bear River and A. W. & M. Co. v. Boles, Id. 654, it is said: "Where no notice of intention to move for a new trial is given or waived, the making and

filing of a statement does not give the court jurisdiction over the subject-matter of a new trial, and an order granting a new trial will be reversed." To the same effect will be found Ellshassar v. Hunter, 26 Id. 279, and Calderwood v. Brooks, 28 Id. 152.

Order reversed.

McKINSTRY and Ross, JJ., concurring. We concur in the judgment.

APPELGARTH *v.* ABBOTT.

Department One. Filed January 19, 1884.

THE PROTEST OF A NOTARY PUBLIC IS ONLY PRIMA FACIE EVIDENCE of the facts recited therein, and evidence is admissible to overcome and contradict the same.

A HOLDER OF A NOTE IS NOT EXCUSED FROM PRESENTING IT FOR PAYMENT, so as to charge the indorsers, by the fact that the maker of the note, before its maturity, notified the president of the bank in which it was left for collection that he would not be able to pay it at maturity.

APPEAL from a judgment of the superior court for Merced county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

E. I. Jackson, for the appellant.

John L. Law, for the respondents.

McKEE, J. The question in this case involves the liability of the indorsers of a promissory note. The note upon which the question arises was made in Merced county, and was left in the Merced Bank for collection. The president of the bank acted as a notary public. As notary he protested the note, at its maturity, for non-payment, and served notice of its dishonor by mail upon each of the indorsers. In his protest he certified that he had demanded "personally, in writing, of the maker, payment of the said note, which was refused." But on his examination as a witness he testified that the note had not been presented at maturity to the maker for payment, nor had payment thereof been demanded. What he had done was to write a letter to the maker of the note on the night of the fourteenth of August, 1879, the day the note became due, demanding of him payment of the same. This letter he inclosed in an envelope addressed to John Appelgarth, Brooklyn, Cal. (the reputed place of residence of the maker), and mailed it that night to go by mail the next day. He further testified, that two or three days before the maturity of the note the maker of it came to him as president of the bank and told him he would not be able to take the note up at maturity. The court found that the note had not been presented at its maturity to the maker for payment, and payment thereof had not been demanded, and that the indorsers were not liable.

Two objections are made to the judgment: 1. That it was error for the court to let the notary contradict and falsify his notarial certificate; 2. That the findings are contrary to the evidence, because the evidence proved that presentment had been excused.

The protest of the notary was only *prima facie* evidence of the facts contained in it: Pol. C., sec. 795; and the admission of evidence to contradict and overcome its recitals was not erroneous: C. C. P., sec. 1833.

The fact that the maker of the note before its maturity notified the

president of the bank in which it was left for collection that he would not be able to pay it at maturity, did not excuse the holder from presenting it for payment in order to charge the indorsers.

Non-presentation under the circumstances was excused as to the maker himself; and he was not entitled to notice of the dishonor of the note: C. C., sec. 3156. But no arrangement between the maker and the holder could change the contract of the indorsers so as to affect their rights or liabilities, or to excuse performance of the conditions of the law of their contract, unless they were parties to it, or on being informed of it consented to it: Story on Prom. Notes, 291. The question raisod has been settled by the supreme court of Massachusetts in Lee Bank v. Spencer, 6 Met. 309. That was a suit against indorsers of a promissory note made payable at the bank. It was not presented to the bank for payment at maturity, because the promisor had formally called on the holders and informed them that it would be useless to present the note at the bank, as he could not pay it. But, said Shaw, C. J., "however this might affect the rights of the promisor, we think it did not alter the conditional obligation of the indorsers and make them responsible without any presentment whatever." So in Pierce v. Whitney, 29 Me. 888, it was held that the fact that the maker of a note had addressed a letter to the holder, informing him that he would not be able to pay it at maturity, and requesting an extension, would be no excuse for non-presentation of the note at its maturity to the maker.

There is no error in the record.

Judgment and order affirmed.

Ross and McKinstry, JJ., concurred.

California Southern R. R. Co. *v.* Colton Land and Water Co.

Department One. Filed January 19, 1884.

The Complaint in an Action against a Corporation for the Condemnation of a Strip of Land for the right of way for a railroad sufficiently complies with the requirements of the code of civil procedure, section 1244, subdivision 2, when it states the name of the defendant, and shows that it was the known owner and claimant of the land sought to be condemned.

The Compensation to Which the Owner of Land is Entitled, in a proceeding to condemn the same for the use of a railroad, is the market value of such land at the time of making the assessment, and not such value at the time of issuing the summons.

Appeal from a judgment of the superior court for San Bernardino county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Gibson & Bethune, for the appellant.

Waters & Cooper, for the respondent.

McKee, J. It is contended that the court below erred: 1. In overruling the demurrer to the complaint in the proceeding; and, 2. In excluding evidence, offered by the defendant, to prove the value of the land in controversy at the time of the trial.

The object of the proceeding was condemnation of a strip of land for the right of way for a railroad. By a general demurrer the defendant objected that the complaint did not contain facts sufficient to entitle the plaintiff to exercise the right of eminent domain, because, as was urged

on the argument, it did not contain "the names of all owners and claimants of the property, if known, or a statement that they were unknown," as required by subdivision 2, section 1244, code of civil procedure.

But the complaint contains the name of the defendant, as a corporation duly organized and acting under the laws of the state of California, and the following allegations:

"That plaintiff is constructing a railroad from the said National City northward to a connection with the railroad of the Atlantic and Pacific Railroad Company, at or near the thirty-fifth parallel of north latitude, in the state of California; that in the construction, maintenance, and operation of its railroad the plaintiff needs, and by this action seeks to acquire, a right of way one hundred feet in width through the lands of the defendants. Said right of way being more particularly described as follows: Being a strip of land one hundred feet in width, located and included between lines on each side of, parallel to, and fifty feet distant from the center line of location of plaintiff's railroad, as the same is located through the lands of the defendants, said center line being located as follows," etc.

These averments sufficiently show that the defendant was properly named, and that it was the known owner and claimant of the land which plaintiff sought to condemn for the right of way in the construction of its road. There was, therefore, no error in overruling the demurrer.

Under section 1248, code of civil procedure, testimony was taken in the proceeding on June 23, 1883—more than five months after the date of the summons issued in the proceeding.

At the taking of testimony the defendant offered to prove, by witnesses then present, the value of the land proposed to be condemned at that time. To this offer plaintiff's counsel objected, on the ground that the date of the summons was the date at which the value must be estimated. The court sustained the objection; and, on submitting the case to the jury, at plaintiff's request instructed the jury as follows:

"The jury are instructed that the actual market value of the property sought to be condemned on the day of issuing the summons [which in this case was the fourth day of January, 1883] is the amount of compensation to be assessed for the property to be taken, irrespective of prospective or speculative value."

The rulings of the court were doubtless based upon section 1249, code of civil procedure. That section declares, that "for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons; and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected," etc. But by the constitution of 1879, it is provided, that "private property shall not be taken * * * for public use without just compensation having been first made to or paid into court for the owner; and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation be first made in money, or ascertained and paid into court for the owner: Constitution, art. 1, sec. 14.

Ascertainment of compensation for land proposed to be taken for public use, or "appropriated for a right of way," is therefore the constitutional rule. The assessment of such compensation is concomitant with the right to take, and payment of the sum assessed with the

actual taking or appropriation. Upon assessment being made according to law, the right to take may be exercised. Then the obligation to pay arises and must be performed within thirty days after the date of the assessment, else the proceeding is annullable: C. C. P., sec. 1252; and upon payment the property of the owner passes to the public use.

One of the principal objects of condemnatory proceedings is the ascertainment and assessment of such compensation; and the chief element in the compensation is the value of the land required by the public necessity. Upon proof of that necessity, the value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for up to the moment of making the assessment the land or its equivalent value belongs to the owner; and it is not subject to be taken for public use until the compensation has been first made; the owner is, therefore, entitled to receive its market value at that time.

"The fact to be ascertained," said the late supreme court, in S. & C. R. R. Co. v. Galgiani, 49 Cal. 139, "is the value of the land *at the time of the taking.*" And Mr. Justice Sanderson says, in Fox v. W. P. R. R. Co., 31 Id. 556, it can not be said, in any legal sense, that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains unchanged by the servitude, there can have been no taking. "It is a mistake to suppose," says Mr. Justice Baldwin, in Bensley v. Mountain Lake Water Co., 13 Id. 317, "that any title comes from mere appropriation of another's property, or from the taking of the legal proceeding to condemn it. The constitution is express. Private property shall not be taken for public use without compensation. The compensation precedes the title. The compensation must be adequate. But adequate when? Of course when the property *is so* taken. See also S. F. & S. J. R. R. Co. v. Mahoney, 29 Id. 112, and C. P. R. R. Co. v. Pearson, No. 2654, not reported.

The court below erred in excluding the evidence as to the value of the land at the time of the trial.

Judgment and order reversed and cause remanded for further proceedings.

McKinstry and Ross, JJ., concurred.

Bailey *v.* Sloan.

Department One. Filed January 19, 1884.

A Defendant has a Statutory Right to have the Place of Trial Changed to the county of his residence, where the county designated in the complaint is not the proper county for the trial of the action.

Appeal from an order of the superior court for Kern county, refusing to grant a change of venue. The opinion states the facts.

Robert Harrison, for the appellant.

J. W. Freeman, for the respondent.

McKee, J. In the superior court of Kern county the plaintiff commenced an action to recover judgment upon three promissory notes made and delivered to him in that county by the defendant in the action.

After service of summons, the defendant moved for a change of the

place of trial of the action, on the ground that he was, at and before the commencement of the action, a resident of the city and county of San Francisco. The motion was based upon affidavits which established the fact of defendant's residence in the city and county of San Francisco. The fact was not controverted by the counter affidavits filed by the plaintiff, nor was any counter motion made by him to retain the cause in Kern county on the ground of convenience of witnesses; but the court denied the motion.

As the county designated in the complaint was not the proper county for the trial of the action, the defendant had a statutory right to have the place of trial changed to the county of his residence. The order of the court denying the right was therefore erroneous: C. C. P., secs. 395, 397.

Order reversed and cause remanded.

McKinstry and Ross, JJ., concurred.

People's Ditch Co. v. King's River and Fresno Canal Co.

Department One. Filed January 19, 1884.

An Action for the Diversion of Water from the Plaintiff's Ditch may be brought in either of the counties in which such ditch is situated, although the defendant's place of business is in the other county, where the act complained of is committed.

Appeal from an order of the superior court for Tulare county, denying the defendant's motion for a change of venue. This action was brought for the diversion of water from the plaintiff's ditch, situated partly in Tulare and partly in Fresno county. The defendant's place of business was in Fresno county, where the acts complained of were committed.

H. S. Dixon, for the appellant.

Brown & Daggett and *Jacobs*, for the respondent.

The Court. This case is analogous to the case of The Lower King's River Water Ditch Co. v. The King's River and Fresno Canal Co., 60 Cal. 408; and upon the authority of that case the order appealed from is affirmed.

Hynes v. Nelson.

Department One. Filed January 19, 1884.

An Order of a Trial Court Setting Aside a Verdict is Reviewable upon a statement on appeal, in the same manner as an order made on motion for a new trial. Such order is within the legal discretion of the court making it, and an appellate court will not interfere with it, unless the circumstances of the case and the principles of law applicable to them show an abuse of discretion.

Question as to the Want of Probable Cause, in an Action for Malicious Prosecution, is a mixed question of law and fact: of fact for the jury, if there is a conflict of evidence, under proper instructions by the court; and of law for the court, if the underlying facts are admitted or uncontroverted.

Probable Cause for an Arrest Exists where the Defendant Believed the Facts Charged against the Plaintiff, and, acting upon such belief, consulted his counsel and was advised by him that such facts constituted a crime, and that he might and ought to have the plaintiff arrested.

Appeal from an order of the superior court for Alameda county, setting aside a verdict against the defendant. The opinion states the facts.

Castello, Allen & Lewis, for the appellant.

Vrooman & Davis, for the respondent.

McKee, J. The case in hand arises out of an action for malicious prosecution. There was a verdict for the plaintiff for five thousand dollars damages, which the court, of its own motion, set aside under section 622, code of civil procedure. By the provisions of that section a court is authorized, of its own motion, to set aside a verdict, "when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of the instructions, or under the influence of passion or prejudice." The order made in the exercise of that power is reviewable, upon a statement on appeal, in the same manner as an order made on motion for a new trial. An order *ex mero motu*, vacating a verdict, is therefore the equivalent of an order granting a new trial; and as either is a matter within the legal discretion of the court that makes the order, this court will not interfere with it, unless the circumstances of the case and the principle of law applicable to them show that there has been an abuse of discretion.

It appears by the order entered that the verdict was set aside because it "was not supported by the evidence given on the trial," and because it "was contrary to the instructions of the court given to the jury." Either of these was good ground for setting the verdict aside, and the presumption is in favor of the ruling of the court.

The controlling questions in the case were the existence of malice in the prosecutor, and want of probable cause for the prosecution complained of. It was necessary for the plaintiff to prove each of these things in order to recover. But the primary question was, whether the prosecution was with or without probable cause: Grant v. Moore, 29 Cal. 644. That was a mixed question of law and fact: of fact for the jury, if there was a conflict of evidence, under proper instructions by the court; and of law for the court, if the underlying facts were admitted or uncontroverted: Potter v. Seal, 8 Id. 217; Harkrader v. Moore, 44 Id. 144; Anderson v. Coleman, 53 Id. 183.

To prove a want of probable cause, it appears by the statement on appeal the plaintiff gave proof of the circumstances of the prosecution, of her arrest and imprisonment under it for five days, and of the dismissal of the charge against her on motion of the district attorney; and in giving testimony in her own behalf, she stated, "There was no foundation in fact for the charge made against me."

To rebut that evidence, the defendant called a witness who gave testimony tending to prove the truth of the charge, and that she had given to defendant information of all the facts within her knowledge as to the truth of it. Her statements the defendant testified he believed, and that believing them, he fully and fairly laid them, "just as the witness told him," before his own counsel and the district attorney of the county, and that, acting under the advice of his counsel, he had the plaintiff arrested for the offense complained of, and appeared in court to testify against her; but the district attorney dismissed the case, without his procurement or consent, and without the examination of any witnesses.

This testimony of the defendant appears to have been uncontroverted, and with reference to it the court instructed the jury that if the defendant, from the information given to him, believed that the plaintiff was threatening, or about to commit a crime against him, "and acting upon

that belief consulted his counsel, and his counsel advised him that it was a crime and that he might and ought to have her arrested, and if acting on that advice, and upon his belief that she was the person, he caused this warrant to be issued and this arrest to be made, then if you find these facts to be true, that would in law constitute probable cause."

That was the law of the question: Harkrader v. Moore, *supra;* Anderson v. Coleman, *supra;* and the jurors were bound to take it as the law from the court and apply it to the facts in the case. If the defendant had probable cause, the plaintiff was not entitled to recover; and as the verdict appeared to the court contrary to its instruction, we are not prepared to say there was error or abuse of discretion in setting it aside *ex mero motu*. It is the duty of a court to set aside a perverse verdict.

Order affirmed.

McKINSTRY and ROSS, JJ., concurring. We concur in the judgment.

HUERSTAL v. MUIR.

Department One. Filed January 19, 1884.

WIFE OF A DEFENDANT IN AN ACTION OF EJECTMENT, AGAINST WHOM A JUDGMENT IS RENDERED, who was in possession of the premises at the commencement of the action, in the absence of proof of a separate property in her, will be presumed to be in possession under her husband, and can be evicted under the judgment against him.

A MORTGAGEE OF GROWING CROPS PENDENTE LITE IN AN ACTION OF EJECTMENT is bound by the judgment against the mortgagor, and may be evicted under the writ issued on such judgment. As between him and the successful plaintiff, such growing crops are part of the realty, and pass to the plaintiff, and consequently the mortgagee is not entitled to a restitution of the premises for the purpose of harvesting such crops.

APPEAL from an order of the superior court for Contra Costa county. The opinion states the facts.

A. H. Griffith, for the appellants.

C. T. Emmett, for the respondent.

MCKEE, J. This is an appeal from an order subsequent to judgment. The record of the case shows that Hugh Muir had been dispossessed of a parcel of land in Contra Costa county, by a writ of restitution issued upon a judgment of the late district court of that county, rendered in favor of L. Huerstal against the said Hugh Muir and one William Harding, for recovery of possession of said land and costs of suit. After Muir had been dispossessed by the writ he re-entered upon the land; and in proceedings against him for the re-entry, he was adjudged guilty of contempt of court, and punished, and an *alias* writ of restitution was ordered and issued, commanding the sheriff to put the plaintiff in the quiet and peaceful possession of the land. The sheriff executed the writ by again dispossessing Muir; but finding Elizabeth Muir and Peter Baker, parties not named in the writ, in possession—one asserting adverse right to the land, and the other the crops, partly cut and in part standing, on the land—he made a "requisition" upon the plaintiff to apply to the court for an order for his protection in executing the writ against those persons. And upon motion of the plaintiff's attorney, based upon an affidavit of the plaintiff, the court ordered said Elizabeth Muir and Peter Baker to show cause why they should not be ejected from said premises, and why the plaintiff should not be put in possession of the crop. Upon their answers the court made the following order:

"It is ordered that an *alias* writ issue upon the judgment herein to put the plaintiff in the possession of the land in said judgment described; that the said sheriff is hereby instructed and directed under the same, to remove from off said lands the said Hugh Muir and his wife, the said Elizabeth Muir, and his family, and give the plaintiff the full possession of said lands, and every part thereof as against them and each of them; that said sheriff, under said writ, deliver to the plaintiff herein the crop of hay taken under the said first-mentioned writ."

Appellants attack the order as erroneous, on two grounds: 1. Because it was made in a proceeding which was not authorized by law; 2. Because a writ of restitution can not be enforced against persons in possession of the lands who are not named in the writ nor were parties to the judgment upon which it was issued.

It is true, as a general rule, that one who is not a party to the action, or privy to the defendant therein, can not be dispossessed of land by a writ issued upon a judgment for recovery of possession. In Tevis v. Ellis, 25 Cal. 515, where a plaintiff in possession of land applied for an injunction to restrain a sheriff from turning him out of possession under a writ of restitution issued upon a judgment to which he was not a party or privy, the supreme court denied his right to an injunction, upon the grounds that he had no relation to the writ of restitution nor the writ to him; * * * and "if the sheriff should interfere with his possession, the writ would not only fail as a justification, but would be pertinent to convict the sheriff of an act of official oppression."

When, therefore, a sheriff is called upon to execute such a writ, if he finds other persons in possession than those named in the writ, who claim that they are rightfully in possession, not in privity with the defendant, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may refuse to execute the writ against them: Long v. Neville, 36 Cal. 455. But the court from which the writ issued may, by virtue of its power over its process, order the sheriff to execute the writ against such persons. And on the hearing of a motion upon notice to them for such an order, the court will act upon the presumption that they entered into possession under the defendant, unless they overcome the presumption by reasonably satisfactory proof by affidavits or evidence of an adverse title to that of the plaintiff in the judgment: Leese v. Clarke, 29 Id. 664. "*Prima facie*, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant; but this *prima facie* case is rebutted when it appears that some person other than the defendant is in possession *under a title adverse to his;* for the right to the possession flowing from such a title has not been determined by the judgment:" Long v. Neville, Id. 136.

In the proceedings under review, appellants offered no testimony tending to show an adverse title to the land. Baker claimed none, and Elizabeth Muir, upon her answer to the order to show cause, offered no evidence of an adverse title in herself. By her answer she admitted that she was the wife of the defendant Hugh Muir; asserted that she was on the premises in possession of the same at the commencement of the action, to which she was not made a party; that she had not entered into possession under her husband or any of the defendants to the action; and that "she was at the time of the execution of said writ by the sheriff, and is now, in possession of the said premises in her own right."

Conceding that that was a sufficient allegation of a claim of title to the land, it was not proved nor attempted to be proved. The mere assertion of such a claim is no evidence of the title, if any, upon which it is founded. Being in possession at the commencement of the action as the wife of the defendant, the presumption is, in the absence of proof of a separate property in her, that she was in possession under her husband; and being in under him, she must go out with him. The plaintiff can not enforce his judgment otherwise than against the defendant and his family in possession: Valencia v. Couch, 32 Cal. 329; Skinner v. Beatty, 16 Id. 156; Gray v. Nunan, 11 Pac. C. L. J. 108; Saunders v. Webber, 39 Cal. 287.

In his answer, Baker averred that at the time of the execution of the first writ he was on the land harvesting the standing crop of hay, as mortgagee of the defendant, Hugh Muir, under a chattel mortgage, which had been executed and delivered to him in February, 1881, and which entitled him to the crop as personal property. The crop was partly cut and partly uncut, and while in the act of harvesting, the sheriff executed the writ, removed him from possession, and placed the plaintiff in possession of the land and crop; therefore he asked restitution of the premises for the purpose of harvesting the crop.

But having entered as mortgagee of the defendant *pendente lite*, Baker was bound by the judgment and removable by the writ; and as he was in fact removed, and the plaintiff was put in possession, the latter was lawfully in possession, not only of the land described in the writ, but of all fixtures and improvements attached to the premises, and to all crops growing or standing thereon. For some purposes growing crops are regarded as personal property, but as between the successful plaintiff in an action of ejectment and the evicted defendant, they are part of the realty: Adams on Eject. 347; Brother v. Hurdel, 10 Ired. 49; King v. Fowler, 14 Pick. 238; Shode v. Swan, 1 A. K. Marsh. 366.

How much, if any portion, of the crop had been made chattel by a severance from the soil does not appear, for no testimony upon the subject was offered or given. If he had any right to chattel property wrongfully taken or detained by the sheriff, the plaintiff, or his agent, he had legal remedies of which he could have availed himself to recover the possession or value thereof; but he had no legal right to a restitution of the premises for the purpose of harvesting the crop.

Order affirmed.

Ross and McKINSTRY, JJ., concurred.

PATRICK v. MORSE.

Department One. Filed January 22, 1884.

WHERE THERE IS NOTHING IN THE TRANSCRIPT TO SHOW THAT ANY OBJECTION WAS MADE in the lower court to the hearing of a motion for new trial on the ground that the motion was made too late, the appellate court will presume that the time was extended by consent of the parties.

APPEAL from an order of the superior court for Alameda county, granting the plaintiff a new trial. The opinion states the facts.

J. B. Hart, for the appellant.

Irvine & Le Breton, for the respondent.

The COURT. This is an appeal by defendant from an order granting a new trial. Judgment was ordered in favor of defendant August 19, 1879. The cause was tried without a jury, and no notice of the decision of the court was given to the plaintiff prior to service by him of notice of intention to move for a new trial, on the seventh day of November, 1879. August 29, 1879, plaintiff had, however, served notice of a motion to vacate and set aside the judgment, and the point made by appellant is, that the plaintiff's right to move for a new trial expired in ten days after August 29, 1879, when, as appears by the record, he had actual knowledge of the decision of the court and the entry of judgment thereupon.

Section 1054 of the code of civil procedure reads: "When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements or of bills of exceptions, or of amendments thereto, or to the *service of notices*, other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending or the judge thereof; * * * but such extension shall not exceed thirty days, without the consent of the adverse party."

There is nothing in the transcript to show that any objection was made below to the hearing of the motion for new trial on the ground that the motion came too late, and we must presume that the time was extended by consent of the parties.

Order affirmed.

PEOPLE *v.* MCDOWELL.

In Bank. Filed January 22, 1884.

EVIDENCE IS ADMISSIBLE IN A PROSECUTION FOR MURDER THAT THE DEFENDANT HAD IN HIS POSSESSION such an instrument as might have caused the wounds inflicted on the body of the deceased.

EVIDENCE AS TO THE PLACE WHERE THE DECEASED WAS SUPPOSED TO HAVE BEEN KILLED is admissible, merely for the purpose of locating the spot as a foundation for further examination.

JUDGMENT WILL NOT BE REVERSED BECAUSE CERTAIN PORTIONS OF THE CHARGE ARE OBJECTIONABLE, if such charge as a whole is unobjectionable.

APPEAL from a judgment of the superior court for San Bernardino county, convicting the defendant of murder, and from an order denying him a new trial. The further facts appear in the opinion.

Byron Waters and *Q. S. Sparks*, for the appellant.

R. E. Bledsoe, for the respondent.

MYRICK, J. The testimony of the witness Hicks, as to the slung-shot in the possession of the defendant, and as to the statement made by defendant, was relevant and material, because there was evidence tending to show that the wounds inflicted upon the person of deceased might have been caused by such an implement. The statements of the witnesses Wixon Rice and Cheatham, as to the place where the deceased was supposed to have been killed, were for the purpose, merely, of locating the spot as foundation for further examination, as was so stated. While there are certain portions of the charge of the court below which, segregated, are objectionable, still, when taken in connection with the context, as they must be, we think it can not be fairly said that there was on the part of the court any invasion of the province of the jury.

Judgment and order affirmed.

MORRISON, C. J., and MCKEE, ROSS, MCKINSTRY, and THORNTON, JJ., concurred.

SHARPSTEIN, J., dissenting. I dissent. In one part of the charge of the court this language occurs: "The guilt of the prisoner rests upon evidence of his own declarations, also evidence tending to show that the dead body of the deceased was found with marks of violence and wounds upon it, and other circumstances tending to connect the defendant with the cause of her death. The conclusion that the prisoner is the person who committed the murder, from all the facts and circumstances surrounding the killing, is a result of a process of reasoning which men exercise in almost every department of society, and in the practical affairs of life and experience."

If we assume, as I think we must, that the jury attached to this language the meaning which men ordinarily attach to it, I can not see how we can escape the conclusion that the appellant is entitled to a new trial.

The constitution, article 7, section 19, declares that "judges shall not charge juries with respect to matters of fact, but may state the evidence and declare the law."

In this case the jury were told that the guilt of the prisoner rested upon evidence of his own declarations, and upon evidence tending to show other material facts and circumstances. And then the jury were informed that the conclusion that the prisoner was the person who committed the murder, from all the facts and circumstances surrounding the killing, was the result of a certain process of reasoning. The jury were certainly warranted in inferring from this that the court knew that somebody had arrived at that conclusion and was familiar with the process by which it had been reached.

The court stated conclusions, not facts. It told the jury what the guilt of the prisoner rested on, and by what process of reasoning the conclusion that he was the person who committed the murder was reached.

If an error of this kind could be cured by giving other instructions which were free from error, it would seem to follow that no judgment could be reversed for errors in the charge of the court, unless the entire charge was erroneous, which would rarely, if ever, occur in trials for murder, as the greater part of the charge usually given in such cases has become, as it were, stereotyped.

I think the judgment should be reversed.

MCQUILKIN *v.* CENTRAL PACIFIC R. R. CO.

Department Two. Filed January 22, 1884.

WHERE A RAILROAD COMPANY HAS PROVIDED A PLATFORM ON ONE SIDE OF ITS TRACK on which passengers may alight, an attempt of a passenger to get off on the other side is not negligence *per se*.

THE ACT OR OMISSION ON THE PART OF A PASSENGER, CLAIMED TO HAVE CONTRIBUTED TO THE INJURY complained of, must have direct relation to the act or omission charged to be negligence on the part of the carrier. Whether such act or omission was negligence, and whether such negligence was to any extent an immediate concurring cause of the injury, are matters to be decided by the jury.

IF THE NEGLIGENCE OF THE PASSENGER CONTRIBUTED DIRECTLY OR PROXIMATELY TO THE INJURY COMPLAINED OF, no recovery can be had against the carrier, whatever may have been his negligence. It is not giving the defendant the benefit of this rule as

to contributory negligence to charge the jury that the negligence of the plaintiff which contributed as a proximate cause to the injury will prevent a recovery, provided the defendant has not been guilty of negligence.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Cope & Boyd, for the appellant.

Montgomery and *Montgomery & Martin*, for the respondent.

The COURT. 1. We can not say that the court below ought to have granted a nonsuit on the ground that plaintiff's evidence showed the negligence of the mother of the infant plaintiff proximately contributed to the injury. The position of defendant's counsel is, that where a railroad company has provided a platform on one side of its track, on which passengers may alight, an attempt of a passenger to get off on the other side is negligence *per se*. We think that the fact, if proved, that the mother of plaintiff attempted to alight on the side where there was no platform is to be taken in connection with the other physical conditions proved; the question whether she was guilty of contributory negligence to be determined by the jury upon all the evidence bearing on that question.

The act or omission on the part of a plaintiff claimed to have contributed to the injury must have direct relation to the act or omission charged to be negligence on the part of a defendant. Whether the attempt to get from the platform at the rear of the car to the ground was, under the circumstances proven, negligence, and whether such negligence was, to any extent, an immediately concurring cause of the injury, were matters to be decided by the jury.

The cases cited by appellant do not sustain its position—in view of the facts proved in this case. In Pennsylvania Railroad v. Zebe, 33 Pa. St. 318, it appeared that a passenger got off "on the wrong side," and stepped upon another track, where he was injured by a moving train. There was a platform on each side of the tracks within the depot, and trains frequently met at that point. It was said that the passenger who voluntarily got off his car, and on the track on the inner side, could not recover in an action against a railroad company, unless there was gross negligence on the part of the latter in permitting the passenger thus to leave the car. The question did not arise upon nonsuit, but upon a request of the trial court to declare the law, or "state the point," that if the plaintiff "voluntarily and negligently" placed himself where he did, when there was a safe mode of exit, and full opportunity to use it, the defendant was not liable as a common carrier: Id. 323, 324. A second judgment for the plaintiff in the same action seems to have been reversed for error in permitting two witnesses to testify that *they* were in the habit of getting off on the same side the train as did plaintiff: Id. 423. It is plain such evidence was inadmissible.

In Michigan it has been held that the mere failure of a railroad company to have a platform on each side of a station is not to be regarded as of itself negligence. There it appeared the plaintiff arrived at a station before the cars came in, and deliberately walked on the side most distant from the platform, etc., and was there injured in attempting to board the train. The court held plaintiff could not be said to have affirmatively proved that she was free from all contributory negligence—

by the law of Michigan the burden of proof being on the plaintiff to show that there was no contributory negligence on her part: Michigan Central Railroad v. Coleman, 28 Mich. 440. In California contributory negligence is a defense to be established by defendant, unless the evidence on the part of the plaintiff shall prove a want of reasonable care on his part: Robinson v. W. P. R. R. Co., 48 Cal. 428.

Bancroft v. Boston etc. R. R., 97 Mass. 275, was a case in which the plaintiff's intestate was, under the circumstances proved, held guilty of contributory negligence in attempting to cross a track from which he was hurled by an engine.

The English case, Siner v. Great Western Railway, L. R., 3 Ex. 150, L. R., 4 Ex. 117, is a case unlike the one at bar in every respect, except that in that case, as in this, the platform was not as long as the train.

2. The court below charged the jury in effect, that the plaintiff was entitled to recover, although the evidence showed that her mother was guilty of negligence contributing proximately to the injury, unless the defendant was guiltless of any negligence in a certain particular.

The following instruction embodies the idea repeated in other portions of the charge: "If you believe from the evidence that there was at the time of the injury complained of a safe platform at Market-street station for the use of passengers in getting on and off the cars, it was the duty of any passenger desiring to leave the train to get off on the platform; and if the mother of the plaintiff disregarded this duty and attempted to get off with the plaintiff on the other side of the train where there was no platform, and thereby *caused or contributed* to the injury, the action can not be maintained, and you must find for the defendant; *provided*, you believe from the evidence that the train stopped long enough to enable the mother and child with reasonable diligence to have landed upon the platform."

At the trial the plaintiff claimed the defendant was negligent in starting the train too soon, and, as said by counsel for appellant, "the legal proposition embodied in the instruction is that defendant must have been free from negligence in that respect in order to prevent a recovery by reason of the negligence of the mother."

But if the negligence of the mother of plaintiff contributed directly or proximately to the injury, she ought not to have recovered, whatever the negligence of the defendant. It is not giving the defendant the benefit of the rule as to contributory negligence to say that the negligence of the plaintiff which contributed as a proximate cause to the injury will prevent a recovery, provided the defendant has not been guilty of negligence.

Judgment and order reversed, and cause remanded for a new trial.

WILCOX *v.* HAUSCH ET ALS.

Department One. Filed January 22, 1884.

A RIPARIAN PROPRIETOR MAY RESTRAIN THE DIVERSION OF ANY WATER FROM HIS STREAM, on the part of one who has conducted water into it by artificial means, unless the latter show that he has not taken from the stream more water than he led into it.

APPEAL from a judgment of the superior court for Tulare county, entered in favor of the plaintiff, and from an order denying the defendants

a new trial. This was an action brought by a riparian proprietor to restrain the defendants for maintaining a dam in a stream running through his land, the effect of which was to cause an entire diversion of the water of such stream. The defendants denied that such stream was a natural watercourse, and alleged that the water was conducted into the same by them. The court found that such stream was a natural watercourse, and granted the plaintiff a perpetual injunction. The further facts appear in the opinion.

Brown & Daggett, for the appellants.

Atwell & Bradley, for the respondent.

The COURT. There was evidence to sustain the findings of the court. If it be conceded that, as against a riparian owner below, a person not such may turn into a natural stream water which would not naturally flow therein, and again divert the quantity of water which he led to the stream, the fact that he has conducted *some* water to it will not authorize him to divert all the water of the stream; and it is for him who has thus interfered with the natural flow to show that he has not taken from the stream more water than he led to it. Otherwise the plaintiff, riparian proprietor, is entitled to an injunction prohibiting the diversion of any water.

Judgment and order affirmed.

TIMES PUBLISHING CO. *v.* COUNTY OF ALAMEDA.

Department One. Filed January 23, 1884.

THE POWER OF CONTRACTING FOR COUNTY PRINTING IS GIVEN BY THE POLITICAL CODE, sections 3766, 4046, and 4047, to the boards of supervisors of the respective counties, and not to a county or township officer.

THE PUBLICATION OF THE DELINQUENT TAX LIST OF A COUNTY IS PART OF THE COUNTY PRINTING required to be published by the tax collector, and is included in a contract made by the board of supervisors providing for the publication of "all notices required to be published by the board," and "all notices that are required to be published by any county or township officer that may be ordered by the board."

WHEN A CONTRACT HAS BEEN AWARDED ACCORDING TO LAW, work required by law to be done in performance of it is in legal effect done by order of the board of supervisors who let the contract for it, and is a charge against the county, enforceable according to the terms of the contract.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the defendant. The opinion states the facts.

R. A. Redman, for the appellant.

S. P. Hall, district attorney, for the respondent.

MCKEE, J. Upon declining to amend the complaint in this case, after a demurrer thereto had been sustained by the court, a judgment of dismissal was entered against the plaintiff, from which it has taken this appeal. The complaint contains a complete statement of a cause of action to recover for work done in publishing the delinquent tax list of the county of Alameda, for the fiscal year 1879–80, in performance of a contract for the county printing alleged to have been awarded to the plaintiff by the board of supervisors.

According to the averments of the complaint, the contract was "to publish the proceedings of the board of supervisors of said county, the quarterly reports of the auditor and treasurer, all notices required to be

published by the board, and all notices that are required to be published by any county or township officer that may be ordered published by the board."

It will be observed that publication of the delinquent tax list is not, *eo nomine*, enumerated in the contract; therefore it was not provided for, unless it be included within the terms "all notices required to be published by the board," or "all notices that are required to be published by any county or township officer that may be ordered by the board." The question therefore arises, whether the board of supervisors of the county had authority to provide for the publication of the delinquent tax list of the county, and to contract for its printing and publication.

Sections 3764 and 3765 of the political code declare what shall constitute a delinquent tax list; section 3766 prescribes the mode of its publication, and section 3764 requires the tax collector, in each of the counties of the state other than San Francisco, to make publication of the delinquent tax list of his county on or before the first Monday of February of each year. The duty of preparing the delinquent tax list for publication and of causing it to be published therefore devolved upon the tax collector; but he could not provide for its publication, unless it had been let to the lowest bidder by sealed proposals, after ten days' public notice: Pol. C., sec. 3766; and he had no authority to let such a contract, because the publication was part of the county printing, for which boards of supervisors in their respective counties were authorized to contract: Id., sec. 4046, subd. 21.

It is claimed, however, that as sections 3765 and 3766, political code, required the tax collector to make the publication, he was the proper officer to contract for it according to law. But section 4047 of the same code declares:

"The supervisors must contract for: 1. All county printing; 2. All books and stationery; 3. All supplies for county institutions. And all contracts must be made with the lowest bidder, and after ten days' public notice that such contract will be let. The bidding must be by sealed proposals."

This section went into effect on the same day that section 3766, *supra*, took effect, namely, on April 1, 1878. Sections 3766, 4046, and 4047 are therefore *in pari materia*, and should be read together in order to arrive at the intention of the legislature upon the subject to which they relate. Reading them together, it seems to be manifest that the legislature intended to give the power of contracting for the county printing to the boards of supervisors of the respective counties, and not to a county or township officer. And as the publication of the delinquent tax list of a county is part of the county printing required to be published by the tax collector of the county, it follows that in this instance it was provided for by the contract awarded to the plaintiff.

When a contract has been awarded according to law, work required by law to be done in performance of it is in legal effect done by order of the board of supervisors who let the contract for it, and is a charge against the county, enforceable according to the terms of the contract: Pol. C., sec. 3764.

Judgment reversed, and cause remanded; and the court below is directed to overrule the demurrer and permit the defendant to answer.

Ross and McKINSTRY, JJ., concurred.

FOWLER *v.* HEIMRATH ET ALS.

Department One. Filed January 23, 1884.

AN ORDER DISSOLVING AN INJUNCTION ISSUED UPON AN EX PARTE APPLICATION restraining the defendants in an action of ejectment from interfering with the crops growing on the premises sought to be recovered, on the ground that such defendants were insolvent and a judgment against them for the value of the crops would be unavailing, will not be reversed where there is nothing in the record to show upon what the court below acted in the hearing and determination of the motion to dissolve.

APPEAL from an order of the superior court for Merced county, dissolving an injunction. The opinion states the facts.

Frank H. Farrar, for the appellant.

S. W. Geis, for the respondents.

MCKEE, J. The appellant, plaintiff in the court below, commenced an act of ejectment for recovery of possession of a tract of land. In addition to a statement of the cause of action in ejectment, the complaint contained averments to the effect that at the time of the alleged entry and ouster by the defendants there was upon the land a crop of grain which had been planted by the plaintiff, a portion of which the defendants, since their entry, had cut and stacked upon the land; that they threatened to cut the remainder and to remove the entire crop from the premises and convert in it to their own use; and that they were insolvent, and a judgment against them for the value of the grain would be unavailing.

The complaint was verified, and upon filing it, together with an injunction bond conditioned according to law, a temporary injunction was issued restraining the defendants from disposing of, removing, or injuring any of the grain, whether uncut, or cut and stacked upon said premises. But the court afterwards, on motion of defendants' counsel, and after argument of counsel of the respective parties, dissolved the injunction.

In the record which the plaintiff brings before us, on his appeal from the order, there is no bill of exceptions, no statement on appeal, no papers properly certified or identifiable as the papers used on the hearing of the motion—nothing, indeed, to show upon what the court below acted in the hearing and determination of the motion to dissolve.

Assuming that the verified complaint was a sufficient basis upon which to issue the injunction, and that it was properly issued thereon: Natoma Water Company v. Clarkson, 14 Cal. 544; yet the court may have had good cause to dissolve it. The court may have been satisfied that the defendants were entirely solvent and able to respond in damages, and that the plaintiff had an adequate remedy at law against them for the recovery of the grain, or for damages for its taking or detention. Upon such a showing the injunction would have been properly dissolved; and the presumption is, that the court did dissolve it upon good cause shown. Every intendment is in favor of the validity of the order.

Besides, the order was made upon notice given to dissolve an injunction issued *ex parte*—the retention or dissolution of which is a matter within the sound discretion of the court, and this court can not interfere with that discretion upon a record which discloses no abuse of discretion.

Order affirmed.

ROSS and MCKINSTRY, JJ., concurred.

PEOPLE *v.* LEE HUNG.

Department One. Filed January 23, 1884.

JUDGMENT WILL BE AFFIRMED WHERE NO POINTS AND AUTHORITIES ARE FILED within the required time.

APPEAL from an order of the superior court for Sacramento county, sustaining a demurrer to an indictment. The opinion states the facts.

Attorney general, for the appellant.

Jones & Carter, for the respondent.

The COURT. No points and authorities have been filed in this case, although the time extended for that purpose has long since elapsed. It is therefore ordered that the judgment be affirmed.

EX PARTE BAILEY.

In Bank. Filed January 24, 1884.

WHERE THE RETURN TO A WRIT OF HABEAS CORPUS, SUED OUT BY A PRISONER held under requisition proceedings, shows a substantial compliance with the act of congress concerning fugitives from justice, the prisoner will be remanded.

APPLICATION for a writ of *habeas corpus*. The facts out of which this proceeding arose are stated in Ex parte Robb, 1 W. C. Rep. 255, and *ante*, page 439.

Frank O'Connor, for the petitioner.

Alfred Clarke, for the respondent.

The COURT. Without passing on the question whether this court has power to go behind the return herein, we say that it clearly appears to us, from the papers produced, on which the governor of this state acted, that his action was regular, and that it substantially complied with the act of congress concerning fugitives from justice. The petitioner is therefore remanded.

PALACHE ET ALS. *v.* HUNT, Judge, etc.

In Bank. Filed January 24, 1884.

AN APPEAL LIES TO THE SUPREME COURT from a judgment of the superior court granting or denying an application for a writ of *mandamus;* and an undertaking in the sum of three hundred dollars, executed and conditioned according to the provisions of section 941 of the code of civil procedure, stays the execution of such judgment pending the appeal.

APPLICATION for a writ of *mandamus*. The original case was a proceeding for *mandamus* to try the title to an office, and, incidentally, determine the right of possession of real property. The judgment of the superior court was, that the defendants in the proceedings, the present petitioners, had no right to the office, and directed them to turn over the same and its incidents to the plaintiffs in the proceeding. The defendants thereupon appealed, and filed a three-hundred-dollar bond, and also applied to the judge of the superior court to fix the amount of a bond, as

for a case involving the possession of real property. This the judge refused to do, whereupon the appellants applied to this court for a writ of *mandamus* to compel him so to do.

Stanly, Stoney & Hayes and *R. Y. Hayne*, for the petitioners.

Ben Morgan, for the respondent.

SHARPSTEIN, J. There is not in the present, nor was there in the late constitution any provision conferring appellate jurisdiction in cases of *mandamus*, *certiorari*, prohibition, or *quo warranto*. And yet this court has repeatedly exercised such jurisdiction. In People v. Carmen, 18 Cal. 693, it declined to do so in a case of *certiorari*. But that case was expressly overruled in Winter v. Fitzpatrick, 35 Cal. 273, which has since been followed in a large number of cases, a majority of which arose under the late constitution, which in this respect did not differ materially from the present one. And we must presume that the framers of the present constitution copied into it the provision of the late one on this subject, with knowledge of the interpretation which this court had given to it, and thereby adopted such construction. In other words, this court having repeatedly held that it had appellate jurisdiction in such cases under the late constitution, the framers of the present constitution, if they had intended to effect a change in that respect, would have made such intention clear.

We are therefore of opinion that an appeal may be taken to this court from a judgment of a superior court, granting or denying an application for a writ of *mandamus*, and that an undertaking in the sum of three hundred dollars, executed and conditioned according to the provisions of section 941, code of civil procedure, stays the execution of the judgment pending the appeal.

The application for a writ of *mandamus* to compel the court to fix the amount of an additional undertaking to be given by appellants is denied, as the undertaking already filed stayed the execution of the judgment pending the appeal.

MORRISON, C. J., and THORNTON, MCKINSTRY, MYRICK, and MCKEE, JJ., concurred.

MCLAUGHLIN v. DEL RE ET ALS.

Department One. Filed January 24, 1884.

AN ACTION, THE MAIN PURPOSE OF WHICH IS TO OBTAIN A DECREE RESTRAINING the commission of continuing trespasses, of a character to produce irreparable injury, is an equitable action, and issues of fact raised therein should be tried by the court, unless it saw fit to order any or all of them to be submitted to a jury.

APPEAL from a judgment of the superior court for Calaveras county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. This was an action for damages and an injunction. The jury found a verdict for the plaintiff for four hundred and seventy dollars damages, whereupon, without any findings by the court, a judgment for that amount, and for a perpetual injunction, was entered. The further facts appear in the opinion.

J. B. Reddick, *W. T. Lewis*, and *C. V. Grey*, for the appellants.

Ira H. Reed, for the respondent.

McKINSTRY, J. The action is neither to recover specific property, nor for money claimed as due upon contract, or as damages for breach of contract, nor "for injuries" simply. The issues of fact ought, therefore, to have been tried by the court, unless the court saw fit to order any or all of them to be submitted to a jury: C. C. P., sec. 592.

The action is in equity, the main purpose of it being to obtain a final decree restraining the continuance or repetition of the trespasses alleged, which are of a character, as claimed, to produce irreparable injury: C. C. P., sec. 526. The facts alleged appeal to a court of equity, for preventive relief, on the grounds that pecuniary compensation would not afford adequate relief, and that restraint is necessary to prevent multiplicity of suits: C. C., sec. 3422.

Judgment and order reversed, and cause remanded, with direction to the court below (on the testimony already taken and such further testimony as may be taken under order of the court) to find the facts and enter appropriate judgment thereon.

McKEE and ROSS, JJ., concurred.

SANTA ANA VALLEY IRRIGATING COMPANY *v.* ANAHEIM WATER COMPANY.

In Bank. Filed January 25, 1884.

JUDGMENT REVERSED ON THE AUTHORITY OF ANAHEIM WATER CO. v. SEMI-TROPIC WATER CO., 12 Pac. C. L. J. 158.

APPEAL by the plaintiff from a judgment of the superior court for Los Angeles county. This was an action to determine the rights of the respective parties to the waters of the Santa Ana river. The plaintiff derived its rights thereto as grantee of the Semi-Tropic Water Co. The facts are stated in the opinion delivered in Anaheim Water Co. v. Semi-Tropic Water Co., 12 Pac. C. L. J. 158.

Glassell, Smith & Smith and *Bicknell & White*, for the appellants.

Howard, Brousseau & Howard and *Thos. H. Smith*, for the respondents.

The COURT. These appeals are by different parties from the same judgment and were submitted upon the same record. On the authority of Anaheim Water Co. v. Semi-Tropic Water Co., 12 Pac. C. L. J. 158, the judgment is reversed and the cause remanded for a new trial.

SUPREME COURT OF COLORADO.

CONNELL ET AL. *v.* GAVITT.

Filed December 4, 1883.

JUDGE OF THE COUNTY COURT WHO HAS BEEN OF COUNSEL FOR THE DEFENDANT in a former trial is disqualified from acting as judge in a subsequent trial of such case. It is his duty to certify such case up to the district court for further proceedings, either upon his own motion or that of a party desiring the same, without imposing as a condition to such removal that the party so desiring shall pay all the accrued costs.

APPEAL from the county court of Pitkin county. The opinion states the facts.

T. A. Rucker and *B. E. Shear*, for the appellants.

No appearance for the appellee.

STONE, J. From the record and bill of exceptions brought up, it appears that suit was brought by appellee against appellant in a justice's court, and from the judgment rendered therein the defendants appealed to the county court, where the case was again tried, resulting in a verdict against defendants, and upon their motion a new trial was granted. Before the second trial came on a new county judge was elected, in the person of J. H. King, Esq., who had acted as counsel for defendants at the former trial, and who was now presiding as judge of the county court when the case came on for the new trial granted. Whereupon, when the case was called up, defendants moved the court to certify the case up to the district court, in accordance with the statute, on account of the disqualification of the judge by reason of his having been of counsel in the cause. The plaintiff waived objection and consented to trial in the county court, but the defendants refused to consent, whereupon the court offered to allow the motion on the condition that defendants pay all the costs which had accrued in the former trials of the case.

The defendants refused to comply with this condition, and thereupon the court set the case down for hearing. Defendants then prayed a change of venue to the district court, setting up by affidavit the disqualification of the county judge as in the former motion. The court consented to grant the change on condition only as before, that defendants pay the accrued costs; and upon the refusal of defendants to comply with this condition, the court proceeded to the trial of the case and rendition of judgment therein. Defendants duly excepted and appealed to this court, and the only grounds of error presented are: first, the disqualification of the judge to try the case; and, second, the refusal of the court to certify the case to the district court except upon the condition named.

The ground of disqualification rests upon the provisions of section 431 of the code, which reads as follows: "A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all the parties to the action."

The judge, having been of counsel for the defendants in the previous trial of the action, was under this statute clearly disqualified from acting

as judge in the trial of the case, and, the disqualification not having been waived by consent of the defendants, had no authority to act judicially therein.

Section 442 of the code is as follows: "If the county judge be disqualified for any cause from sitting on the determination of any action or proceeding pending before him, the cause shall be certified with the original papers to the district court of the same county, which shall proceed thereon to final determination and judgment."

In accordance with this provision, it was the duty of the judge to certify the case up to the district court for further proceedings, upon his own motion, or upon the suggestion merely, or motion of the party not desiring to waive the disqualification without requiring such party to petition for a change of venue, under the provisions of the chapter relating to change of venue. The provisions of section 442, quoted above, are special in relation to judges of county courts, and when not waived by all the parties to the action, are imperative.

As to the second ground of error respecting the accrued costs, we think there was no authority for imposing the condition of payment, for there was no law imposing such condition, under the law as it stood before the adoption of the code; the expenses of a change of venue in courts, other than justices of the peace, were not to be taxed as part of the costs, but were to be paid by the party procuring the change of venue. The code repealed all former law upon this subject, and none relating to costs upon a change of venue has been subsequently enacted. In the absence, therefore, of any statutory provision upon the subject, the general rule that costs abide the event of the suit must apply: Sudam v. Swart, 20 Johns. 476.

In this case there was no apparent reason outside of statutory law for requiring the condition imposed, since the appellants, in appealing the case to the county court, had given the required appeal bond, which was ample security for all costs which should be adjudged against them.

For these reasons we must hold that the trial and judgment in the court below were void, and the judgment will accordingly be reversed, and the cause remanded for further proceedings according to law.

Judgment reversed.

BROWN ET AL. *v.* TUCKER.

Filed December 4, 1883.

QUESTION AS TO THE SUFFICIENCY IN LAW OF AN ANSWER IS RAISED by the filing of a demurrer to a replication.

WHERE SERVICE OF A SUMMONS BY PUBLICATION IS RELIED ON, as conferring jurisdiction on a court, the material requirements of the statute must be strictly complied with; and although the court acquires jurisdiction of the defendant at the expiration of ten days after the expiration of the time prescribed for publication, it is error to render judgment against him until after forty days after such service is complete. Such error may be taken advantage of on a direct proceeding to review the judgment, but not collaterally.

JUDGMENT AGAINST A NON-RESIDENT DEBTOR, RENDERED ON A SERVICE OF SUMMONS BY PUBLICATION, is not void where property of the debtor was taken under attachment after the institution of the action, although the judgment is entered *in form* as a personal judgment against the defendant. Such judgment need not contain an order as to the application of the attached property, as the statute expressly authorizes the sheriff to subject such property to the satisfaction of the judgment lien.

SUPREME COURT OF COLORADO.

CONNELL ET AL. *v.* GAVITT.

Filed December 4, 1883.

JUDGE OF THE COUNTY COURT WHO HAS BEEN OF COUNSEL FOR THE DEFENDANT in a former trial is disqualified from acting as judge in a subsequent trial of such case. It is his duty to certify such case up to the district court for further proceedings, either upon his own motion or that of a party desiring the same, without imposing as a condition to such removal that the party so desiring shall pay all the accrued costs.

APPEAL from the county court of Pitkin county. The opinion states the facts.

T. A. Rucker and *B. E. Shear*, for the appellants.

No appearance for the appellee.

STONE, J. From the record and bill of exceptions brought up, it appears that suit was brought by appellee against appellant in a justice's court, and from the judgment rendered therein the defendants appealed to the county court, where the case was again tried, resulting in a verdict against defendants, and upon their motion a new trial was granted. Before the second trial came on a new county judge was elected, in the person of J. H. King, Esq., who had acted as counsel for defendants at the former trial, and who was now presiding as judge of the county court when the case came on for the new trial granted. Whereupon, when the case was called up, defendants moved the court to certify the case up to the district court, in accordance with the statute, on account of the disqualification of the judge by reason of his having been of counsel in the cause. The plaintiff waived objection and consented to trial in the county court, but the defendants refused to consent, whereupon the court offered to allow the motion on the condition that defendants pay all the costs which had accrued in the former trials of the case.

The defendants refused to comply with this condition, and thereupon the court set the case down for hearing. Defendants then prayed a change of venue to the district court, setting up by affidavit the disqualification of the county judge as in the former motion. The court consented to grant the change on condition only as before, that defendants pay the accrued costs; and upon the refusal of defendants to comply with this condition, the court proceeded to the trial of the case and rendition of judgment therein. Defendants duly excepted and appealed to this court, and the only grounds of error presented are: first, the disqualification of the judge to try the case; and, second, the refusal of the court to certify the case to the district court except upon the condition named.

The ground of disqualification rests upon the provisions of section 431 of the code, which reads as follows: "A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all the parties to the action."

The judge, having been of counsel for the defendants in the previous trial of the action, was under this statute clearly disqualified from acting

as judge in the trial of the case, and, the disqualification not having been waived by consent of the defendants, had no authority to act judicially therein.

Section 442 of the code is as follows: "If the county judge be disqualified for any cause from sitting on the determination of any action or proceeding pending before him, the cause shall be certified with the original papers to the district court of the same county, which shall proceed thereon to final determination and judgment."

In accordance with this provision, it was the duty of the judge to certify the case up to the district court for further proceedings, upon his own motion, or upon the suggestion merely, or motion of the party not desiring to waive the disqualification without requiring such party to petition for a change of venue, under the provisions of the chapter relating to change of venue. The provisions of section 442, quoted above, are special in relation to judges of county courts, and when not waived by all the parties to the action, are imperative.

As to the second ground of error respecting the accrued costs, we think there was no authority for imposing the condition of payment, for there was no law imposing such condition, under the law as it stood before the adoption of the code; the expenses of a change of venue in courts, other than justices of the peace, were not to be taxed as part of the costs, but were to be paid by the party procuring the change of venue. The code repealed all former law upon this subject, and none relating to costs upon a change of venue has been subsequently enacted. In the absence, therefore, of any statutory provision upon the subject, the general rule that costs abide the event of the suit must apply: Sudam v. Swart, 20 Johns. 476.

In this case there was no apparent reason outside of statutory law for requiring the condition imposed, since the appellants, in appealing the case to the county court, had given the required appeal bond, which was ample security for all costs which should be adjudged against them.

For these reasons we must hold that the trial and judgment in the court below were void, and the judgment will accordingly be reversed, and the cause remanded for further proceedings according to law.

Judgment reversed.

BROWN ET AL. *v.* TUCKER.

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QUESTION AS TO THE SUFFICIENCY IN LAW OF AN ANSWER IS RAISED by the filing of a demurrer to a replication.

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ERROR to the district court of Lake county. The opinion states the facts.

Decker & Touley, for the plaintiffs in error.

Markham, Patterson & Thomas, for the defendant in error.

BECK, C. J. The questions presented by this record arise upon the pleadings, and involve the sufficiency of the answer and replication. A demurrer to the answer was overrulod by the court, and a demurrer to the replication sustained. The foundation of the action is a judgment of the district court of Arapahoe county in favor of Brown & Brother, plaintiffs in error, against one A. H. Collins, which judgment is alleged to have perfected a lien in favor of said plaintiffs upon a stock of goods owned by the defendant Collins. Tucker, the defendant in error, and who was also defendant below, was sheriff of Lake county, and as such officer seized the goods upon a writ of attachment issued by the district court of Arapahoe county in the case of Brown & Brother against Collins, and duly levied said writ thereon. After judgment in the latter action, Tucker sold the goods upon a special execution issued from the county court of Arapahoe county, and to him directed as sheriff of Lake county, upon a junior judgment rendered in said county court in favor of the German National Bank of Denver against said Collins. Subsequently he returned an execution afterwards issued upon the judgment of Brown & Brother, *nulla bona*.

The defense set up by Tucker, in his answer to the complaint in the present action, is, substantially, that the judgment in favor of Brown & Brother is void, because it is a judgment *in personam* rendered upon constructive service only, and also because it was entered prematurely. The defendant likewise justifies under the special execution in favor of the German National Bank of Denver. So far as the replication is concerned, we have only to say that it is certainly a remarkable pleading, and, in our opinion, fully warrants the criticism passed upon it by counsel for defendant in error, who say: "The demurrer [to the answer] was argued at length and overruled, upon which our learned friends reduced their argument of the demurrer to writing, filed it in the cause, and called it a replication."

The replication is clearly bad, but we can not agree with defendants' counsel, that this conclusion terminates our investigation, and nothing remains but to affirm the judgment of the court below.

The errors assigned are: 1. The sustaining of the demurrer to the replication; 2. Giving judgment upon said demurrer for the defendants in error, when upon the whole record judgment thereon should have been for the plaintiff in error.

A rule applicable to every system of pleading is, that a demurrer runs through the whole series of pleadings, and will be sustained to the first defective pleading. The objections to the answer, therefore, are not waived, as supposed, by the fact that a replication thereto has been filed, since a demurrer was subsequently filed to the replication. On the contrary, the sufficiency in law of the answer was legitimately raised by the filing of the last-mentioned demurrer.

We will therefore proceed to test the sufficiency of the answer. This involves an inquiry as to the validity of the judgment of Brown & Brother against Collins, the answer alleging fatal irregularities to have occurred in the entry of said judgment. The objection that the judgment was prematurely entered is based upon the facts that the only

service of process upon Collins was by the publication of the summons, the first publication of which was on the seventh of September, 1880, and the last publication thereof on the sixth of October, 1880; and that judgment by default was rendered against him on the eighteenth day of October, 1880, or twelve days after the last publication. That the service by publication was complete, and that the district court acquired jurisdiction of the cause before the entry of the judgment, is expressly declared by statute. When personal service can not be made upon a defendant, section 42 of the code requires the summons to be published in a public newspaper at least once a week for four successive weeks.

The section concludes thus: "And in case of publication the service of summons shall be deemed complete at the expiration of ten days after the expiration of the time prescribed for publication."

Section 46 provides that "from the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings."

No distinction is made by this section as to the manner of service of the summons upon the defendant, and the language necessarily includes service in either of the ways provided by the preceding sections. Where service by publication is relied upon, it must be in a case and under circumstances wherein that mode of acquiring jurisdiction is authorized by the statute, and the material requirements of the statute must be strictly complied with. A point is made by counsel for defendants in error, that a copy of the summons was not deposited in the post-office by the clerk of the district court, directed to Collins at his place of residence, as required by section 42.

We can not consider this point, for the reason that it does not properly arise in the case. The section only requires a copy of the summons to be so deposited "where the residence of a non-resident or absent defendant is known."

The answer does not allege that the residence of Collins was known, nor does it raise the objection that a copy of the summons was not deposited in the post-office. So far, then, as the objections stated in the answer are concerned, there was a literal compliance with the requirements of the statute in respect to the service of the summons, and in the language of section 46, the court must be deemed to have acquired jurisdiction, and to have had control of all subsequent proceedings.

But notwithstanding the foregoing conclusion, the judgment against Collins was prematurely entered. We have held in two cases that where service is obtained by publication of the summons, the defendant has forty days to answer the complaint after the service is complete: Conley v. Morris, 2 Col. 452; Skiles et al. v. Baker, 3 Id. 201.

This is a question of statutory construction, and was passed upon by the district court, as appears from the recital in the judgment, that "the legal time for answering having expired," etc. In the decision of this point the court erred, and in a direct proceeding to review the judgment it would have to be reversed for error. But the judgment is collaterally drawn into question here, and a different rule obtains, which is, that unless it is absolutely void, the error complained of is not available in this proceeding.

The decided weight of authority is to the effect that when jurisdiction has been obtained by the service of process, actual or constructive, all subsequent proceedings are exercise of jurisdiction, and however erro-

nouncing its judgment, no authority exists for disregarding or refusing to give effect to that judgment in a collateral proceeding. Section 91 of the civil code authorizes the plaintiff, at the time of commencing an action on contract, express or implied, or at any time before judgment, where a ground for attachment exists, to have the property of the defendant, not exempt from execution, attached as security for any judgment that may be rendered in such action.

Section 95 permits the defendant by an affidavit to traverse and put in issue the matters alleged in the affidavit on which the attachment is based.

In the absence of such traverse, or of any application to quash the writ or to discharge the attachment, the statute does not require an investigation of the truth of the allegations of the affidavit, or that the court shall make any finding or order concerning either the attachment or the property attached. These matters are merely incidental to the action, and there being no issue as to them, the court does not appear to have any duty appertaining thereto to perform. The statute itself fixes the *status* of the attached property, and gives full directions as to its custody and disposition. Section 105 requires the sheriff to retain the property attached to answer any judgment that may be recovered in the action, with two provisos: one is, if the attached property be perishable, he is required to sell it, and retain the proceeds for the above purpose; the other is, that before judgment is obtained, the attached property or its proceeds may be subjected to execution upon another judgment recovered previous to the issuing of the attachment.

After judgment for the plaintiff, the sheriff is required, by the express terms of section 107, not by the order of the court, to enforce the attachment lien by a sale of the property attached, unless it has been released as provided by law, or subjected to execution on another judgment recovered previous to the issuing of the attachment. The objection to the judgment, that it contains no order as to the application of the attached property, does not appear to be well taken. The decisions cited upon this point, based upon other systems of practice and upon dissimilar statutes, can not control. And if the rule of decision adopted by the supreme court of the United States in respect to proceedings *quasi in rem* against non-residents be admitted, viz., that only the property seized before judgment can be applied in satisfaction of the judgment, still under our statute the failure to make such order can not be held fatal to the judgment in this class of cases. No mention of the attachment being made in the pleadings, no issue being tendered concerning it, and no prayer contained in the complaint as to the application of the attached property, any order of the court respecting it would be outside the allegations of the complaint and of the issues. In addition, are the considerations that the statute requires no such order, but has vested full authority and cast all responsibility concerning the custody and proper application of the attached property upon the officer of the court. These views are sustained by the following adjudications upon a similar statute: Low v. Henry, 9 Cal. 551; Meyers v. Mott, 29 Id. 364; Gregory v. Nelson, 41 Id. 282.

The levy of the writ of attachment in this case being followed by judgment, and execution having issued within what was held in Spelman v. Chaffee, 5 Col. 247, to be a reasonable time, the plaintiff's lien upon the attached property was preserved by the statute as against the

special execution issued out of the county court upon the junior judgment rendered therein in favor of the German National Bank.

We are aware that there has been a slight modification of the statute under which the question of reasonable time for the issue of an execution arose in the above-cited case, but the same reasons therein mentioned still exist for adhering to the rule there announced. The objection that a general execution was issued upon the judgment of plaintiff in error, instead of a special execution against the property attached, is equally unavailing. The execution follows the judgment, and under it the defendant in error, as sheriff of Lake county, was fully warranted in subjecting the attached property to sale in satisfaction of the judgment.

As a result of the foregoing conclusions, we must hold that the answer filed by the defendants in error to the complaint in this cause is insufficient to constitute a defense to the action. The demurrer to the replication, therefore, should have been carried back and sustained to the answer.

We have not considered in the foregoing opinion, and do not decide upon, the effect of the provisions of our statute concerning constructive service of process, where property of an absent defendant is not seized, pending the action, or where the property seized is insufficient to satisfy the judgment subsequently rendered.

The judgment is reversed and the cause remanded.

Judgment reversed.

DUCKETT ET ALS. *v.* PRICE ET ALS.

Filed December 4, 1883.

PRINCIPALS AND SURETIES ON AN INJUNCTION BOND MAY BE SUED TOGETHER in an action for the breach of the conditions thereof, and the damages assessed and awarded in such action.

APPEAL from a judgment of the district court for Fremont county. The opinion states the facts.

Macon & Cox and *J. F. Vaile*, for the appellants.

No appearance for the appellees.

BECK, C. J. Appellants brought suit in the court below upon an injunction bond, averring in their complaint the dissolution of the injunction, and stating several claims for damages accruing to them for the wrongful suing out of the injunction. Appellees, who are the principals and sureties upon the injunction bond, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the appellants amended their complaint. Appellees demurred to the amended complaint, assigning the same ground of demurrer. The court again sustained the demurrer, and appellants declining to plead further, judgment was given for the appellees, dismissing the complaint, and for costs, from which judgment the appellants have prosecuted this appeal. The appellees have made no appearance in this court, and the cause has been heard *ex parte*. We are therefore not advised by the appellees what they rely upon as the fatal defect or defects in the complaint which can be reached by a general demurrer. No damages were awarded on

dissolution of the injunction, nor have any been assessed and awarded in any proceeding instituted for the purpose since its dissolution. Courts have held, under dissimilar statutes, however, that no right of action accrued upon an injuntion bond until damages were assessed and awarded against the complainants in the injunction proceedings.

Section 139 of our civil code provides that this shall not be necessary in cases of this character, but that principal and surety may be sued together in the first instance, and the damages assessed and awarded in such action. If, therefore, this objection be relied upon, it is untenable. We are of opinion that other objections to the complaint, if they exist, should be specially assigned.

The judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed.

WELLS ET AL. *v.* ADAMS.

Filed December 4, 1883.

WHERE ONE ATTORNEY EMPLOYS ANOTHER TO ASSIST HIM IN A CERTAIN LITIGATION, and promises to pay him a "good fee" for his services, in an action against the former to recover the same evidence of the fee received by him is inadmissible when the amount thereof was contingent upon the success of such litigation.

HYPOTHETICAL QUESTIONS CONTAINING ERRONEOUS RECITALS OF FACTS CAN NOT BE ASKED of an expert witness, for the purpose of determining the value of such services.

DECLARATIONS OF A PERSON NOT A PARTY TO THE RECORD, and having no connection with the controversy, are hearsay and inadmissible.

SECONDARY EVIDENCE OF THE CONTENTS OF AN IMPORTANT DOCUMENT IS INADMISSIBLE, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found, if the circumstances admit of such proof. The mere statement that diligent search had been made in the plaintiff's office, and the same was unsuccessful, is not sufficient.

ADMISSION OF EVIDENCE AS TO THE VALUE OF SERVICES other than those sued for is error.

APPEAL from a judgment of the district court for Custer county. The opinion states the facts.

Wells, Smith & Macon, in propia persona, for the appellants.

George S. Adams, in propia persona, for the appellee.

HELM, J. Appellants are and were in May, 1879, copartners in the practice of the law. The firm was at that time engaged in prosecuting a certain cause, known as the Bull Domingo suit, then pending in the district court of Custer county. Macon, one of the partners, being on the ground in charge of the case in behalf of himself and copartners, employed appellee (a local attorney at law) to assist in the trial thereof, promising him a "good fee" for his services in connection therewith. The cause was tried, occupying some ten or twelve days, and appellee assisted as counsel therein. Failing to secure such compensation as he deemed his services worth, appellee brought suit, and obtained a verdict and judgment against appellants for the sum of twenty-five hundred dollars. Neither of appellants was present at this trial, though they were represented by counsel; no evidence was offered in their behalf, and the verdict was based exclusively upon the testimony introduced by appellee.

It appears that appellants took charge of the Bull Domingo case for a contingent fee, and were to furnish all of the legal services necessary

in the management thereof; and appellee and one Hunter were permitted to testify that appellants received forty-two thousand five hundred dollars for the services rendered.

In determining the value of appellee's labor, the jury doubtless took into consideration the amount of this fee, and were governed to some extent thereby.

There was no contingency as to appellee's compensation for his services. Appellants were bound, if at all, to pay him a good fee whether they received anything or not. His compensation did not depend in any way upon success in the case; theirs rested entirely upon this contingency. He was to be well paid for the services actually rendered; they might bear most of the responsibility and perform the lion's share of the work, and yet receive no remuneration whatever therefor. Had appellants been unsuccessful in that cause, and received nothing for their labor and responsibility, they could not have reduced the amount of appellee's recovery by proving that fact in this case.

The value of an attorney's services in a given cause is to some extent governed by the amount in controversy, and the consequent responsibility resting upon him.

A larger fee is usually charged and received for the management of a cause involving fifty thousand dollars than for similar services in a controversy over fifty dollars. And we are not disposed to say that the court erred in admitting proofs showing the value of the property at stake in the Bull Domingo suit, though appellee was only assistant counsel therein, and bore but a small part of the responsibility. But we can not, by any satisfactory reasoning, extend this rule so as to sanction the court's action in admitting proofs as to the fee received by appellants.

The court also erred in allowing the witness Moorman to answer the hypothetical question put to him. Moorman, who was a practicing attorney, was called for the purpose of giving his opinion as to the value of the services rendered by appellee. The question put to him supposed that the party occupying the position of appellants received forty-two thousand five hundred dollars for services rendered, and it also contained a supposition that appellee was engaged fifteen or twenty days in the preparation and trial of the case; whereas his own testimony limits the time to ten or twelve days. It is only reasonable to infer that Moorman considered these elements of the question, and in consequence thereof placed his estimate of the value of appellee's services higher than he otherwise would.

Witness Hunter was permitted to testify to declarations made by one Wilson, concerning the employment of appellee by Macon. Wilson was not a party to the record, and had no connection with the controversy; his declarations were purely hearsay and should not have been admitted.

Appellee, while testifying, stated the contents of a letter received by him from appellant Wells. The only evidence as to the loss of this letter is given by him as follows: Question. "Have you got that letter?" Answer. "I have not; I have hunted my office over for it." Question. "Have you made diligent search for that letter?" Answer. "I have."

The proof of diligence used in searching for a lost instrument, required as a foundation for the admission of oral evidence concerning the contents thereof, depends to some extent upon the nature of the instrument lost: 2 Best on Ev., sec. 482.

The contents of a letter, or the superscription upon an envelope, which

is not likely ever to become useful, might be shown by parol upon more slender proof of loss than would be required in the case of an important contract.

But such secondary evidence as to the contents of any document should not be admitted unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found, if the circumstances admit of such proof: 1 Whart. on Ev., sec. 147.

The declaration of appellee, that he had made diligent search in his office for the letter, is not a compliance with the foregoing requirements; the court erred in admitting secondary evidence of its contents.

According to the averments of the complaint, and the testimony of appellee himself, he was only employed by Macon to assist in the trial of a suit then pending; yet he was permitted to testify as to services rendered, including a trip from Rosito to Pueblo, in a subsequent suit between the same litigants. These services and expenses were included by the jury in estimating the amount of his damages. There was error in admitting this testimony, but as no exception was preserved thereto, we are precluded from considering the same.

For errors, however, in the admission of testimony, to which exceptions were duly taken, the cause must be reversed.

While some of these errors would perhaps not be sufficient in themselves alone to justify a reversal, yet others were important, and taken together, we are satisfied that appellants were seriously prejudiced thereby, and should be awarded a new trial.

Reversed and remanded.

STEVENS *v.* SOLID MULDOON PRINTING CO.

Filed December 4, 1883.

WRIT OF ERROR WILL BE DISMISSED WHEN THE RECORD FAILS TO DISCLOSE that a final judgment has been rendered.

ERROR to the district court of Ouray county. The opinion states the facts.

Thomas George, for the plaintiff in error.

Markham & Patterson, *W. Harrison*, and *F. C. Goudy*, for the defendant in error.

THE COURT. The record in this case fails to disclose anything which by the most liberal interpretation can be termed a final judgment. The nearest approach thereto is the following language, viz.: "The court having heard the same, this motion was granted, and the action dismissed at plaintiff's costs." This is a mere declaration that the action was dismissed at the plaintiff's costs; it does not profess to be a judgment, neither does it appear therefrom that it was intended to be such.

"A strict compliance with forms is not essential in the entry of judgments, yet to constitute a final judgment the record must not only indicate that an adjudication took place, but the entry must have been intended as an entry of judgment:" Alvord et al. v. McGaughey, 5 Col. 244.

There being no final judgment to either affirm or reverse, the writ of error must be dismissed.

Writ dismissed.

EMERY ET AL. *v.* YOUNT ET AL.

Filed December 14, 1883.

EQUITY WILL NOT INTERFERE TO SET ASIDE A CONVEYANCE ON THE GROUND OF FRAUD, at a suit of a general judgment creditor of the grantor, where the latter has other property subject to execution sufficient to satisfy the judgment. In such action the complaint must allege the insolvency of the debtor, or facts sufficient to indicate that the judgment could not be collected without equitable aid.

FAILURE TO MAKE SUCH ALLEGATIONS CAN BE TAKEN ADVANTAGE OF at any time, and is not cured by evidence establishing the insolvency of the judgment debtor.

VOLUNTARY CONVEYANCE WILL NOT BE SET ASIDE ON THE GROUND OF FRAUD on the grantors' creditors, unless it is averred and proved that the grantor was in debt at the time of such conveyance, or that the same was made with a view of contracting further obligations.

LIEN OF AN ATTACHING CREDITOR IS SPECIFIC, AND IS NOT MERGED in the judgment until a transcript of the judgment docket is filed in the office of the county recorder. No time is limited by law for filing such transcript, and it is optional with the attaching creditor to do so or not.

LIEN OF A JUDGMENT CREDITOR OBTAINED BY FILING A TRANSCRIPT OF HIS JUDGMENT extends to all the realty of the debtor not exempt from execution, unattached as well as attached. Such lien takes precedence over subsequent purchasers or incumbrancers; but if such transcript is not recorded, the rights of *bona fide* purchasers or incumbrancers of the debtor's realty, prior to execution levy thereon, are in no way affected by such judgment.

COMPLAINT IN AN ACTION BY A JUDGMENT CREDITOR, HAVING A SPECIFIC LIEN by attachment upon a particular parcel of his debtor's land, need not aver the fact of the debtor's insolvency, where the object of the action is to have a subsequent conveyance of such land declared fraudulent and void as to the plaintiff, and that, as to the extent of his lien upon the same, his right to obtain satisfaction of his judgment therefrom be recognized and enforced.

ERROR to the county court of Larimer county. The opinion states the facts.

Tilford & Gilmore, for the plaintiffs in error.

No appearance for the defendants in error.

HELM, J. This in an equitable action brought by Ella B. Yount, a judgment creditor of defendant George A. Emery, against him and others, for the purpose of subjecting certain real estate to the satisfaction of her judgment. Plaintiff's theory is that a deed to one of the parcels of land was procured by said Emery, to be executed to his wife, a co-defendant herein, for the purpose of defrauding his creditors; and that he himself assigned a title bond to the other tract to his mother and other co-defendant with like intent.

The complaint substantially prays that said deed be canceled, and the lots conveyed to Mary Emery be subjected to the payment of plaintiff's judgment; also that plaintiff be awarded the benefit of a specific lien upon the lots covered by the title bond by virtue of her judgment aforesaid, and a writ of attachment levied thereon in aid of her suit, before the assignment of said title bond. The defense is that Emery's wife advanced the purchase money from her own funds, and purchased the property, and took the deed in good faith; and that his mother was the real owner of the title bond before and at the time of the levy of said attachment writ; that Emery was merely a trustee for her benefit, and that the assignment was made in good faith and in execution of the trust.

The questions of fraud involved in the case were submitted to a jury, who found that both transactions were had with the intent of defrauding Emery's creditors. A decree in favor of plaintiff was entered upon these

findings. The complaint nowhere alleges that said defendant Emery is insolvent, or that he has not other property amply sufficient to satisfy plaintiff's judgment. It does not even aver that an execution had ever been issued upon said judgment, or that any effort of any kind had ever been made to procure satisfaction thereof; the only allegation on this subject is that the judgment "still remains unsatisfied in whole or in part."

The evidence shows that an execution was issued upon said judgment and returned "unsatisfied." Aside from this, there is nothing in the record bearing upon defendant George A. Emery's financial condition, save a declaration made by himself to one of the witnesses, that he had "plenty of property to pay the note," meaning the note upon which said judgment was afterwards rendered. The doctrine is settled, that a court of equity will not interfere to set aside a conveyance on the ground of fraud at the suit of a general judgment creditor where the debtor has other property subject to execution sufficient to satisfy the judgment. And therefore it has become an established rule of pleading that the bill must by proper averment allege insolvency, or facts sufficient to indicate that the judgment can not be collected without equitable aid; failing to do this, it is fatally defective, and the defect is not cured even in cases where evidence is received fully establishing the insolvency of the judgment debtor. The averment is material, and a decree upon proofs without the necessary allegation is error, for the "defendant can not be required to meet and overcome evidence not responsive to the pleadings:" Thomas v. Mackey et al., 3 Col. 393; Burdsell v. Waggoner et al., 4 Id. 259.

A failure to state in the complaint facts sufficient to constitute a cause of action may be taken advantage of at any time: C. C. P., sec. 56.

Another valid objection urged against the complaint in this case is its failure to aver that plaintiff, or any one else, was a creditor of defendant Emery at the time the alleged conveyance to his wife was executed.

Before a court of equity is authorized to cancel a voluntary conveyance on the ground of fraud upon creditors, it must be alleged and proven that debts existed at the time the conveyance is made, or that it was executed with a view to the contracting of future obligations: Sexton v. Wheaton, 8 Wheat. 229.

These principles of pleading are decisive of the case so far as the deed to Mary Emery is concerned, and would terminate our investigations were it not for complications arising from the levy of plaintiff's attachment writ upon the property afterwards conveyed to Mrs. A. S. Emery. The equitable interest of the latter in the premises, if any she had, did not appear of record; and there is nothing to show that plaintiff had any notice thereof until the assignment of the title bond.

The proceeding by attachment is in the nature of proceedings *in rem*, and the attaching creditor acquired a specific lien upon the property attached; he is not in the attitude of a mere creditor at large. This lien can not be destroyed except by dissolution of the attachment, or by some default of the attaching creditor: See Drake on Attachment, secs. 224, 225, and cases cited. And unless a merger takes place, it remains in full force and effect. But it is contended by counsel for plaintiff in error, that defendant in error is entitled to no special advantage from the levy of her writ of attachment; because the lien acquired thereby was merged in her judgment, she has secured no judgment lien upon the premises, and therefore no specific lien upon the same can be recognized.

In this state, an execution, levy, and sale may be made under a judgment as soon as rendered; but the judgment itself constitutes no lien upon realty until a transcript of the judgment docket is filed with the recorder of the proper county.

The attachment lien does not merge in the judgment as contended by counsel; no merger takes place until a judgment *lien* exists. Therefore with us there is no merger of the attachment lien until a transcript of the judgment docket is duly filed as aforesaid. No time is limited by law for the filing of such transcript, and it is optional with the creditor to do so or not.

If he takes advantage of the statute and records, he obtains a judgment lien upon *all* the realty of the debtor not exempt from execution, unattached as well as attached; this lien takes precedence over subsequent purchasers or incumbrancers thereof. If he does not record, the rights of *bona fide* purchasers or incumbrancers of the debtor's realty prior to execution levy thereon, are in no way affected by his judgment.

We do not decide how long this attachment lien upon realty would hold good, nor how soon the attaching creditor should move to subject the property to the satisfaction of his judgment.

When a transcript of the judgment docket is filed with the recorder, the lien secured is good for six years, whether execution issue or not: Sess. Laws, 1879, sec. 16, p. 223.

And it may be that in cases like this, where the creditor secures no judgment lien upon all the *debtor's realty*, his attachment lien upon a specific portion thereof would be held to survive for the same period. In this case, however, these questions are not presented because there was no delay; this action was begun within six weeks after judgment in the original suit. Plaintiff's attachment lien did not merge, because she never filed a transcript of the judgment docket, and never acquired a judgment lien.

It is still in force, and she is entitled to the benefit thereof. No hardship will result in other cases from the application of the rule we thus recognize and adopt; for by our statute an attachment of realty is secured by the sheriff filing with the county recorder a copy of the writ and description of the property attached: Code, sec. 96; and this record is notice to all the world of the attachment lien acquired thereby; it informs parties dealing with the debtor of the creditor's claim upon the property quite as effectively as does the filing of a transcript of the judgment docket.

Defendant in error is then in the attitude of a judgment creditor, having a specific lien upon a particular tract of land, asking equitable relief against a subsequent fraudulent conveyence of the same. She demands that such conveyance be declared void as to her, and that, to the extent of her lien upon the property, her right to obtain satisfaction of the judgment therefrom be recognized and enforced.

For this purpose we think the pleadings sufficient; the issue as to a fraudulent assignment of the title bond is made by the answer and replication, and supports the verdict of the jury. To recover upon this branch of the case, an averment of the debtor's insolvency was unnecessary; the reasons for that averment by one who is only a general judgment creditor do not control. The debtor may be abundantly able to satisfy the judgment, yet he shall not by a fraudulent transfer of property

checks, regardless of the price at which the mines were sold. Smith, in his testimony, denied this, and stated that he was himself to receive two thousand dollars for all of the four mines, or five hundred dollars for each, and that it was understood between all parties in interest that all over two thousand dollars received from the sale should go to Roe and one Hyland, who was co-operating with Roe, and to whom also four conditional checks were given by Smith, aggregating one thousand dollars, of the same tenor as those given to Roe, but that it was agreed to try to sell at four thousand dollars, and not at a greater price, and that the property was therefore bonded to Suydam for this price. This certainly seems the most reasonable construction to put upon the agreement, considering both the facts which were admitted and those which were disputed, for it is difficult to believe upon the whole evidence that Smith agreed to give the two thousand dollars commission to Roe and Hyland, and at the same time agree that the property might be sold at any price whatever, and considering also that it further appeared in testimony that Butler was a party in interest in the property with Smith, and was entitled to one half of the price that Smith was to receive.

That there was a failure to make the sale in accordance with the original agreement is evident, but that such failure may have been due to the conduct of Smith is equally evident.

It is not disputed that Roe performed all the services that he was required and expected to do under the agreement in furtherance of the sale, and that the payment of the one thousand dollars to Smith under this sale, such as it was, by Smith to Suydam, through Butler, was brought about primarily by means of the previous efforts of Roe. And it can not be said that the sale might not have been made by Roe, under his agreement therefor, had he been allowed by Smith the full time stipulated by that agreement in which to make the sale. It appears from the testimony of Suydam, that soon after he arrived upon the ground to examine the property he learned that by dealing directly with Smith he could buy the property for less than the price at which it had been bonded to Roe, and this resulted in Smith offering it, through Butler, for two thousand dollars, that sum being the amount Smith was to receive under his agreement with Roe. It seems an attempt, on the part of Smith, to facilitate a sale by underbidding his own agent, Roe, and getting his own half of the agreed price, leaving Roe without any commission for his services in procuring a purchaser. At least, this action of Smith was a violation of his agreement with Roe, who was thus cut off from a chance of making the sale within the time allowed him by the agreement, and we may fairly presume that, if allowed the full time conditioned in the agreement, Roe might have sold the property either to the purchaser in hand or to some other purchaser within that time, and for the price named in the bond, in which case he would be entitled to the specific sum sued for.

It is a familiar doctrine of the law of contracts, that if one party is prevented from fully performing his contract by the fault of the other party, the latter can not be allowed to take advantage of his own wrong to exempt himself from liability under the contract. But since the appellee Roe is not finding fault with the judgment of the court below, we have only to deal with the objections to the judgment as coming from Smith, the appellant, and upon his part we think there is no good ground for reversal. He admitted in his testimony the services of

Roe in the transaction, and that he, Smith, had offered to pay Roe fifty dollars as compensation for such services, and we presume this admission was the basis of the amount found by the court in favor of the appellee. However incorrect this was as a basis for the judgment, in so far as it relates to the appellee, yet, in respect to the appellant, the latter has no just cause of complaint that the judgment against him is for a sum less than the amount sued for, or that he would be liable for under a *quantum meruit*. So far as the record shows, he made no objection to a variance between the complaint and the proofs in the court below, where, under sections 77 and 78 of the code, an amendment if necessary and proper might have been made to cure the objection; nor is it pretended that appellant was misled by such variance. In such case the objection is too late when made for the first time in this court: Sussendorff v. Schmidt et al., 55 N. Y. 319.

There have been two trials of the case below, resulting in a judgment substantially the same in both, and no sufficient reason appearing for disturbing the judgment herein questioned, it will be affirmed.

Judgment affirmed.

CITY OF DENVER *v.* BAYER.

Filed December 21, 1883.

THE WORD "PROPERTY," AS USED IN THE CONSTITUTIONAL GUARANTY that "private property shall not be taken or damaged without just compensation," includes not only the corporeal thing, whether the same be chattels or land, but also the right to fully possess, use, and alienate the same.

AN OWNER OF LAND ADJOINING A STREET IS NOT ENTITLED TO COMPENSATION UNDER SUCH CONSTITUTIONAL GUARANTY FOR INJURIES to his property, occasioned by a reasonable improvement of the street by the proper authorities, for the greater convenience of the public, or for a temporary inconvenience resulting from a legitimate use thereof by the public; but where such injuries result from a change in or use of the street, wholly foreign to the ordinary purposes of a highway, as where the same is devoted to the purposes of a steam-railroad, such owner is entitled to compensation, although such use was authorized by the authorities having charge of the streets. And this result follows whether the fee in the street is in such owner or not.

WHAT CONSTITUTES A "TAKING" OR "DAMAGING" OF PRIVATE PROPERTY, within the meaning of the constitution, stated, and the distinctions between commented upon and explained.

AN OPINION OF A COURT IS NOT DECISIVE OF A QUESTION NOT MENTIONED therein, although the same might, and perhaps should, have been passed upon.

A MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES TO LAND caused by building and operating a steam-railroad in an adjoining street, although the right so to use such street was conferred upon the railroad company by an ordinance of the city council.

THE MEASURE OF DAMAGES IN AN ACTION FOR SUCH INJURIES IS THE ACTUAL DIMINUTION in the market value of the land, for any use to which it may reasonably be put; and if, by reason of the proximity of such railroad, such land has been in any way peculiarly benefited, such benefit should be deducted in determining the amount of the owner's compensation.

APPEAL from a judgment of the district court for Arapahoe county. The opinion states the facts.

J. P. Brockway, Stallcup, Luthe & Shaffroth, J. A. Dawson, and *J. C. Stallcup, city attorney*, for the appellant.

Samuel E. Brown, for the appellee.

HELM, J. Plaintiff below seeks to recover in this action for the obstruction of free ingress and egress to and from his lots by means of the

street upon which they front, and for a depreciation in the value of his property, caused by the construction and operation upon the street of the railroad mentioned in the pleadings.

Three questions are fairly presented for adjudication by the record before us: 1. Is the abutting lot owner in this state entitled to compensation when the adjoining street is occupied by an ordinary railroad, and his property is thereby injured? 2. If he is, did the city of Denver become liable therefor, through the action of its council in passing the ordinance recited in the answer? And, 3. If the adjacent proprietor is entitled to compensation, what is the proper measure of *damages* by which the same shall be determined?

The abutting lot owner has a peculiar interest in the street; he has rights therein not shared by the general public. If the fee thereof be in the municipality, he owns an easement therein; this *easement*, or right, though incorporeal and intangible, often gives to the realty whatever value it may be found to possess. Without it, the land and the improvements thereon may be of little use or benefit; with it, they may yield to the owner a handsome revenue. This is especially true of business streets and business blocks erected thereon.

Property in its broader and more appropriate sense is not alone the chattel or the land itself, but the right to freely possess, *use*, and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible. The people and the courts of Colorado are constantly treating as property the right to a use of water acquired by priority of appropriation; the right of user would of course be of no value without the water, but it is this right that is mainly the subject of ownership. Incorporeal hereditaments, particularly those denominated easements, have always been considered property, both by the civil and the common law. They are generally attached to things corporeal, and are said to "issue out of or concern" them; but any wrongful interference therewith has been promptly recognized and punished by the courts.

No good reason is observed for discriminating against the easement in a street connected with the lot of an abutting owner. We are disposed to say that it is property within the meaning of our constitution, and any interference therewith which results in injury to the realty must, with the exceptions hereinafter stated, be justly compensated. If in such a case there be no technical taking of private property, there is a damaging thereof within the constitutional inhibition. Whatever permanently prevents the adjacent owner's free use of the street for ingress or egress to or from his lot, and whatever interference with the street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon.

But sometimes these interferences and resulting injury may properly, even in this state, be held to be *damnum absque injuria;* as where they are occasioned by a reasonable improvement of the street by the proper authority for the greater convenience of the public; or where a mere temporary inconvenience or injury results from a legitimate use thereof by the public.

The streets of a municipal corporation are highways; they are dedicated to the use of the general public, and it has a right therein in the nature

of an easement—a right which is termed an easement by some of the authorities. Whether the fee thereof be in the city or in the adjoining owner, this right of the public ordinarily remains the same; if in the former, such fee is generally in trust for the benefit of the public. If in the latter, it is subject to the right of user or enjoyment by the public for all the ordinary and legitimate purposes of a highway. With us the control thereof is, in either case, vested by law in the municipal government; it is the duty of the city council to protect and improve the same in such manner as will render it most useful for a highway. In determing what changes and improvements are most conducive to this end, the council exercise a large discretion, and unless unreasonable changes are made, or injury results to the adjoining premises through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain; though, in fact, the real value and convenience of his property are diminished thereby. For in purchasing his lot or in relinquishing the public easement, he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof.

But it must be borne in mind that these presumptions attach only so long as the purpose of the change is to render the street more convenient and useful as a highway. When this object is abandoned, and the council direct or permit a change or use wholly foreign to the ordinary purposes of a highway, and when thereby adjacent property is actually damaged, the owner thereof is, in this state, entitled to reasonable compensation for the injury.

The abutting owner may well be presumed to have taken into consideration the fact that the grade of the street might be raised or lowered, that pavement might be laid and bridges and culverts constructed, and that a street railroad, even, might be built and operated thereon; and it may fairly be presumed that in purchasing he anticipated and allowed for the possible or probable damages to result from these and similar changes, or that he signified his consent thereto, and thus deprived himself of any right to compensation therefor. But no such presumption, consent, or estoppel applies to the use of the street by an ordinary railroad. The argument that such a railroad is an improved public highway, and therefore its construction and operation in the street is only an improved and appropriate use thereof, we do not regard as resting either upon correct principle or sound logic.

The street is designed for local convenience and use, and is dedicated thereto; it should be entirely unobstructed, save as temporary obstructions occur in the improvement thereof by the proper authorities or in its legitimate use by the public.

An ordinary railroad is not a local convenience; the city is but one of its termini; its cars do not stop at the beck of any one who may wish to ride, and do not commonly transport passengers from one point to another within the city; its ties and rails, as generally laid, are a permanent interference with the use of the street for ordinary vehicles; the smoke and dust, interruption and noise, produced by operating its trains, are a perpetual annoyance, and the danger a constant menace, in the occupation and enjoyment thereof for the usual purposes.

We can not escape the conclusion that such a railroad is an additional burden or servitude not comprehended within the easement for an

ordinary public street or highway—a burden or servitude which the abutting owner can not be presumed to have anticipated or consented to.

The railroad is a public benefit; it is generally of great advantage to the town or city to or through which it is built and operated. And for any injury or annoyance occasioned thereby, which an adjoining owner shares in common with the general public, he ought not to recover; but for those damages which are peculiar to him, which affect his property and impair its value without injuring that of his neighbor, he ought in justice to receive compensation.

We are aware that upon some of these questions the courts are by no means in accord—our views conflict with the decisions of courts for whom we entertain the profoundest respect. But while this want of harmony is to be regretted, it can not be avoided, for agreement with all the able decisions is impossible. No attempt has been made to review in this opinion the cases: the task would be too long and laborious; we have not stated exhaustively the reasons controlling the views adopted upon this branch of the case, nor shall we undertake to do so. There are, however, a few subjects and decisions which we feel called upon to more specifically consider.

A distinction has sometimes been made with reference to the *fee* of the highway. The doctrine is announced, and supported by a strong preponderance of authority, that if the fee of the street be in the public, or in the municipality for the use of the public, the legislature may authorize it to be used for the construction and operation of a railroad, without compensation to the adjoing property owner, and against his wishes. And of course the legislature may delegate to the municipal authorities power to grant the same privilege, with like immunity from liability, to lot owners along the street occupied. See the following works and the cases cited therein: 2 Dillon on Mun. Corp., sec. 556; Mills on Em. Dom., sec. 203; Cooley's Const. Lim., 5th ed., 687.

We are not, as may at first seem, ignoring this doctrine, or necessarily denying its correctness under the law prevailing where it has been declared. A careful examination shows that almost without exception those decisions which consider the subject, and deny a right to compensation for injury where the abutting owner does not also own the fee of the street, were rendered under constitutions which require compensation only for the taking of private property, and a majority of those opinions are largely devoted to analyzing the word "taken," and to defining its meaning as used in their respective constitutions.

The constitution of Colorado contains the following provision: "Private property shall not be taken or damaged for public or *private* use without just compensation." We believe that the framers of this instrument did not insert the words "or damaged" therein without a purpose. We can not consent to the proposition that these words add nothing to the word "taken," also used, and that the provision would be just as broad without them. It is hardly necessary to invoke the course of construction which forbids that we shall consider them as either meaningless or merely cumulative.

The position taken in some of the cases is, that if the adjoining owner has not the fee of the street, and the value of his property be diminished fifty per cent. by the construction of the railroad therein, he has no redress; while, if he be the fortunate owner of this fee, he may recover, not only for the taking or appropriation of the street, but also for the

interference with his easement and the *decrease occasioned in the value* of his premises. Yet, whether he own the fee or not, his rights in connection with the street, while it remains a street, are practically the same. His possession of this fee in no special way contributes to the use or enjoyment of his lot, and enables him to exercise no greater control over the street than he would have without it.

This distinction as to the fee seems to rest upon the fact, that in one case there is a *wrongful incumbrance* of his *freehold*, while in the other there is not. The actual injury inflicted is about the same in both. But while, if the fee vest in the city, there may be no wrongful incumbrance of his *estate* in the sense of these cases, there is, under our constitution, at least a damaging thereof, for which he is entitled to compensation.

Constitutional provisions, where only the *taking* of private property is to be compensated, have frequently been held to include any "direct physical obstruction or injury" to the abutting premises, even though there be no actual appropriation of the ground itself, as where, by excavation or embankment, water was caused to overflow the same; a kind or class of injuries for which, in the absence of constitutional or statutory enactment, a remedy existed at common law: Toledo, Wabash & Westerly R'y Co. v. Morrison, 71 Ill. 616; Hooker v. New Haven & N. H. Co., 14 Conn. 146; Pumpelly v. Green Bay Co., 13 Wall. 166.

We think this construction of the provision eminently reasonable and just. Accepting it as correct, we are forced to draw the inference that the words "or damaged" with us were intended to reach still another class of injuries. To this class belong, in our judgment, those complained of in the case at bar. Upon this subject see Gottschalk v. C. B. & Q. R. R. Co., S. C. Nebraska, 16 Reporter, No. 13, p. 402; also Transportation Co. v. Chicago, 99 U. S., and other cases hereinafter considered.

There has heretofore been no interpretation of our constitutional provision by this court, with reference to damages such as those complained of in the case before us.

The rights of the parties in Col. Cent. R. R. v. Molandin, 4 Col. 154, occurred prior to the adoption of that instrument; and for this reason, although the decision was rendered subsequent thereto, no mention was made, or discussion had, of the constitutional inhibition. But section 48 of chapter 18, revised statutes of 1868, provides that private property shall not be "taken or *injuriously* affected" without compensation. This statute remained in force till 1876; and it may be urged that the decision in the Molandin case above mentioned was governed thereby.

We may admit that the words of the statutes, "injuriously affected," are as comprehensive in meaning as the word "damaged" used in the constitution, and yet not be concluded by the foregoing decision. The statute was not relied upon or discussed in that case; not a word appears in the opinion itself, nor in the briefs and arguments of counsel, to show that it was even remotely considered. The opinion of a court is not decisive of a question not mentioned therein, although the same might, perhaps should, have been passed upon. It is generally a party's privilege to waive a statutory right; and courts, particularly those of last resort, do not, as a rule, press upon litigants the benefit of a right or privilege which they have elected not to invoke or claim. Had the courts been called upon for a construction of that statute, it is probable that a

view would have been adopted similar to the one here announced as to our constitutional provision.

The sixty-eighth section of the "land clauses consolidation act," 8 and 9 Vict., c. 18, contains the following language: "If any party shall be entitled to any compensation in respect of any land or any interest therein, which shall have been taken for or *injuriously affected* by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction," such compensation was to be determined as in the act provided.

It will be observed that this section contains the words "taken" and "injuriously affected," used in our statute of 1868, and it is not improbable that these words were borrowed, either directly or indirectly, from section 68, aforesaid, or from some other English act using them in the same connection.

The English courts, in interpreting this statute, have usually (not always) held that the words "injuriously affected" only allow compensation where a right of action would have existed at common law; yet, in their application of this construction, they have been extremely liberal, sometimes declaring that actionable at common law which we generally do not so consider.

In McCarthy v. Metropolitan Board of Works, 7 L. R. C. P. 508, the action was brought to recover for the depreciation in value occasioned to plaintiff's premises by the stopping up and destruction of a certain dock near the same. "Plaintiff had no right or easement in the dock, other than his right as one of the public;" "nor was there appurtenant or otherwise belonging to plaintiff's premises any easement or privilege in or to the dock." But by reason of their proximity thereto, there being only a narrow street between, the buildings were rendered valuable, either to sell or occupy; and by the destruction thereof they were permanently damaged and diminished in value.

The court, *per* Willis, J., say: "Notwithstanding the striking differences of opinion which have been expressed upon this subject, I can not entertain the slightest doubt that what was done here was an *injurious affecting* of the plaintiff's property, which would have given him a cause of action before the statute, and which entitles him to compensation, under section 68." The plaintiff's recovery of one thousand nine hundred pounds was sustained.

In The East and West India Docks v. Gattke, 3 Mac. & G. 154, defendant professed to have "incurred great pecuniary loss and damage by reason of the construction of the plaintiff's railway in the immediate vicinity of his premises;" he claimed compensation under said act, on the ground that his property was *injuriously affected*.

The lord chancellor declines to maintain an injunction permitting defendant's proceeding by suit to collect damages for the injury. His lordship suggests that under this statute a party is entitled to compensation where his lands are not "taken, used, or directly interfered with," but where there is a "consequential" injury, resulting in the actual depreciation of the value thereof.

Beckett v. Midland R'y Co., 3 L. R. C. P. 82, was a case where the highway fifty feet wide in front of plaintiff's premises was narrowed by means of a railroad embankment to thirty-three feet in width. Plaintiff claimed, among other things, that by the narrowing of the road and the embankment the value of his property was reduced. Bovill, C. J.,

speaking of the property's being injuriously affected under said section 68, says: "I am also of opinion that, but for the act of parliament which authorized the making of the railway and the narrowing of the road, an action might have been maintained by the plaintiff for such injury, and that he is entitled to claim compensation under the provisions of the act I have referred to;" and Willis, J.: "I am of the same opinion. * * * It must be conceded that there was a damage to the owner of the house from the narrowing of the road in front of it. It is not worth so much to sell or let as it was before. I will not cite authorities upon a matter which is so plain."

The learned judge who delivered the opinion in Rigmy v. The City of Chicago, 102 Ill. 64, formulates the rule, deducible from the foregoing and other cases, in the following language: "If there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and (if) by reason of such disturbance he has sustained special damage with respect to his property in excess of that sustained by the public generally," the common law would, but for some legislative enactment, afford him redress. A recovery was sustained where the injury resulted from the construction, without negligence, through the public street, of a viaduct by the municipal authorities.

It is immaterial whether or not we declare the English rule thus formulated in Illinois sufficiently well established to recognize a right of action at common law in cases like this; for whether we so conclude, and say with these English cases, interpreting words similar in meaning to those of our constitution, that such language only gives a right to recover where it would have existed at common law, or whether we interepret the provision of our constitution, as did Lord Westbury the English statute, as recognizing a new right of action, the result is the same; in either event, parties are entitled to compensation for such injuries as are here complained of.

Lord Westbury in the case of Ricket v. Directors of Metropolitan R'y Co., 2 Law Rep. H. L. 175, questions the correctness of the above rule as applied to the English statute, in the following vigorous language: "If this view be correct, it follows that it is a mistake to lay down, as I find it in several cases, and in effect in the judgment of four judges in this case, that the injury intended by the words 'injuriously affected,' must be one of which, if there has been no statute enabling the company to do the act, an action would have lain for the injury at common law," and again he says: "Where, therefore, the general railway acts use the term 'injuriously affected,' the word 'injuriously' does not mean 'wrongfully' or 'unlawfully;' nor does it imply that compensation is limited to cases where the act done is such as but for the powers given would be a tort at common law. The words mean 'damnously affected' only. * * * There is nothing in the statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action."

In Transportation Company v. Chicago, 99 U. S. 635, the court, in speaking of the constitution of Illinois of 1870, say: "It ordains that private property shall not be taken or *damaged* for public use without just compensation. This is an *extension* of the common provision for the protection of private property."

The following cases were decided under constitutional inhibitions sim-

ilar to ours in this respect; and they assume, without discussion, that the words "or damaged" thus used are the recognition by their respective constitutions of a new right of recovery; they do not limit such right to cases where an action would, without the constitutional provision, have lain at common law: Williams v. G. C. & S. F. R'y, 1 Denver Law Jour., No. 34, p. 267; Graves v. G. C. & S. F. R'y, 1 Texas Law Jour. 8; Johnson v. Parkersburg, 16 W. Va. 402; Moore v. City of Atlanta, 1 Denver Law. Jour., No. 10, p. 78; City of Atlanta v. Green, Sup. Ct. Ga., Sept. Term, 1881; City of Elgin v. Eaton, 83 Ill. 535.

The two Texas cases, *i. e.*, those of Williams and Graves, above mentioned, were brought to recover for injuries from the use of the street by a railroad. The others were against the cities for damages caused in grading the streets by their respective councils. The right to recover compensation was sustained in all.

As will be observed, we do not go so far as some of these cases. That our position might not be misunderstood, we have, at the risk of being charged with repetition, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street by the council in a careful manner the abutting owner should not recover.

We now proceed to consider the liability of the city in this case for such compensation. The ordinance before us might perhaps be construed as in no way undertaking to compromise the right of adjoining owners in cases like this to compensation by simply granting a license on behalf of the public and the city government to occupy the street in question; we might possibly regard it as merely a declaration that both the city government and the general public consented to such use of the street, and would interpose no objection or obstacle thereto. To this extent the council had power to act; beyond this it could not go. Under such a view of the ordinance, no one would contend for a moment that the action against the city could be maintained.

On the other hand, if the ordinance in question was intended to confer upon the company a right to use the street for railroad purposes, without compensation to adjoining owners, where permanent injury results from the use it is in this respect an effort to authorize something expressly forbidden by the constitution. The act of the council was a clear usurpation of power not possessed; the ordinance, in so far as it denies the right to compensation, is *ultra vires* and void. We find no statutory provision authorizing such action by the city council, and if such a statute existed, it would also be void.

But if the city council assume, or attempt to assume, powers not conferred, their action is not binding upon the corporation: 2 Dillon on Mun. Corp., secs. 563, 767, 768, and cases cited. Certainly a municipal corporation can not be bound by the action of its council sanctioning, or attempting to sanction, disobedience of law. The case of Stack v. The City of East St. Louis, 81 Ill. 377, cited by counsel, might possibly be thought to recognize a right of recovery in a case like this, upon the doctrine of principal and agent. But we can not realize the fitness of this application of the rule of agency. If the city council determine to make some change in a street for the benefit of the public, and proceed to do the work, the contractors or employees would be the city's agents; for injuries arising from their unskillfulness or negligence, the municipality would unquestionably be liable. But the construction of an

ordinary railroad is not, as we have found, an improvement of the street for the convenience and benefit of the local public: it is a private enterprise for private profit. True, the city attaches certain conditions to the license granted—such as that the road-bed shall be upon a certain grade, that culverts shall be constructed for the gutters and planks laid at the crossings; but otherwise the municipal authorities do not control the enterprise. Whether we term the railroad company purely a private, or whether we call it a *quasi* public corporation, the situation remains unchanged. In constructing and operating the road, it is acting for itself, and not for the city. It is no more the city's agent than is the individual licensed by ordinance or resolution to engage in some legitimate private business requiring such license or authority. If the railroad company disobey the law in building or operating its road, the city is no more responsible therefor than it would be for a tort of the private individual in the pursuit of his business aforesaid.

The remaining question to be passed upon refers to the measure of damages adopted by the court, in admitting testimony, and in charging the jury. Unlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit, in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent.

After thorough examination of the cases, we are of opinion that the following rule is just and equitable, and that it is sanctioned by the weight of authority: When the action is against the proper party, and the plaintiff is entitled to recover, the measure of his compensation is the actual diminution in the market value of his premises for any use to which they may reasonably be put, occasioned by the construction and operation of the railroad through the adjacent street. The jury, of course, must not consider any fluctuations in value resulting from other causes.

No personal inconvenience or annoyance, no interference with his trade or business, no decrease in the rental value of his premises occasioned by the construction or operating of the railroad, and no temporary interruption or damage thereby, constitute the test. None of these things can enter into the question, except as they may appropriately aid in determining the actual depreciation in market value of the realty and improvements.

If by reason of the proximity of the railroad thereto, plaintiff's property is in any way peculiarly benefited—that is, if he experiences a benefit therefrom not shared generally by the property owners of the city—such benefit should be considered and the value thereof allowed in determining the amount of his compensation.

The judgment will be reversed and the cause remanded, with directions to the district court to dismiss the action.

Reversed.

SUPREME COURT OF NEVADA.

MALTER ET ALS. *v.* FALCON MINING CO.

Filed December 3, 1883.

LIEN OF A MECHANIC CAN ONLY BE MAINTAINED BY A SUBSTANTIAL OBSERVANCE OF, and compliance with, the provisions of the statute; and omissions so to do can not be aided by any averments in the complaint, or by extrinsic evidence.

FAILURE TO STATE IN THE NOTICE OF A MECHANIC'S LIEN THE NAME OF THE OWNER of the building against which the lien is sought to be enforced, as required by statute, is fatal to the existence of such lien. The name of such owner should be stated in a direct, clear, and positive manner, and not inferentially.

APPEAL from a judgment of the fourth judicial district court for Elko county, entered in favor of the defendant. The opinion states the facts.

W. E. F. Deal, for the appellants.

Rand & Dorsey, for the respondent.

HAWLEY, C. J. This action was brought by appellants, as subcontractor of Morey & Sperry, to foreclose a mechanic's lien against the Falcon Mining Company. The district court sustained a demurrer, interposed by respondent, to the amended complaint, dismissed the action as against it, and entered judgment in its favor for the costs. Respondent contends that the notice of lien, attached to and made a part of the complaint, does not in any respect comply with the requirements of section 5 of the act relating to mechanics' liens: Stat. 1875, p. 122.

We will not notice all the various objections urged by counsel, as we are of opinion that one of the points presented is fatal to appellants' claim. We have repeatedly declared that the act relating to mechanics' liens should be liberally construed; that the spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions, and that courts should "avoid unfriendly strictness and mere technicality:" Skyrme v. Occidental M. & M. Co., 8 Nev. 221; Hunter v. Truckee Lodge, 14 Id. 28; Lonkey v. Wells, 16 Id. 274.

This rule should always be followed where the objections urged serve only to perplex and embarrass a remedy intended to be simple and summary without adding anything to the security of the parties having an interest in the property sought to be affected. But in following this rule, courts should always be careful not to impair the force of the statute or fritter away its meaning by construction.

It must always be borne in mind that a mechanic's lien is purely a statutory creation, and that it can only be maintained by a substantial observance of and compliance with the provisions of the statute. It is "a remedy given by law, which secures the preference provided for, but which does not exist, however equitable the claims may be, unless the party brings himself within the provisions of the statute and shows a substantial compliance with all its essential requirements:" Phill. on Mech. Liens, sec. 9.

Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute, in the notice of lien, is indispensable. The omissions, if any, in the notice and claim as recorded, can not, in essential particulars, be aided by any averments in the complaint, or by extrinsic evidence: Bertheolet v. Parker, 43 Wis. 551.

Under the provisions of section 5, of the act relating to mechanics' liens, it is, among other things, essential to the validity of the lien that the name of the owner, or reputed owner, of the building, improvement, or structure, upon which the lien is sought to be enforced, should be stated. The notice of lien in this case does not substantially comply with this positive requirement of the statute. It declares that it is the intention of the claimants "to hold and claim a lien upon * * * that certain Howland pulverizing and wet crushing and amalgamating mill, situated in Rock creek, on the mill site owned or claimed by the Falcon Mining Company, in Elko county, state of Nevada."

There is a statement that the Falcon Mining Company is the owner, or the reputed owner, of the mill. The question of ownership is left to inference only, and the inference to be drawn from such a statement that the Falcon Mining Company is the owner, or reputed owner, of the property, may or may not be true. It does not necessarily follow, because the company claims to be the owner of the mill site, that it is the owner, or reputed owner, of the mill erected thereon. Moreover, the statement that the Falcon Mining Company claims to be the owner of the mill site is apparently made for the purpose of giving a description of the property instead of designating the name of the owner. The description given, if intended to be a statement of the name of the owner, or reputed owner, of the property, is radically defective.

In Beals v. Congregational B'nai Jeshurun, it was stated in the notice of lien that the claim was for work done and performed, and material furnished, "for and upon the building known as the Jewish synagogue, situated in Green street," etc. The notice also stated that one of the "owners is one Mark Levy." The court, after declaring that "without the name of the owner, there can be no substantial compliance" with the statute, and that the statement as to one of the owners was insufficient to bind the defendants, said: "The designation, Jewish synagogue, in the notice, is no compliance with the act, because it is not the name of the defendants, and because it is not stated in any manner as the name of the owner, nor as the name by which the owner is known or called. On the contrary, the language of the notice is explicit, and limits these words to the description of the building, and does not apply it to the owners at all:" 1 E. D. Smith, 657.

In Rugg v. Hoover, the lien claimant stated in his notice that "he did, at the request of one Martin Hoover, furnish and deliver unto said Hoover, for the furnishing * * * of his mill at Crookston, in the county of Polk," certain mill supplies. The court, after disposing of certain questions, said: "There is no direct, unequivocal allegation as to ownership" of the building. "The only word in the affidavit that could, by possibility, be construed to imply ownership is the word 'his,' used in a clause describing or identifying the building. * * * It is impossible to say that its use, in the connection in which it is used in this affidavit, is a substantial equivalent for an allegation of ownership:" 28 Minn. 407.

There is no direct, unequivocal allegation of the name of the owner or of the property in the notice of lien under consideration. The question of ownership is only mentioned inferentially in giving a description of the property, and is there stated in the alternative.

The statute contemplates a positive designation of the name of the owner, if known: Mayes v. Ruffners, 8 W. Va. 386. It only relieves a

party claiming a lien from giving the name of the owner where it is not known to him: Kelly v. Laws, 109 Mass. 396. If the person claiming a lien "knows the name of the owner, that name must be inserted; if he only knows of a person reputed to be the owner, the name of such person, with the fact that he is so reputed to be the owner, must be inserted:" McElwee v. Sandford, 53 How. Pr. 90; Hooper v. Flood, 54 Cal. 222.

The decisions upon this question are numerous and uniform: Phill. on Mech. Liens, sec. 345 *et seq.* They all declare that, where the statute requires it, the name of the owner, if known, must be stated; and if the name of the owner is unknown, that fact ought to be stated, and the name of the reputed owner given. These facts ought to be stated—independently of a description of the property—in a direct, clear, and positive manner.

The judgment of the district court is affirmed.

SUPREME COURT OF NEW MEXICO.

STAAB ET AL. *v.* ORTIZ.

Filed January, 1884.

A PARTIAL FAILURE OF THE CONSIDERATION UPON WHICH A PROMISSORY NOTE WAS GIVEN may be shown in an action thereon by the payee, under a plea of the general issue.

PLEA OF SET-OFF MAY BE INTERPOSED BY THE DEFENDANT IN AN ACTION ON A PROMISSORY NOTE, given in final settlement of account, arising from a failure of the plaintiff to deliver some of the goods for which such note was given. Such set-off may be averred as though it arose on an account for goods sold and delivered by the defendant to the plaintiff.

PLEA OF SET-OFF, WITH A BILL OF PARTICULARS OF THE SAME, MUST SET FORTH THE NATURE of the defendant's claim with sufficient particularity to enable the plaintiff to meet it at the trial. It should state the items of the demand, and when and how it arose, but it need not be in any particular form.

AN ITEM OF A PLEA OF SET-OFF, the plaintiff's liability for which is shown to depend upon a condition precedent, can not be considered by the jury without evidence of the performance of such condition.

APPEAL from a judgment of the district court of the first judicial district for San Miguel county. The opinion states the facts.

W. T. Thornton, for the appellants.

S. M. Barnes, for the appellee.

BELL, J. This is an action of *assumpsit* against the defendant on a promissory note made by him to the plaintiffs, and was brought in the district court of San Miguel county, but subsequently moved by a change of venue to Santa Fé county. The defendant pleaded the general issue, and also filed a plea of set-off, with a bill of particulars of the same. The cause was tried by a jury, and judgment rendered on the verdict for plaintiffs for the sum of thirty-one dollars and twenty-two cents. Plaintiffs have appealed from that judgment, and counsel in their behalf has filed numerous assignments of error.

It will not be necessary for us to consider all these assignments, most of them being immaterial, in our judgment. We shall confine ourselves to the consideration of the three errors alleged, which we regard as the most important.

It is urged by the plaintiffs that a partial failure of consideration could not be shown under the general issue, and that therefore the court below erred when it permitted the defendant to show partial failure of the consideration upon which the promissory note in suit was given. This was not error, in our judgment; the right of the defendant to prove partial failure of consideration in an action on a promissory note under the settled rules, can not, we think, be doubted: Edwards on Bills, sec. 467. The author there says: "It is now settled that this doctrine is applicable even when the defendant imputes no fraud, but only complains that there has been a breach of contract on the part of the plaintiff." And the same author says: "Where the note given on the settlement of the account is by mistake drawn for a greater sum than was due, there is only a partial want or failure of consideration. * * * There is a plain distinction between mere inadequacy and a total or partial failure of consideration. Inadequacy of consideration is not in itself any defense to an action on a bill or note; but a total failure or want of consideration is a perfect defense, and a partial failure is a good defense *pro tanto*:" Id., sec. 469. The same doctrine is laid down by Greenleaf, from whom it is not necessary to quote, but I cite 2 Greenl., 13th ed., sec. 136, and notes.

These authorities also dispose of the claim made by plaintiffs' counsel, that the note, having been made in final settlement of the account between the parties, can not be met by a defense of set-off; but if there is any doubt on that subject, it seems clear to us that under the statutes of the territory in this case, the defendant was clearly entitled to his plea of set-off.

Section 11 of the practice act of 1880, Prince's compilation, page 124, is as follows:

"A defendant may plead as set-off or counter-claim any of the following matters, and may recover judgment thereon, if proved, for any excess thereof over the plaintiff's demand as proved: 1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or, 2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some one of them, arising out of the transactions or contracts set forth in the declaration or connected with the subject of the action; or, 3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so pleaded."

It is further claimed by plaintiffs, that under the plea of set-off, the defendant was not entitled to show a failure to deliver some of the goods for which the note in suit was given, as though they were goods sold and delivered by the defendant to the plaintiffs. I do not understand that it is claimed that such failure could not be made the subject of a cross-action, but that in form it could not be shown, as the defendant claimed he had a right to show it, *i. e.*, under a plea of goods sold and delivered. This, in our opinion, is not the law. Averments of a plea of set-off are sufficient, when they would disclose a cause of action if embodied in a declaration: Breen v. Sullivan, 5 Ill. 449. The rules applicable to the defendant's bill of particulars are the same as those applicable to the plaintiff's bill: Burrel's Pl. 433, 434, ed. 1840.

These rules require that the bill should set forth the nature of the defend-

ant's claim with sufficient particularity to enable the plaintiffs to meet it at the trial. It should state the items of the demand, and when and how it arose. * * * It need not be in any particular form: Burrel's Pl. 432, ed. 1840.

It seems that the object of the rule is to fully and thoroughly apprise the plaintiffs of what the claim of the defendant is, so that they shall not be misled or taken by surprise; and that where, as in this case, the bill of particulars shows exactly what the various items of defendant's claim are, that objection is not well taken to the mere form in which it was put. The defendant was permitted to show failure of plaintiffs to deliver certain goods under the specifications in his bill of particulars; that they were goods sold and delivered by him to the plaintiffs. Were the plaintiffs in any way misled or prejudiced thereby? We think not. It is not so claimed by plaintiffs' counsel, and therefore, under the rule I have stated, it was not, in our judgment, error for the court below to allow the proof. There is, however, another assignment of error made by counsel for appellants, which, we think, is serious. Among the items of set-off claimed by defendant in his bill of particulars is one as follows: "For fourteen thousand two hundred and forty-one pounds corn delivered at Fort Stanton, in New Mexico, being a part of forty thousand pounds of corn on account of contract of Z. Staab & Company, which amount has not been paid to defendant by plaintiffs, September 27, 1878, at two and three fourths cents per pound—three hundred and ninety-one dollars and sixty-two cents."

Defendant was permitted to prove this item of corn delivered by him on account of plaintiffs, and their failure to pay him therefor. It is urged by appellants' counsel that it was error for the court to have permitted this evidence to go to the jury without the defendants first showing that the quartermaster of Fort Stanton had receipted to plaintiffs for the corn in question, such receipt being, in accordance with the evidence of the defendant himself, a condition precedent to payment. We think that the point is well taken. Upon this subject, the testimony of the defendant is as follows:

"Q. At the time that you signed that note, Mr. Garcia [note in question], what settlement or agreement did you have with Mr. Staab? A. I had an agreement that when the quartermaster had reported about all the corn, that he would deduct the amount from my note:" Record, p. 15.

Further on, in answer to another question, the defendant said: "My answer to that quetion is, that I understood that he (Staab) would have to return the value of the corn when the quartermaster reported it:" Record, p. 156.

J. Francisco Chaves, a witness for the defendant, testified that he was present when the disputed item for corn was discussed by plaintiffs and defendant, and further testified as follows: "Mr. Staab told him (Garcia) that there was twenty-five thousand and odd pounds of corn that had been credited to him already; but Mr. Garcia said, 'I can't accept that as the whole, because I took over forty thousand pounds to Fort Stanton.' Mr. Staab said he could not settle that matter until he heard from the quartermaster, and said: 'As soon as I hear from the quartermaster, you shall be credited with the full amount, whatever it may be:'" Record, pp. 22, 23.

No evidence whatever was offered to show that the quartermaster at

Fort Stanton had ever receipted for the corn in question. It is clear, from defendant's evidence, that it was not to be paid for until such receipt or voucher had been issued, and that without proof of its issuance he could not have maintained an action against the plaintiffs for its value. In the absence of some such proof, he should not have been allowed to prove it as an offset to plaintiffs' claim. Whether or not the jury allowed this item to the defendant in arriving at their verdict is not certain, but it can not be said from the result that they did not. The evidence was allowed to go to them without proof of the condition precedent, and that, we think, was clearly error, for which the judgment below should be reversed and a new trial ordered.

All concur.

ROBERTS ET AL. *v.* TRUJILLO ET AL.

Filed January, 1884.

AN ACTION OF FORCIBLE ENTRY AND DETAINER DOES NOT LIE TO ENFORCE AN INCORPOREAL RIGHT OF WAY, although an action on the case might be maintained for its obstruction, or a suit in equity to restrain an interference therewith.

APPEAL from a judgment of the district court for Santa Fé county. The opinion states the facts.

C. H. Gildersleeve, for the plaintiffs in error.

Fiske & Warren, for the defendants in error.

BELL, J. This is an appeal from the judgment of the district court of Santa Fé county, entered therein by default. The action was originally brought in a justice's court for precinct No. 4, of said county. Judgment was there rendered against the defendants, the plaintiffs in error here. Appeal was taken to the district court for Santa Fé county, and there, the appellants failing to docket their appeal, it was, under the rule, docketed by the appellees, and the judgment of the justice's court affirmed by default. Had the attention of the chief justice who presided in the district court been called to the record, the motion to affirm the judgment would undoubtedly have been denied and the complaint dismissed.

The action is intended to be an action of forcible entry and detainer, but an examination of the complaint shows that it alleges nothing upon which such an action could be maintained. The language used in the complaint is, that the plaintiffs "were legally entitled and possessed freely to the entrances and exits of a certain tract of land, situated in precinct No. 4 of said county, and known and described as the entrances and exits of the house of Rosario Arias, and being thus legally entitled to the said entrances and exits upon said land, as above said, the said defendant, Thomas Roberts, on or about the twentieth day of August, 1880, and in the county aforesaid, illegally and by force entered upon said land or tract of land, and detained and kept the same in possession, and still keeps it in possession against the plaintiffs," etc.

This complaint is wholly insufficient and no judgment could be properly rendered on it. It does not allege that the plaintiffs owned or were entitled to the possession of any lands or tenements whatever. In that behalf, the only allegation is that they were entitled to "certain entrances and exits." What is meant by these words it is somewhat difficult to say. They may mean doors, or gates, or openings, or per-

haps passages. By the construction most favorable to the plaintiffs, they might be held to mean a right of way over certain lands. An action of ejectment or forcible entry and detainer does not lie to enforce such a right: Child v. Chappel, 9 N. Y. 246. It is incorporeal, and of course could not be delivered by the sheriff.

An action on case may be sustained for its obstruction: Allen v. Osmond, 8 East, 4; or equity may be invoked to restrain interference, but no relief can be granted on the present form of action.

The judgment should be reversed and the complaint dismissed at the costs of the plaintiffs.

All concur.

AYERS, Ex'r, etc., *v.* CHISUM.

Filed January, 1884.

DEPOSITIONS TAKEN IN AN ACTION IN ANOTHER COURT BETWEEN THE SAME PARTIES, and in regard to the same subject-matter, are admissible in evidence upon parol proof of the existence of such former action.

APPEAL from a judgment of the first judicial district court for Santa Fé county. The opinion states the facts.

Conway & Risque, for the appellant.

William Breeden and *T. B. Catron*, for the appellee.

AXTELL, C. J. This was a suit brought by John Ayers, executor of William Rosenthal, deceased, to recover upon three promissory notes. On the trial, plaintiff introduced certain depositions to prove the making and indorsing of said notes. These depositions, it was alleged, had been taken between the same parties, touching the same subject-matter, in the second judicial district. Defendant objected to the introduction and reading of said depositions, because the only evidence offered of the existence of the former suit was by parol. Defendant contended that the record of said suit ought to have been introduced. This is the only error we deem important to notice, for if the depositions were properly admitted, there was evidence sufficient to go to the jury. This is not a case of proving the contents of a document, and every other fact, speaking generally, must be proved by parol evidence. It was not sought to prove the contents of the depositions, but simply and only to establish the fact that they had been properly taken, introduced, and used in the second judicial district, in a suit touching the same subject-matter and between the same parties. This fact was properly proved by oral evidence. The depositions once introduced, there is a fair issue of fact. This has been passed upon by a jury. The finding of the jury, when lawfully and fairly reached, ought to stand. Another jury might find differently and might not, but whether they would or not, this was the jury to whom, under the law, the responsibility was committed and whose decision must not be disturbed unless error, or mistake, or unfairness has been shown to have brought it about. Nothing of that kind is shown, and we see no good ground for setting aside their verdict. Judgment affirmed.

All concur.

SUPREME COURT OF OREGON.

NEWBY *v.* ROWLAND.

Filed October, 1883.

IN THE ABSENCE OF A BILL OF EXCEPTIONS IN THE RECORD, the appellate court will not notice alleged irregularities occurring at the trial.

DEFENSES OF POSSESSION UNDER A WRITTEN CONTRACT OF SALE, WITH PAYMENT of the purchase money, and matters constituting an estoppel *in pais*, can not be relied on in an action of ejectment; but the refusal of the court to strike out such defenses will not warrant a reversal, where the jury specially find that the defendant was the owner in fee and entitled to the possession of the land in dispute.

APPEAL from a judgment of the circuit court for Yamhill county, entered in favor of the defendant. The opinion states the facts.

W. D. Fenton, for the appellant.

McCain & Hurley, for the respondent.

WATSON, C. J. This action was brought to recover certain real property, situated in Yamhill county. The complaint alleges that the plaintiff is the owner in fee simple, and entitled to possession, but that defendant wrongfully withholds the same from him, to his damage, etc. The answer denies these allegations, and sets forth a number of affirmative defenses.

These are: 1. Ownership in fee in defendant. 2. Possession under a written contract of sale, with payment of the purchase money. 3. Matters relied on as constituting an estoppel *in pais*. 4. The statute of limitations.

The plaintiff moved to strike out the second and third defenses, and also demurred to them, upon the ground, among others, that they constituted no defense at law. Both were overruled, and plaintiff replied, denying all affirmative matter in the answer.

The cause was then submitted to a jury, who found, by their verdict, that the defendant was "the owner in fee simple and entitled to the possession of the premises described in the complaint." Plaintiff thereupon filed a motion for a new trial, which was refused, and judgment rendered for defendant on the verdict. The plaintiff appeals. There is no bill of exceptions in the record; hence we can take no notice of alleged irregularities occurring at the trial. This is the settled rule in this court, in cases like the present, where the statute has prescribed the contents of the record: Oregonian Railway Co. v. Wright, 10 Or. We think the circuit court erred in overruling the motion and demurrer.

The matters pleaded in the second and third defenses were unavailing in an action at law: Bigelow on Estoppel, 2d ed., 534 et seq.; Hayes v. Livingston, 34 Mich. 384; Wythe v. Smith, 4 Saw. 1.

When the civil code, section 316, declares that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer," in actions of this nature, it must be construed to mean only *such* a license or right to the possession as would constitute a *legal defense*, and not an equitable right merely. It does not say that every license or right to the possession may be pleaded as a defense at law, but only that none can be made availing at the trial unless pleaded. No different meaning can reasonably be given such provision.

But assuming that the circuit court did err, as we think we must, how has the appellant been injured by it? The respondent's plea of title in herself is conceded by appellant to be a good defense, and is fully sustained by the verdict of the jury. It was, in fact, a special finding that the fee was in her and not in the appellant, and clearly applicable to the issue as to title and right of possession founded thereon. It does not appear by the record that any evidence was introduced or instruction given at the trial relating to the issues made by the replication to the objectionable defenses, and we are not at liberty to presume that there was any such evidence or instruction in the case in the lower court. And if there had been, it is difficult to perceive how that state of facts would render a reversal necessary, in view of the special character of the verdict returned, and its sole applicability to a valid defense.

But had it been general instead of special, in view of the condition of the record before us, we should have felt compelled, under the authorities, to have made the same application: Smith v. Cleveland et als., 6 Met. 332; The Indianapolis etc. Railroad Co. v. Taffe, 11 Ind. 458; Peoria Marine and Fire Ins. Co. v. Whitehill, 25 Ill. 466.

It not only does not appear that appellant was injured, but on the contrary, it affirmatively appears that he was not injured or prejudiced upon the final trial by the errors of which he now complains, and which we find to have been committed. It follows, therefore, that the judgment should be affirmed.

Judgment affirmed.

SUPREME COURT OF UTAH.

CHAMBERLAIN ET AL. *v.* RAYMOND ET AL.

Filed February 11, 1883.

JUDGMENT OF THE LOWER COURT WILL BE REVERSED WHERE THE PREPONDERANCE OF EVIDENCE is so great as to a particular finding that the appellate court has no hesitancy in declaring such finding against the evidence.

REFUSAL OF THE TRIAL COURT TO ALLOW THE DEFENDANTS TO DISPROVE NEW MATTERS first introduced by the plaintiffs in their rebuttal testimony is error.

APPEAL from a judgment of the third district court, entered in favor of the plaintiffs. The opinion states the facts.

Bennett & Harkness, for the appellants.

A. Hagan, for the respondents.

EMERSON, J. This is an appeal from an order refusing a new trial. The judgment of the court below will have to be reversed and a new trial ordered, on two grounds, viz., the insufficiency of the evidence to support the findings, and the rejection of proper and material evidence offered by the appellant. The statement on the motion for a new trial and on this appeal contains all the testimony introduced on the trial.

Among the main and important facts controverted was the *place* where the I X L was located, and whether work was done on it in compliance with the local laws and customs. Various exceptions to the findings of fact and conclusions of law are taken, but they are all based on or are corollaries to the exceptions to the following portion of the fifth finding: "That the I X L was located at a point at least five hundred feet south-

erly from the point from which it is surveyed; that soon after the location it was abandoned; that from the date of the location no work was done on it as required by mining laws."

The evidence on this point is too voluminous to undertake to give an abstract of it, or to analyze it in detail. It is sufficient to say that the evidence on the part of the appellants, directed to this point, is direct and affirmative, and of that positive character, and attended by so many corroborating circumstances, that it carries conviction with it. Among other strong items of proof were the admissions of the locators, which there was no attempt to contradict or deny, that the Azure Queen was a relocation of the I X L. This would not have been the fact if the I X L was located in the point stated in the finding. The points of the discovery of the I X L, as claimed by the appellants, and as fixed by their testimony, was not to exceed twenty or thirty feet from the discovery of the Azure Queen; in fact, the dump of the Azure Queen works partly covered up and partly obliterated the works at the discovery of the I X L. The rebutting testimony of the respondents upon which this portion of the finding is based is weak and inconclusive, and fixed the point of the location of the I X L not at about five hundred from the point from which that claim was surveyed, but from seven hundred to two thousand feet from that point. In fact, there is more testimony, such as it is, that it was two thousand feet away than that it was either five hundred or seven hundred.

In the case of Harrington et al. v. Chambers et al. [1 W. C. Rep. 63] decided at this term, we announced as the settled doctrine of this court, "that the findings of the trial court will not be disturbed unless the preponderance of evidence is so apparent and marked that the appellate court has no hesitancy in declaring that the particular finding under review is against the evidence." In the case at bar the preponderance is so great and decided that we have not the slightest hesitancy in declaring that this particular finding is against the evidence. It requires no nice weighing and balancing of the testimony to arrive at this conclusion.

On the trial, after the appellants, defendants in the court below, had closed their case, all their testimony tending to show that the place of discovery and location of the I X L in 1864 was near that of the Azure Queen, the respondents called several witnesses, who testified that from June, 1870, to April, 1871, they had seen a stake on the right-hand side of the gulch going up, with the letters I X L cut in it; the Azure Queen and the claimed point of location of the I X L being on the opposite side of this gulch. It is a suspicious circumstance that none of the respondents' witnesses had ever seen or heard of the Alwilda location, which must have been at or near the point where this stake is said to have been seen, though some heard of the Southern, which was a relocation of the Alwilda. The latter location is proved to have been there until 1871.

The respondents, who were plaintiffs below, in making out their main case, gave no hint that any testimony would be offered or any attempt made to show that the place of location of the I X L was at any other point than that claimed by the appellants, hence the latter could not have anticipated it in making out their defense. In fact, all the testimony of the respondents in their main case was an attempt to establish as a fact that there was no other work, nor traces of work, within one hundred feet of the Azure Queen. All the testimony in the case which in

any way tended to prove that the I X L location was anywhere near the point fixed in the finding was offered by the respondents on their rebuttal. This was entirely new matter, and yet the court, by its ruling, refused to allow the appellants to disprove it. As claimed by the appellants, it was error to exclude evidence offered by them to show that no stake marked I X L stood at the place described by respondents' witnesses. The fact that a stake so marked stood at the point named in 1870 and 1871 was immaterial, unless the inference be made that it was placed there in 1864 by the locators of the I X L, that being the year in which it was actually located. The portion of the fifth finding under discussion makes this inference, and makes it on the sole evidence, introduced by the respondents in rebuttal, that a stake stood there in 1870 and 1871, and yet contradictory evidence was excluded as immaterial and not surrebutting.

As stated by counsel in their brief, the only point in the case, under the findings, is the one considered. Finding that the I X L was located five hundred feet southerly of the point claimed, the finding that no work was done, and that the claim was forfeited and abandoned, follow as a matter of course. The court made no finding as to what, or the value of the work, at the point claimed as the I X L, nor were such findings necessary.

As we have determined, however, that there is error in the finding, as to the place of location, it becomes necessary to have further findings, and these can only be made by the trial court, and for that purpose a new trial must be granted.

The judgment of the third district court in refusing a new trial is reversed, and a new trial ordered.

In re Clasby.

Filed June 22, 1883.

No Appeal Lies from an Order or Judgment of the District Court, directing the discharge of a prisoner after a hearing on an application for a writ of *habeas corpus*, either by the defendant named in such writ or by the people.

Appeal from an order of the third district court. The opinion states the facts.

Arthur Brown, for the petitioner.

J. L. Rawlins, for the defendant.

Twiss, A. J. The respondent being arrested and brought before Alex. C. Pyper, a justice of the peace in Salt Lake City, upon a warrant charging him with the unlawful sale of spirituous liquors, without obtaining a license from the county of Salt Lake for the sale of the same, made application to the judge of the third district court for a writ of *habeas corpus*, which was granted and made returnable before the third district court, to which return was made by the defendant, the constable making the arrest, that the plaintiff was held by him under and by virtue of said warrant and order of said justice of the peace. On the hearing of the parties upon the writ and return thereof, the court ordered the discharge of the plaintiff, from which the defendant and the people of the territory of Utah appealed to this court.

Two questions are raised by the arguments of counsel: 1. Was the plaintiff rightfully discharged by the court below? 2. Have the appellants the right of appeal to this court?

If the appeal is not rightfully here, we need go no further in the case. The first question, whether correctly decided by the court below or not, is not essential to a disposal of the appeal in this court.

In the case of Wythe v. Richardson, 10 Gray, 240, Shaw, C. J., in the opinion of the court, says: "The great purpose of the writ of *habeas corpus* is the immediate delivery of the party deprived of personal liberty. The allowance of exceptions would be inconsistent with the objects of the writ. The consequence of allowing exceptions must be either that all further proceedings be stayed, which would be wholly inconsistent with the purpose of this writ, or that the exceptions must be held frivolous, and judgment, *non obstante*, for the discharge of the party, in which case the exceptions would be unavailing. The allowance of the exceptions being thus inconsistent with the very purpose of the writ, the conclusion must be that the exceptions do not lie."

The provisions of section 1553 of the compiled laws, that an appeal may be taken from a final judgment in an action or special proceeding commenced in the court in which the judgment is recorded, and of the organic act that writs of error, bills of exception, and appeals shall be allowed in all cases from final decisions of said district courts to the supreme court, do not give the defendant and the people of this territory the right of appeal in this case.

By sections 1144 and 1145 of the compiled laws, it is provided that the court or judge shall proceed in a summary manner to settle the facts by hearing the testimony and arguments of the parties interested, and shall dispose of the prisoner or prisoners, as the case may require, and "if no sufficient or legal cause of detention is shown, the plaintiff must be discharged."

A person unlawfully imprisoned invokes the writ of *habeas corpus* with the expectation that an intelligent, conscientious discharge of judicial duty will restore to him his liberty, and upon the judge who hears and determines the cause rests an important responsibility, both to the prisoner and the people.

It is not to be presumed that a court or judge will hastily or without due consideration either remand the plaintiff into custody or discharge him from arrest. If the judge is of the opinion that the process by which the plaintiff is held is illegal, or that he is unlawfully restrained of his liberty, he is bound to release him from such unlawful restraint, and upon an order discharging him, the prisoner is entitled to unrestrained liberty unless the defendant who holds him in custody or the people have the right of appeal, and the judge or court, upon appeal being taken, has the right to order the prisoner into the custody from whence he came, until the legality of such imprisonment is determined by the appellate court, in which case the writ is of no avail to the prisoner; if he is permitted to go at large, pending the appeal, the appeal in most cases would be of no use to the people, for the reason that the plaintiff has absconded.

The object of the writ is that the right to a discharge may, in a summary manner, be at once determined. If the people have a right to an appeal when the plaintiff is, by order of the court or judge, discharged, then in such case the writ falls far short of the purpose for which it was

intended, and for the last two centuries has been used. Suppose for a moment the appeal to be well taken, and that this court should find that the court below erred in discharging the plaintiff: can this court issue a bench-warrant for his rearrest; or direct the justice of the peace to again issue his warrant upon the same original complaint for arrest of the person there charged with the commission of a criminal offense for which he was arrested, imprisoned, and discharged from arrest by the district court? Or, suppose in the mean time the grand jury have passed upon the fact involving the guilt or innocence off the plaintiff, and have refused to find an indictment, ought the plaintiff to be again arrested by an order of this court and compelled to defend himself against an arrest made on such an order?

It is easy to see that such proceedings would inevitably result in inextricable confusion, and if the discharge of the applicant upon a writ of *habeas corpus* before a court or judge having jurisdiction is an order or judgment from which an appeal can be taken to this court, necessarily attended with unavoidable delay, the value of this great writ as a safeguard of personal liberty is, at least, greatly impaired, if it is not changed into a means of oppression: Yates v. The People, 6 Johns. 335; Ex parte Jils, 64 Mo. 205.

For these reasons, we are all of the opinion that the defendant named in the writ of *habeas corpus*, and the people of this territory, have no right to an appeal from the district court to this court, and the appeal is dismissed.

NOTES

In the case of the Canada Southern R'y Co. v. Gebhard, the supreme court of the United States has recently decided an important question of constitutional law. The plaintiff in error was a corporation duly incorporated under the laws of the dominion of Canada. In accordance with the powers conferred upon it by its charter, it issued a large number of bonds, secured by a trust mortgage. Such bonds were payable in the city of New York, and provided for the payment of interest at the rate of seven per cent per annum. The defendants in error were large holders of such bonds. Subsequently, the corporation, not being able to meet the accrued interest on such bonds, made an arrangement by which they were to be surrendered for other bonds bearing a much less rate of interest. This arrangement was ratified by the parliament of Canada, and consented to by a majority of the stock and bond holders. The defendants in error never consented thereto; and upon the refusal of the corporation to pay the interest on the first issue of bonds held by them, brought this action, and recovered judgment in the lower court. This judgment has been reversed by the supreme court, which held, that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. That anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

Mr. Justice Harlan dissented from the conclusions of the majority of the court, on the ground that the funding arrangement made by the corporation impaired the obligation of its contract with the holders of the first issue of bonds, and could not be enforced in the courts of the United States. In concluding his opinion, the learned judge thus sums up his reasons for dissenting: "As I do not think that a foreign railway corporation is entitled, upon principles of international comity, to have the benefit in our courts—to the prejudice of our own people and in violation of their contract and property rights—of a foreign statute which could not be sustained had it been enacted by congress or by any one of the United States, with reference to the negotiable securities of an American railway corporation; and as I do not agree that an American court should accord to a foreign railway corporation the privilege of repudiating its contract obligations to American citizens, when it must deny any such privilege, under like circumstances, to our own railway corporations—I dissent from the opinion and judgment of the court."

The obligor in the following unique instrument was recently arrested on a charge for assault to murder. With the consent of the prosecuting witness, the charge was dismissed upon payment of costs and the execution of the following:

"Know all Men by these Presents, That I, Charles Loerash, of Eleventh ward, Allegheny, do hereby solemnly agree and bind myself not to murder Edward Schendel, at

any time within two years from this date; and further, though it is not required of me, I do hereby absolutely and without reservation in conscience or otherwise, agree to bind myself, my heirs, executors, and administrators, that should I at any time hereafter see any worthy citizen moving upon said Schendel with a view to kill him, for the relief of the community, I will, if entirely convenient to myself, endeavor to dissuade him from such action, as not being strictly in accordance with law. CHARLES LOERASH.

"ALLEGHENY CITY, December 4, 1883.

"GUARANTY.

"We jointly and severally obligate ourselves, to the amount of forty thousand dollars, that Charles Loerash will fulfill all the stipulations of the obligation.

"JACOB SHACKMAN,
"THOMAS HOGAN.

"Witness: A. N. ANWALT.
"December 5, 1883."

WEST COAST REPORTER.

No. 6. FEBRUARY 7, 1884. VOL. I. No. 6.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

IN Wixon v. Bear River etc. Co.[1] the court held, that if a tract of land on the bank of a stream in the mineral regions is inclosed and appropriated for the purposes of a garden or orchard, and the water of the same stream is afterwards appropriated by another person for mining purposes, at a point above the tract, the water subsequently appropriated must be used so as not to injure the garden, orchard, or fruit trees; that one who incloses a tract of public land in the mineral regions, and plants it with fruit trees, acquires a vested right therein, and a subsequent appropriator must use the water for mining purposes so as not to disturb such vested right, or destroy or injure the garden or orchard.

The rights of a private owner who has obtained a full title to a tract of land bordering upon a stream have been stated by quite recent decisions of the California supreme court. "As being owners of the land, the plaintiffs have an interest in the living stream of water flowing over the land; their interest is called the *riparian right.* Under settled principles, both of the civil and the common law, the riparian proprietor has a usufruct in the stream as it passes over his land."[2] In Creighton v. Evans,[3] the same court held that the right of a riparian private owner to have the water of the stream run through his land is a vested right, and any interference with it by another person gives him a cause of action for appropriate relief; that a diversion of the water by one who is *not* a riparian proprietor on the same stream is a legal wrong to the person who is such a riparian

[1] 24 Cal. 367; and see Rupley v. Welch, 23 Id. 453; Hill v. Smith, 27 Id. 476. The right of the prior occupant was here merely possessory as against the United States. An early statute of California seems to have given miners a right to enter upon the lands of prior occupants used solely for *farming* purposes, when situated in the mineral regions—the interest of such occupants being only possessory.

[2] Pope v. Kingman, 54 Cal. 3, 5.

[3] 53 Cal. 55.

owner; that a person who is *not* a riparian proprietor has no right to take any water from the stream, even if enough is left for the uses of the riparian owner—even if the latter has sustained no actual damage from the diversion.

It having been shown that the rights of a patentee from the United States, as a prior purchaser or owner, relate back at least to the time when he has duly performed all the acts, including payment, which entitle him to a patent, the question still remains, whether his rights do not in fact relate back to the date of his first or initiative step in the course of proceedings prescribed by congress—as in the case of a pre-emptor, to the filing of his declaratory statement.

This question arises in the construction and application of general statutes of congress, which were intended to encourage actual settlers and occupants of the public lands, by providing a means for such actual settlers to acquire the private ownership of tracts of land, and for such actual occupants to acquire the right to divert and use the waters of streams. The same policy plainly underlies the whole system of legislation. When any conflict arises between parties seeking to avail themselves of these different statutes—between parties seeking to acquire tracts of land under one set of statutes and parties seeking to acquire water-rights under another—it would seem to be just and reasonable that the same principle or method of construction and interpretation should be extended to all these statutes in determining the rights of such conflicting claimants. In respect to the appropriator of water on the public lands, when he has duly posted and given the notices of his appropriation, and has followed up this initiative by proceeding to construct his ditches, dams, and other works with reasonable diligence, and without unreasonable delay, his right of appropriation, when his works are thus completed, relates back to the date of his first or preliminary act.[4] This rule seems to be fully settled. In cases of conflict as to priority of right between such appropriator of water and a patentee of land from the United States, it would seem to be just and reasonable that the same rule of interpretation should be extended to the other similar legislation of congress by which private persons are authorized to acquire title to portions of the public domain as pre-emptors, homestead occupants, and the like. Congress has given no intimation of a policy more favorable to the use of water on the public domain than to the use of the public lands for all other beneficial purposes. In the absence of decisions, it would naturally be supposed that the same rule should be

[4] See Osgood v. El Dorado etc. Co., 56 Cal. 571.

applied to all persons who acquire rights under this system of legislation, in determining any conflict which may arise between them.

The decisions dealing or appearing to deal directly with this question are very few. In California the rule is settled *against* the claims of a pre-emptor who has received his patent from the United States, so far as it can be put at rest by one decision. In Farley v. Spring Valley M. & I. Co.,[5] the plaintiff, a pre-emptor, settled on government land; filed his declaratory statement February 27, 1871; proved up and paid in 1877; and obtained his patent January 23, 1879. The defendants made an appropriation of water which began after 1871 but before 1877. The plaintiff's right was held to have begun only in 1877, when he had "proved up and paid," and he was therefore a subsequent purchaser to the defendant. This decision was rested upon the following grounds: The public land belonged to the United States until the plaintiff had proved up and paid in 1877. Until that time congress had full power to withdraw the land from sale, and to sell or grant it to another. Certain cases were cited as expressly sustaining these conclusions.[6]

With great respect for the able court which rendered this decision, and deference to its learning and ability in all questions connected with governmental land titles, I think that the matters actually decided in Frisbie v. Whitney, Hutton v. Frisbie, and Western Pacific R. R. v. Tevis do not sustain the conclusion which they reached in Farley v. Spring Valley M. & I. Co.; that a careful examination of these prior cases will show that they dealt with an entirely different state of facts, and an entirely different kind of legislation; and that the opinions in these cases avowedly and carefully except and exclude from their operation such questions as that of priority of right between a pre-emptor and an appropriator of water, arising under the general statutes of congress concerning the disposition of the public lands among private proprietors or occupants. In order to understand the exact points decided by the United States supreme court in Frisbie v. Whitney, and the character of the legislation to which it relates, a brief statement of the material facts is necessary. A certain person, whom I will designate as A., held a Mexican grant to a large tract of land in California.

[5] 58 Cal. 142.

[6] Namely, Frisbie v. Whitney, 9 Wall. 187; Hutton v. Frisbie, 37 Cal. 475; West. Pac. R. R. v. Tevis, 41 Id. 489. The court also held that under the acts of congress, July 26, 1866, and July 9, 1870, the defendants obtained "existing rights" to construct and use their reservoir, which were excepted and saved in the patent issued to the plaintiff, citing Jennison v. Kirk, 8 Otto, 460; Broder v. Natoma etc. Co., 50 Cal. 621. Of course the real question was whether the defendants had any such "existing rights" at the time when the right of the plaintiff first accrued and became vested *as against the defendants.*

This grant was for years supposed to be perfectly valid, and A.'s title as perfectly good. He had from time to time sold and conveyed portions of it to divers purchasers, who had for years held possession of their farms, inclosed them, built on them, planted orchards, and otherwise improved them, under the supposition that the titles obtained from A. were valid. At length the supreme court of the United States decided that the grant to A. was null and void, and the land included in such grant was therefore the public domain of the United States, subject to all of the general statutes of congress concerning the public domain. Immediately upon the rendition of this decision, a great number of persons rushed on to the tract, and, disregarding the rights of the prior occupants, proceeded to locate claims as pre-emptors upon it, upon the improved and cultivated and occupied portions, to file their declaratory statements, and to take the other steps necessary, under the general statutes, in order to secure their titles as pre-emptors of the public lands. This proceeding was a palpable wrong to the *bona fide* and innocent occupants who were thus dispossessed. In this condition of facts, congress interfered, after the pre-emptors had filed their declaratory statements but before they had paid the price so as to be entitled to patents, and by a special statute, applicable to the lands included in A.'s grant, withdrew those lands, or at least such portions of them as had been sold to *bona fide* purchasers, from sale or pre-emption under the general statutes, and confirmed and established the rights and titles of such prior *bona fide* purchasers holding under A.'s grant, as against the claims of the pre-emptors who had located tracts and filed declarations, but had not yet proved up and paid. A controversy arose concerning the ownership of a certain tract between a pre-emptor and a prior purchaser and occupant under A.'s grant, which the supreme court of the United States finally decided in the case of Frisbie v. Whitney.[1] As the reporter's head-note accurately describes the questions passed upon by the court, it will be sufficient to quote it, without giving more elaborate extracts from the opinion. It will be seen that all the equities were strongly in favor of the prior occupants and against the pre-emptors. The head-note is as follows: "Occupation and improvement on the public lands, with a view to pre-emption, do not confer a *vested right* in the land so occupied [*i. e.*, as the rest of the case plainly shows, a vested right against the United States]. It *does* confer a preference over others in the purchase of such land by the *bona fide* settler, *which will enable him to protect his possession against other individuals*, and which the land officers are

[1] 9 Wall. 187.

bound to respect. This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, but it is not valid against the United States. The power of congress over the public lands, as conferred by the constitution, can only be restrained by the courts, in cases where the land has ceased to be government property by reason of a right vested in some person or corporation. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser. Until this is done, it is within the legal and constitutional competency of congress *to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler.*" The case of Hutton v. Frisbie[8] was an exactly similar controversy, growing out of the very same transaction, involving exactly the same questions, which the supreme court of California decided in the same manner. In Western Pacific R. R. v. Tevis[9] the court held, for the same reasons, that congress has power, by a special statute giving the right of way over the public lands of the United States to a railroad company, to include within such statutory grant, and thus convey to the railroad, portions of the public lands which pre-emptors had previously entered, located, and claimed, under the pre-emption laws, but for which they had not yet paid and received certificates of purchase.

It is plain that the courts do not intend, in these three cases, to touch upon the question, To what period or stage of his preliminary proceedings does the right of a pre-emptor (or other purchaser), *after he has received his patent*, relate back, in a contest as to priority with another person claiming title under the *general* legislation of congress? These cases simply hold that a pre-emptor who has merely located a tract of the public land, occupied it, and filed the preliminary declaration, but has not yet paid the price, obtains no vested right therein against the United States; and that congress may, therefore, by some special statute exercise *its* continuing rights of ownership over such tract, withdraw it from entry, location, settlement, or sale under the operation of the general legislation, and may sell or donate or grant such tract to another person, without regard to the inchoate and imperfect right to it of the pre-emptor. The conflicting rights of two persons claiming under different provisions of the *general* statutes of congress concerning the acquisition of private titles or interests in the public lands—general statutes which were dictated by and carry out the same liberal policy—present, in my opinion, another question

[8] 37 Cal. 475. [9] 41 Id. 489.

which, I would most respectfully but earnestly submit, is not embraced within nor passed upon by the three decisions above described, and which were cited and relied upon in Farley v. Spring Valley M. & I. Co.[10] Those cases deal with the interest of a pre-emptor before he obtains a patent, and before he has paid the price, not with his interest *by relation* after the patent is delivered. Even *that* inchoate interest is not a mere nullity. While it is not, in its imperfect condition, a perfect and vested right to the land as against the United States, the supreme court pronounces it to be an existing right which the courts will protect against third persons who have no superior or equal claims. When are the claims of third persons, derived from other portions of the *general* system of legislation concerning the acquisition of private ownership in the public lands, superior or equal to the inchoate right of the pre-emptor? It seems to me that *this* question is carefully distinguished by the decisions above quoted, and excepted from their operation; that those decisions are confined to a special act of congress directly *withdrawing* specific portions of the public lands from the operation of such general legislation as the pre-emption laws, and do not touch upon the effect of the *general* statutes dealing with the public lands, and prescribing the modes by which private titles or interests therein may be acquired. *J. N. P.*

(TO BE CONTINUED.)

[10] 58 Cal. 142.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

IN THE MATTER OF CHOW GOO POOI ON HABEAS CORPUS.

Filed January 26, 1884.

DETENTION OF CHINESE, WHEN UNDER AUTHORITY OF UNITED STATES—HABEAS CORPUS.—When a Chinese person is detained on board of a ship and refused the right to land, either by the authority of the ship's master or by the collector of the port, he is restrained of his liberty under or by color of the authority of the United States, and is entitled, as of common right, to sue out a writ of *habeas corpus*, that the legality of his detention and restraint may be passed upon by the court. When his body is produced in obedience to the writ the control of his person remains with the court, which may commit him to the custody of the marshal, or hold him to bail to await the decision of the court.

DETENTION OF SHIP.—The court has no power to detain the ship pending the investigations with regard to the right of her Chinese passengers to land.

CUSTODY OF CHINESE PASSENGER PENDING PRESIDENT'S ACTION.—When the justice, judge, or commissioner has determined that the Chinese passenger is not entitled to be or remain in the United States, and it is impossible to remand him to the ship on which he arrived, he may be committed to the custody of the marshal, or held to bail for a reasonable time until the president's direction can be had.

RIGHT OF CHINESE PASSENGER TO TRIAL BY JURY—FINDING BY THE JUSTICE.—In the investigation before the justice, judge, or commissioner to ascertain and find out whether a Chinese person is unlawfully within the United States, there is no right to a trial by jury. Such investigation may be had on a proceeding by *habeas corpus*, and the finding of the court or judge in such proceeding that the petitioner is a Chinese laborer, prohibited by law from landing or from being or remaining in the United States, amounts in fact to a finding by a justice, judge, or commissioner that such person is unlawfully here, within the meaning of section 12 of the Chinese exclusion act.

ORDER REMANDING CHINESE PASSENGER.—When the judge or court decides that the petitioner has no right to be or remain in the United States, an order should be made that he be remanded by the marshal to the custody from which he was taken. Upon the return of the marshal apprising the court that the vessel on which he arrived has sailed, the judge may, by a supplemental order, commit him to the custody of the marshal, to be held for a reasonable time to await the direction of the president. As to what constitutes a reasonable time, *quære*. Such direction of the president may be given by a general or special order. It may operate retrospectively as well as prospectively; but it can not revise the judgment of the justice, judge, or commissioner. He may, by a general order directed to the marshal or to the collector, direct that all persons found to be unlawfully here shall be removed, and he may instruct such officers to procure their tickets and effectuate their removal. If there be any difficulty from the want of appropriation or means at his command in fulfilling the duty imposed on him, it is for congress to remove it.

PRACTICAL OPERATION OF THE CHINESE EXCLUSION ACT, with reference to the duties imposed on the United States courts, commented on.

Before SAWYER, Circuit Judge, and HOFFMAN and SABIN, District Judges.

AN affidavit of complaint was filed and sworn to by Carroll Cook, the assistant United States attorney, charging the defendant with being a Chinese laborer, unlawfully within the United States, and not entitled to remain therein. A warrant was issued by the judge of the circuit court for his arrest, returnable before the circuit court. Defendant interposed a demurrer, the grounds of which are set forth in the opinion of the court. After argument, the case was submitted and the decision of the court rendered, wherein it was ordered—it appearing that no final order had been made in the *habeas corpus* proceeding pending in the United States district court, relative to the defendant—that this complaint be dismissed, and the prisoner be remanded to the custody of the United States marshal, to await such further order as may be made by the district court, as suggested by the opinion in this case.

S. G. Hilborn, United States attorney, and *Carroll Cook, assistant United States attorney,* for the government.

T. D. Riordan, for the defendant.

By the Court, HOFFMAN, D. J. By permission of my associates, I proceed to deliver the opinion of the court on the questions that were argued and submitted on last Saturday. The principal questions which are presented for our determination are probably the most important that can arise under this law. On the solution to be given to them will depend not merely the mode of procedure to be adopted, but whether the terms of the law are such that its obvious object can be carried into practical effect. But before proceeding to discuss them, there are some preliminary questions that have been raised, which, though their solution is not difficult, yet we have thought it best that they should now be passed upon by this court, and by the unanimous opinion of all the judges be set at rest so far as any further discussion of them in this court or the district court is concerned.

We are unanimously of opinion that when a Chinese person is detained on board of a ship and refused the right to land, whether by the authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the United States, and that he is entitled as of common right to sue out a writ of *habeas corpus*, that the legality of his detention and restraint may be passed upon by the court. When his body, in obedience to the writ, is produced in court, we are also of opinion that the control of his person remains with the court, and that he may be committed to the custody of the marshal, or be held to bail to await the decision of the court. If, on the investigation, the court should be of the opinion that he had no right to land, it is its duty to remand him to the custody from which he was taken, if the ship be in port, and about to return to the country from whence he came.

We are also of opinion that the court has no right nor color of right to detain the ship. The statute confers on us no such power, and in that respect it differs from the statute which relates to cases of prostitutes, or supposed prostitutes, arriving from foreign ports. Not only have we no power to inflict this great wrong on the owner of the ship, but the exercise of it would be in the highest degree inexpedient and oppressive. It would be vexatious to detain a ship for one or two or three months, while the numerous investigations with regard to the right of her passengers to land are in progress. It would interrupt our trade and intercourse with China. It would disturb the postal service, and it would do a wrong to the owner of the ship whose master may have, in good faith, brought passengers here, who presented to him certificates which by the law itself are *prima facie* evidence of the holder's right to land. To detain, therefore, the ship, rotting at the wharves for months, would be as unjustifiable an injury and injustice to the owners as, in our opinion, it would be unwarranted by law.

I now come to the more important and difficult questions which have been submitted for our decision. It being evident that two hundred or three hundred cases of persons claiming that they are unjustly restrained of their liberty could not be investigated within the interval which usually occurs between the arrival and the departure of the ships that ply between this port and China, it results that in a large majority of cases

the court would be unable to remand the passenger to the ship on which he arrived, in case the decision of the court should be against the right to land. The question then arises, and it is not free from difficulty, What is to be done with those passengers who remain in the custody and under the control of the court after the ship has departed?

By the twelfth section of the act it is provided: "That any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the president of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States."

It will be observed that this section is very vague and inexplicit. It confers no power, in terms, on the "justice, judge, or commissioner" to cause the person to be brought before him. It provides no process by which that object can be effected, nor does it indicate in any way what shall be done by the "justice, judge, or commissioner" in case he shall determine that the person brought before him is one not entitled to be or remain in the United States.

But the object of the section is apparent, and however inexplicit and indefinite the language is, we feel called upon to effectuate the unmistakable intention of the act, if we can, by construction, inference, and implication, find a warrant in the language of the act for doing so. We are of opinion, that inasmuch as the president's action is conditioned on the previous finding by a "justice, judge, or commissioner" that the person is not lawfully entitled to be in the United States, the power is impliedly conferred on the "justice, judge, or commissioner" to cause the man to be brought before him in order that that fact may be determined; and further, that it also confers, by implication, on the "justice, judge, or commissioner" who shall find that the person is not lawfully entitled to be in the United States, the right to hold that person for a reasonable time, to await the direction of the president for his removal. For if, upon ascertaining the fact that the person brought before the "justice, judge, or commissioner" is not entitled to be and remain in the United States, he is thereupon discharged, the execution of the duty devolved upon the president to cause him to be removed becomes impossible.

We therefore hold, though not without some hesitation, that the act does, by implication, confer upon the "justice, judge, or commissioner" the right, after having determined that the person is not entitled to be or remain in the United States, to commit him to the custody of the marshal, or to hold him to bail for a reasonable time, until the president's direction can be had. We are also of opinion that the person thus brought before the magistrate has no right to a trial by jury. He is not brought before him as a criminal. No punishment as such is inflicted upon him. The consequence of his being unlawfully here is that he will be sent back to the country whence he came. The power conferred and exercised is essentially a police power. It is closely analogous to the power freely exercised in the east with regard to idiots, imbeciles, lunatics, paupers, and other classes whose presence is deemed incompatible with the safety or welfare of our own people. The Chinese laborer is met at the frontier, as it were, and not having the right to enter the country, is denied admission to it. As well might a passenger quarantined

in the harbor, or a person sent to the pest-house as being infected with small-pox, demand the right to trial by jury to ascertain whether he is infected with that disease.

We are therefore of the opinion that in the investigation before the "justice, judge, or commissioner," to ascertain and find out whether a person is unlawfully within the United States, he has no right to trial by jury. The power exercised by the magistrate is a power summarily to investigate and determine the right of a person to enter or remain in the country—a power sometimes conferred on commissioners of immigration, but by this law confided to a "justice, judge, or commissioner;" and the whole purpose and operation of the act would be defeated if that inquiry, converted into a criminal prosecution, were to be determined by a verdict of a jury. I may further observe that the power is not given to a court, but is given to a "justice, judge, or commissioner," neither of whom, as such, has any right to summon a jury or can invoke its assistance.

We are further unanimously of opinion that the finding contemplated in the act, so far as we can ascertain from its obscure and vague provisions, is such a finding as may be had on a proceeding by *habeas corpus*. That where the person by his own procurement is brought before the court or a judge, on the allegation that he is unjustly restrained of his liberty, and the return shows that the pretext or cause of the restraint is that he is a Chinese laborer, not by law allowed to land, and the court, after giving him ample opportunity to be heard, determines the question on the proofs, and finds that he is a Chinese laborer, prohibited by law from landing, or from being and remaining in the United States, and if the ship were here and about to return to China, would remand him to the ship to be carried to the country from whence he came. Such a finding amounts in fact to a finding by a justice, judge, or commissioner that the person is unlawfully here, within the meaning of the twelfth section of the act. In this, as in other proceedings in *habeas corpus*, the usual order of the court, when the decision is adverse to the applicant, is that the petitioner be remanded by the marshal to the custody from which he was taken. Upon the return of the marshal apprising the court judicially that the vessel has sailed, and that he therefore can not be remanded to the custody from which he was taken, we are all of the opinion that the judge may, as in the case of an investigation before a commissioner, make a supplemental order committing him to the custody of the marshal, to be held for a reasonable time to await the direction of the president. Such action of the court on the *habeas corpus* being considered by us to be equivalent and as amounting to a finding by the "justice, judge, or commissioner," contemplated by the twelfth section of the act.

I may further observe, in answer to the pretension that the petitioner has a right to a trial by jury when the investigation is had before the commissioner, that where it is had on *habeas corpus*, and the ship is in port, he is remanded to the vessel at once and carried away, and surely he can gain no right to a trial by jury, or any other privilege, from the fact or the accident that the ship has happened to have sailed before the determination of the case.

With respect to the time of his detention, it is not claimed or supposed that we have a right to indefinitely confine him or hold him subject to the order of the court. He should be detained a reasonable time, that the president may have an opportunity to perform the duty imposed on him by the act, that is, to direct his deportation at the expense of

the United States. An analogy seems to be afforded by the provisions of the extradition law. By that act, a criminal, demanded by a foreign nation and found to be liable to extradition, is committed to prison, but if not taken away by the agents of the power demanding him, at the expiration of two months he may apply to the court for his discharge, which must be granted unless just excuse be shown for the omission to deport him. This provision would seem to afford some guide as to the period of time during which a Chinese person may be detained awaiting the order of the president.

We are further of opinion that the order of the president may be either general or special. It may be retrospective and prospective; and inasmuch as the law imposes on him the duty of causing the person to be removed to the country whence he came after he shall have been found to be unlawfully here by a "justice, judge, or commissioner," but gives him no power to revise that judgment, and apparently confers upon him no discretion in the matter, he may, in our opinion, by a general order directed to the marshal (or perhaps to the collector), direct that all persons who shall thus have been found to be unlawfully here shall be removed, and he may instruct that officer to procure their tickets and effectuate their removal. If there be any difficulty from the want of appropriation or means at his command in fulfilling that duty imposed on him by law, it is for congress to remove it.

We also think it proper to avail ourselves of this occasion, as this opinion may possibly attract some public attention, to say, that if the Chinese immigrants come in the future in anything like the number in which they have recently arrived, it will be impossible for the courts to fulfill their ordinary functions if these *habeas corpus* cases are to be investigated and disposed of by them. There remain on the calendar of the district court, I am informed, one hundred and ninety cases. For five or six weeks, even with night sessions, I have been unable to make any great impression on them. All ordinary business, public and private, of the court is necessarily suspended, or if resumed, these passengers, many of whom may be entitled to their discharge, are left either in custody or on bail awaiting the determination of their cases. It is therefore an urgent necessity that congress, by committing that duty to commissioners, or by some other mode, should relieve the courts of the burden of passing on these cases. I know of no subject that more imperatively demands the attention and the interposition of our representatives in congress. And to procure this relief to the courts, it is necessary that the decision of the commissioner or other authority to whom the right to determine these questions is confided shall be final; for if an appeal can be taken in every case, the same obstruction to the ordinary business of the court will arise.

We are aware that this decision may be open to criticism, and that in the minds of some it may savor of a latitudinarian construction of the act; but we are left to choose between so construing it and the alternative of depriving it almost entirely of practical efficiency.

CIRCUIT COURT, DISTRICT OF COLORADO.

JEROME *v.* COMMISSIONERS RIO GRANDE COUNTY. WILDER *v.* THE SAME.

Filed January 2, 1884.

COUNTY WARRANTS—WHO MAY SUE.—County warrants payable to bearer are not negotiable as bills of exchange and promissory notes. All holders take them subject to any defense that may be made against the original payee. Nevertheless, the property therein passes by delivery when they are payable to the holder. Hence, when the holder is a citizen of another state, he may maintain action thereon in the federal court, even when the payee can not maintain such action.

SAME—DUE AS UPON DIRECT PROMISE.—Such instruments are not assignable within the meaning of the act of congress of 1875, regulating the jurisdiction of federal courts, 18 Stat. 470. They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the first holder.

SAME—REMEDY.—In such case the remedy (in the United States courts) of the holder in the first instance is by action at law prosecuted to judgment, as a foundation for *mandamus* to compel the levy and collection of a tax for their payment.

UPON WARRANTS issued for interest on a judgment, an action will not lie.

ACTION to enforce certain county warrants. The opinion states the facts.

John L. Jerome, for the plaintiffs.

L. C. Rockwell, for the defendant.

HALLETT, J. These actions are upon warrants, signed by the chairman of the board of county commissioners and the clerk of the county, on the county treasury for different sums, and payable to different persons or bearer; all of them excepting two (to be mentioned hereafter) appear to have been issued for the current expenses of the county. The warrants were not issued to the plaintiff, and the citizenship of the persons to whom they were issued is not averred. A question has arisen whether upon such warrants payable to a person named, or to bearer, which circulate from hand to hand without indorsement, an action may be maintained by a holder, a citizen of another state, against a county in this state, without showing that the persons to whom they were issued are qualified to sue in this court. It can not be contended that such warrants are negotiable as bills of exchange or promissory notes, and free from all equities in the hands of an innocent holder. All holders take them subject to any defense that may be made against the payee, even when they are payable to bearer: Dillon's Mun. Corp., 3d ed., secs. 487, 503. Nevertheless, as they are payable to bearer, the property therein passes by delivery, and "a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee:" Bank of Kentucky v. Wister, 2 Pet. 318. Such instruments are not assignable within the meaning of the act of congress of 1875, regulating the jurisdiction of this court: 18 Stat. 470. They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the payee or first holder: Thompson v. Perrine, 16 Otto, 589. This is true only when the plaintiff becomes the owner of the paper by the delivery thereof. If his title is colorable only, and procured for the sole purpose of enabling him to bring suit in a federal court, the action will be dismissed: Williams v. Nottawa, 14 Id. 209. But of that we have no information at present. Objection is also made that the demands for which the warrants were issued, having been

allowed by the board of county commissioners, can not be the subject of an action against the county. The remedy of plaintiff, if any, is by *mandamus* to compel the county to levy and collect a tax with which to pay the amounts due on the warrants.

Whether this is the course of proceeding in the courts of this state is not shown; but it is certain that the practice in the federal courts is to proceed to judgment as a foundation for a writ of *mandamus*. It is only a question whether the money shall be taken to be due and owing from the county on the warrants alone, or after judgment on the warrants; and whatever the rule may be in the courts of the state, it is the settled rule of the federal courts to obtain judgment in the first instance: Chickaming v. Carpenter, 16 Otto, 663. In either case the county can not be compelled to pay except in the time and manner provided by law. As to two of the warrants described in the sixth and seventh counts of Jerome's complaint, the rule may be different. They appear to have been issued to Rollins & Young for interest on a judgment. The right of a plaintiff to interest on a judgment recovered by him is the same as the right to the principal sum for which the judgment may have been entered, and the remedy to enforce payment thereof is the same. As to the judgment and the interest thereon, there appears to be no reason for allowing a second action in the same jurisdiction. A second action can only have the effect to multiply costs without substantial results. The demurrer will be sustained to the sixth and seventh counts of the complaint in Jerome's case, and otherwise overruled.

OWENS v. WIGHT.

Filed January 3, 1884.

LEASE—COVENANT OF.—The execution of a lease for real estate implies a covenant to lessee for quiet enjoyment during the term.

SAME—REMEDY OF LESSEE.—In case of entry upon the demised premises by the lessor during the term, the remedy of the lessee is in damages by suit at law for breach of covenant, and not by action in equity for an accounting.

BILL in equity for an accounting. The opinion states the facts.

C. I. Thompson, for the plaintiff.

A. W. Rucker, for the defendant.

HALLETT, J. The bill avers that defendant and others demised to plaintiff a mining claim, called the Vanderbilt lode, for a term of six months from March 7, 1883. The defendant afterwards, and during said term, entered on the said premises and took therefrom a large quantity of valuable ore, and plaintiff prays that defendant may be required to account for said ore. If, as alleged, defendant and others made a lease to plaintiff, a covenant for quiet enjoyment would be implied from such letting: Taylor's Land. & Ten., sec. 304; Sedg. Dam. 183, note. The entry into the premises by defendant during the time was a breach of the covenant, and plaintiff's remedy is in damages for such breach. What the measure of damages may be, is not for present consideration. Upon the facts stated plaintiff is not entitled to an account, and the remedy is not in equity, but at law. Plaintiff may have the case transferred to the law docket if he wishes to do so; whether the action shall

be against the defendant alone or against all of the lessors, is not now to be determined. Defendant should have demurred before answering, and therefore he must pay the costs of the answer, and the costs, if any, upon the issue of fact joined. The answer may be withdrawn, and the demurrer will be sustained.

CIRCUIT COURT, DISTRICT OF OREGON.

SPARE *v.* HOME MUTUAL INSURANCE COMPANY.

Filed January 21, 1884.

AGENT ADVERSELY INTERESTED TO PRINCIPAL.—The law will not allow a person to act as agent when he has an interest adverse to his principal; and therefore an agent of an insurance company to receive and transmit applications for insurance, when making an application therefor on his own property, directly or indirectly for his own benefit, is acting for himself, and can not be considered the agent of the insurance company.

SUIT TO REFORM A CONTRACT.—The evidence necessary to support a bill to reform a contract must show certainly in what the mistake consists, and that it was mutual.

CASE IN JUDGMENT.—The owners of a warehouse applied to an insurance company, of which they were agents to receive and transmit applications for insurance, for a policy on the same as the property of their judgment creditor, and the company knowing nothing to the contrary, issued the policy accordingly, and upon the destruction of the property by fire refused to pay the insurance, on the ground that the assured had no insurable interest therein; the assured having failed in an action on the policy to recover the insurance, on the ground that it did not appear but that his debt could be otherwise made out of the remaining property of his debtors (8 Saw. 618), brought a suit in equity to reform the policy, alleging that by mistake it was issued in the name of the creditor, as owner, when it should have been issued in the name of the debtor and for his benefit, in case of loss: *Held*, that the evidence did not support the allegation of mistake; but, on the contrary, showed that the company was induced to issue the policy by the false representation of the owners and applicant, on account of which deception it was entitled to rescind the contract or treat it as null.

BILL in equity to correct a mistake in a policy of insurance. The opinion states the facts.

W. Scott Bebee and *W. Cullen Gaston*, for the plaintiff.

Cyrus A. Dolph, for the defendant.

DEADY, J. This suit was commenced on April 28, 1883. It is brought by the plaintiff, a citizen of Oregon, against the defendant, a corporation formed under the law of California, and doing business in this state, to reform and enforce a policy of insurance against fire, issued by the defendant on a warehouse in Cottage Grove, Oregon, for the period of one year, from July 26, 1881, in the sum of nine hundred dollars, by correcting an alleged mistake therein, whereby said property appears to have been insured as the property of the plaintiff, when in fact it was agreed and understood that it should be insured as the property of Aaron and Ben Lurch, whose property it was and is, for the benefit of the plaintiff.

The answer of the defendant denies the allegations of the bill as to the alleged mistake; and avers that Lurch Brothers applied to it as the agents of the defendant to have the property insured as that of the plaintiff, and that it never was otherwise informed until after the loss and readjustment, when it refused to pay the same, and offered to return the premium of eighteen dollars and ninety cents, which was refused. The answer also contains a plea of limitation, to the effect that the suit

is barred by the stipulation in the policy which provides that no suit shall be maintained thereon unless commenced within twelve months after the loss occurs.

On August 13th this cause was before this court on a demurrer to the bill, when it was held that the stipulation in the policy limiting the right to sue thereon to the twelve months next after the loss did not commence to operate until the expiration of the sixty days thereby given to the insurer in which to make payment: 17 Fed. Rep. 568.

But now it is contended by the defendant that because it gave notice of its intention not to pay and the reason therefor before the expiration of the sixty days, the plaintiff was at liberty to commence his suit at once, and therefore the period of twelve months commenced to run from that time and expired more than a month before the commencement of the suit, namely, March 23, 1883. This is a plausible proposition, but I do not think it a sound one. The stipulation for a delay of sixty days after notice and proof of loss within which to make payment being intended for the benefit of the defendant, doubtless it might waive it. And by giving notice on March 23d, that it would not pay the loss, for the reason stated, it evidently did so. Thereafter the plaintiff may have been at liberty to sue without further delay. But I doubt if the defendant could by this means compel the plaintiff to commence sooner than he otherwise would be required, or that the limitation of twelve months would thereby commence to run, as against the plaintiff, before the previous period of sixty days had expired.

The defendant also contends now, upon the proof that the suit is barred, even allowing that the twelve months did not commence to run until after the expiration of the sixty days, because it appears that the notice and proof of loss were made as early after the fire as February 16th.

The evidence in the case consists of the testimony of the plaintiff, Aaron and Ben Lurch, the defendant's Oregon manager, Mr. George L. Story, and its traveling agent, D. B. Bush, and sundry exhibits, consisting of prior policies of insurance on this property, and letters and documents relating thereto.

From these proofs and the pleadings it satisfactorily appears that the property was destroyed by fire on February 14, 1882, and the loss adjusted by the defendant within a few days, and not exceeding a week thereafter, at nine hundred dollars, and that on March 23d the defendant gave notice to the plaintiff that it declined to pay the loss because it had ascertained at and since the adjustment that the plaintiff had no interest in the property. Aaron and Ben Lurch both testify that they gave notice of the loss on the next day thereafter, and that within a week the agent, Bush, was at Cottage Grove and adjusted the same. Bush swears that he was there and made the adjustment on February 16th; and as he speaks positively, and from written memoranda, this is probably the fact. The plaintiff does not appear to have had anything to do with the business personally, and knows nothing about it, except the offer to refund the premium in Lurch's store, when he and they declined it—he saying that he had nothing to do with it.

But taking the statement most favorable to the plaintiff on this point, and assuming that a full week elapsed before the adjustment, which necessarily included notice and proof of loss, or waiver of the same by defendant, the period of sixty days commenced to run from and after February 21st, and expired on April 22d. Within the next twelve

months this suit should have been commenced, whereas it was delayed until six days thereafter.

The plaintiff claims, however, that the sixty days did not commence to run until Bush returned to Cottage Grove, and notified the plaintiff, on March 23d, that the defendant would not pay the loss. But according to the language of the policy, the sixty days is to be counted from the giving of notice and proof of loss, which was either made or waived before the adjustment, and not the refusal of payment. Indeed, this sixty days is manifestly given to the defendant for the very purpose of ascertaining and determining whether, admitting the loss or the sufficiency of the notice and proof thereof, it is bound to or will pay the claim of the assured.

Nor is there any ground to claim that the matter was kept open from the first to the second visit of Bush to Cottage Grove, for further proof in any particular. The proof of loss and ownership was made on the first visit, and it was explicit and satisfactory. The plaintiff swore that he had no interest in the property, and the Lurch Brothers claimed to own it, which claim was supported by the county record of deeds.

So it is quite plain that this suit is barred by lapse of time. It was commenced just six days too late. But if this were otherwise, the plaintiff is not entitled to the relief sought. I have examined the circumstances of the case as disclosed by the evidence, and they do not lead to the conclusion that there was any mistake made in the wording of this policy as alleged, but the contrary.

Briefly, it appears that in 1878 the Lurch Brothers were doing business at Cottage Grove as commission merchants, when they failed, claiming to owe the plaintiff, who is a person of comparative wealth, living in the same place, near five thousand dollars, with interest at one per centum per month, for which he obtained or had a judgment against them on December 9, 1878. Upon this he sold and purchased their store, but retained them as clerks and managers of the business for a year or two, when they succeeded in making a settlement with their creditors and took the store back again, still owing him, as they allege, about two thousand dollars, which was the value of the stock when returned to them.

Aaron Lurch says that after the failure he told the plaintiff that, as he was a creditor of theirs, he would have this property insured for his benefit, without stating how or in what manner he expected to accomplish it, and the plaintiff says he assented to the suggestion, but it does not appear that he ever gave the matter any further attention, or that the Lurches were under any legal obligation to him to do so.

On July 26, 1879, Aaron Lurch had the property insured in the Connecticut Fire Insurance Company, for one year from that date, for the sum of nine hundred dollars, as the property of the plaintiff; the application therefor, which was made by him in person, being in his handwriting and signed by him, "A. H. Spare."

In 1880, and before July 24th, the Lurch Brothers became the agents of the defendant at Cottage Grove to solicit and receive applications for fire insurance, and on that day they, as such agents, wrote to the manager of the defendant at Portland, inclosing the said Connecticut policy on this property as the property of the plaintiff, and asked to have it renewed in the Home Mutual; and that they might be allowed the proper commission therefor, which was done; and on July 14, 1881, on their written application, the policy was renewed with the defendant for another

year. This was all the communication there ever was, until after the fire, between the defendant and any of these parties on this subject, and all the knowledge which the defendant or its manager or agents had as to the ownership of this property, prior to the loss, was derived from and in accordance with the information thus obtained.

Upon this state of facts it is preposterous to claim that the plaintiff or his agents, the Lurches, ever intended or thought of insuring this property as the property of the latter for the benefit of the former, or otherwise than it was done. It was insured for three years in succession, at the request of the Lurches, as the property of the plaintiff, and exactly as Aaron Lurch described it in the first application made and written by him in 1879.

What was the reason or purpose of this misrepresentation it is not material now to inquire. The Lurches may have honestly intended to insure this property for the benefit of the plaintiff, but were mistaken as to the proper method of so doing. But in that case, the plaintiff must abide the result of their action, just as he would if they had refused or neglected to insure it at all. He had no control over them in this respect—they were not under any legal obligation to insure the property for him—and in fact were acting for themselves.

But on the evidence, the whole case of the plaintiff is so vague, improbable, and contradictory that it is difficult to assign any reasonable and correct motive for their action.

But counsel for the plaintiff insist that the Lurches, in procuring this policy to issue, were acting as the agents of the defendant, and therefore their mistake, if any, is the mistake of the defendant, of which it can not now take advantage.

When the alleged understanding between the plaintiff and the Lurches about this insurance was first had, and when it was first effected, the latter were not the agents of the defendants for any purpose, and what followed thereafter was in strict conformity with what had been done. But it is not worth while to refine on this point. The Lurches were evidently acting for themselves in this matter. They were not under any legal obligation to have this property insured for the benefit of the plaintiff, and if they voluntarily did so, it was in fact for their own benefit rather than his. In such case, if the property was destroyed by fire they would so far pay their debt with the insurance, and the plaintiff would get nothing but what he was otherwise entitled to, and they might be otherwise able to pay.

Before commencing this suit this plaintiff brought an action at law in this court on this policy as it is, claiming an insurable interest in the property, as a judgment creditor of the Lurches, and on a demurrer to the complaint the court held that he had such an interest, but he could not recover unless it also appeared that the debtor had not other property sufficient to satisfy the judgment: 8 Saw. 618. The plaintiff did not amend his complaint, so as to make this allegation, as he certainly would if he could; and the only inference is, that he suffered no loss by the fire and was not benefited by the insurance.

But another sufficient answer to this claim is, that the Lurches could not act as the agents of the defendants in this matter of the insurance of their own property for either the direct or indirect benefit of themselves. The law has too much regard for the infirmity of human nature to allow a person to be subject to the temptation of acting as an agent in a matter

in which he has an interest adverse to his principal. The law, dealing with the average integrity and disinterestedness, wisely assumes that no man can faithfully serve two masters whose interests are in conflict: Story on Agency, secs. 9, 10, 210, 211; 4 Kent's Com. 438.

Assuming, then, that the Lurches were acting for themselves and not the defendant, because as a matter of fact it appears they were so acting, and because as a matter of law they could not act otherwise, what possible ground is there for the claim that this policy does not truly state the contract of the parties? None whatever. The Lurches applied in writing to have this property insured as that of the plaintiff, and the defendant knowing nothing to the contrary accepted the application, and issued the policy accordingly. The minds of the parties met on this proposition and no other. But it was essentially false; and as soon as the defendant ascertained that the Lurches had misrepresented the matter, and attempted to procure an insurance on their own property, substantially for their own benefit, in the name of Spare, it refused to be bound by the contract, as it had a right to both under the general law and the express stipulation of the policy, and offered to return the premium.

A party seeking to have a mistake in a written instrument corrected must show exactly in what the mistake consists. It must be a mutual mistake, whereby both parties have in fact done what neither intended. And the evidence must be sufficient to prove this satisfactorily—to a moral certainty: Brugger v. State Ins. Co., 5 Saw. 310.

There was no mutual mistake here. There was, indeed, in the proper sense of the term, no mistake at all. The defendant was deceived by the deliberate misrepresentation of the Lurches as to the ownership of this property, whereby, according to the testimony of its manager, it was misled to accept a greater moral hazard than it was aware of or otherwise might have done. For this reason the defendant had a right to rescind the contract or treat it as null, independent of the clause in the policy making it void on that account.

There is still another point made by the plaintiff, and that is a subsequent waiver of the misrepresentation by the defendant. The Lurches testify that during the year 1881, and after this policy was issued, Bush was at Cottage Grove, and in conversation with them learned that the warehouse was not the property of Spare, but of the Lurches, whereupon he called their attention to the irregularity, but said as they were the agents of the defendant it might stand so until the next year, when it must be corrected. The time, circumstances, and details of this alleged conversation are very vaguely and conflictingly stated by the Lurches, while the whole story is flatly and explicitly contradicted by Bush, who also swears positively that he was not at Cottage Grove from March 11, 1881, to February 16, 1882.

Without stopping to consider the legal effect of such a conversation or understanding, or the power or authority of Bush to thus validate a void contract, it is sufficient to say that the burden of proof is on the plaintiff to establish the fact, and that in my judgment it is not proven that the conversation ever occurred.

There must be a decree dismissing the bill for want of equity, and for costs for the defendant.

WELLS, FARGO & CO. *v.* OREGON RAILWAY & NAVIGATION CO.

Filed January 25, 1884.

EXPRESS FACILITIES.—Whether an express company doing business over a line of railway or steamboats is entitled to the services of the pursers and conductors thereon, as its messengers, depends on circumstances; but when one express company doing business over any such line of transportation is allowed such service, the same thereby becomes an express facility as to all other express companies doing business thereon, and can not lawfully be withheld from them.

INJUNCTION TO BE OBEYED.—When a party to an injunction doubts its extent or significance, he ought not to disobey or disregard it, with a view of testing it in this particular, but he should apply to the court for a modification or construction of it.

PUNISHMENT FOR CONTEMPT.—In a proceeding for contempt between the parties to a suit for disobedience to an injunction, causing a pecuniary loss or injury to the party instituting the proceeding, the court, in imposing punishment upon the wrong-doer, may do so for the benefit of the party injured.

PROCEEDINGS for contempt in the violation of an injunction. The opinion states the facts.

M. W. Fechheimer, for the plaintiff.

Rufus Mallory and *Byron C. Bellinger*, for the defendant.

DEADY, J. On December 11, 1882, plaintiff commenced a suit in this court to compel the defendant to allow and furnish it express facilities on its lines of transportation; and on March 19th, after a hearing on the bill, an injunction was allowed requiring the defendant to furnish the plaintiff such facilities on and over its lines of railway and steam navigation as it then was and had been doing before the commencement of the suit, and upon the same terms.

On November 20, 1883, the plaintiff filed a petition in the cause, verified by the oath of its superintendent, Mr. Dudley Evans, asking that the manager of the defendant, Mr. C. H. Prescott, and certain of its pursers and conductors, be ordered to show cause why they should not be punished as for contempt, for not obeying said injunction as therein alleged.

The petition and affidavits in support of it show that at and before the allowance of said injunction, and since, the defendant was and is the owner and operator of two certain steamboats, then and now plying on the Columbia river between Portland and Astoria and way ports; and also a certain steamship plying between Portland and San Francisco; as well as the lessee and operator of a certain narrow-gauge railway running from White station to Sheridan and Airlie, in Oregon; that until October 1, 1883, the defendant allowed the plaintiff to have the services of pursers and conductors on said vessels and road to take charge of its treasure-box and letter-bag, and deliver and receive all matter transported therein, as its agents and messengers along the routes traveled by them, for which it has paid and is willing to pay a reasonable compensation, and indemnify the defendant against any loss by reason of the carriage of such express matter; and that since said date the defendant had refused to allow or furnish the plaintiff these facilities, contrary to the injunction herein, and notwithstanding it is furnishing the same to the Northern Pacific Express Company, a corporation, the stock of which is largely owned by the persons who control the defendant.

The order was made as asked for, and on December 4th the manager of the defendant answered for it and himself, admitting the facts alleged

in the petition, and stating that he did not understand that the defendant was required by the injunction to allow its pursers and conductors to act as the agents and messengers of the plaintiff; that acting upon this impression, and the advice of counsel that such services were not included in the injunction, and were not express facilities anyhow, he had directed the pursers and conductors of the defendant not to act as the agents and messengers of the plaintiff; and that the respondent did not intend to violate or disobey the injunction of the court.

Only two of the pursers and conductors—C. A. Gould of the narrow-gauge, and John B. Maynard of the steamship Columbia—appear to have been served with the order to show cause, and they answered jointly, saying that the injunction was not served on them, and they were not aware of its terms, and did not suppose that it required them to act as agents of the plaintiff; but that in refusing to do so, they did not intend to disobey the injunction, and were simply acting in obedience to the orders of their superior.

The scope and meaning of the phrase "express facilities" does not admit of absolute definition. Its force and effect must often depend on circumstances, of which local usage, and the conduct and convenience of the parties, may be important considerations.

For instance, take the service which the plaintiff claims at the hands of the purser of the steamship. It consists simply of receiving the plaintiff's treasure-box and letter-bag in his office on the vessel, and putting it in the safe and keeping it there until the arrival of the vessel at Portland or San Francisco, as the case may be, and there delivering the same, on board, to the agent of the plaintiff. Thereby the defendant incurs neither expense nor risk, and the plaintiff saves the hire and transportation of a special agent between these ports. The inconvenience to the defendant is nothing, while the inconvenience to the plaintiff is very considerable. It is an arrangement which commends itself at once as reasonable and well calculated to promote the conduct of the business in which the parties are engaged; namely, the transportation and delivery of parcels with certainty and celerity on the one hand, and the furnishing the means and conveniences for so doing on the other.

And it is not apparent on what ground the defendant can reasonably refuse this facility, unless it desires to impede rather than promote the plaintiff's business, which is contrary to its duty and obligations as a common carrier.

While the plaintiff was the only company doing business on the defendant's routes, it was furnished this facility as a matter of course. It was mutually profitable. Under the circumstances the defendant could furnish it much cheaper than the plaintiff could supply it. That it was the proper and convenient thing to do, seems then not to have been questioned.

But when a rival corporation enters this field to compete with the plaintiff in the express business, the defendant withdraws this facility from the latter and extends it to the former. The only reasonable explanation of this conduct is that the defendant intends to favor the one company, which is in fact itself or its near ally in interest, and hinder the other in the conduct of its business.

The same may be said of the services of the conductors on the narrow-gauge road. Presumably, the business thereon is so light that it is a

burdensome expense to send a special messenger over the road with the express matter, while the duties of the conductor are so inconsiderable that he can attend to it as well as not.

The injunction requires the defendant to furnish the plaintiff with the express facilities that it was allowed at and before the filing of the bill; and this facility, as we have seen, was one of them. If, however, the defendant or its manager thought that this was such a facility or convenience as it ought not under the circumstances to be required to furnish, and would not, if the court's attention was specially called to the matter, he should have applied for a modification of the injunction in this respect, and not have undertaken to disregard it, with a view of testing the matter, or otherwise. The merit or propriety of the injunction is not open to consideration in this proceeding. It is the duty of all the parties to obey the injunction until it is set aside or modified: Craig v. Fisher, 2 Saw. 345.

As it is, the respondents are clearly guilty of a violation of the injunction, and are liable to be punished as for a contempt, regardless of the question whether this service is one which the defendant ought to furnish the plaintiff as an "express facility," or not.

But even if the defendant had never furnished the plaintiff with this facility, and even if it is not, under the circumstances or otherwise, an absolute express facility, yet the defendant has by its conduct so far made it one that it is bound, both by the terms of the injunction and its duty and obligation as a common carrier, to furnish it to the plaintiff.

Having voluntarily furnished the Northern Pacific with this convenience in the transaction of its business, it can not refuse it to Wells, Fargo & Co. In giving this convenience to the one company doing an express business over its lines of transportation, the defendant, as to all other companies doing such business thereon, has thereby made it an absolute express facility, to which all are equally entitled.

As was said by this court in Wells, Fargo & Co. v. The O. & C. R'y Co., 1 W. C. Rep. 250, "The defendant is bound to furnish the express company with reasonable facilities for the conduct of its business, and if there is more than one company doing business over its road, it must furnish equal facilities to all. To deal fairly and justly in this respect, and according to its obligation, the defendant must serve the express companies equally, and neither directly nor indirectly favor the one nor hinder the other. Whatever terms or favors it extends to one, it must extend to the other, because that other becomes thereby entitled to them. No discrimination can be allowed; but equality of service, conditions, and compensation is the fundamental rule governing the business or transaction."

This case is also referred to generally as authority in the premises. The two cases are in principle, if not in instance, exactly alike.

Disobedience to an injunction is a contempt of court which may be punished by fine or imprisonment: Atlantic G. P. Co. v. Dittmar P. M. Co., 9 Fed. Rep. 316; R. S., sec. 725. Either the corporation committing the contempt may be punished or the agent through whom it acts: U. S. v. Memphis & L. R. Co., 6 Fed. Rep. 237.

The purser and conductor are discharged. It does not appear that they were ever served with the injunction or made aware of its terms in this respect. The defendant corporation and its manager are adjudged to be guilty of a contempt, as alleged in the petition herein, by the vio-

lation of the provisional injunction heretofore issued in this case in pursuance of the order of this court made and entered on March 19, 1883.

But as this is a proceeding between the parties to the suit, having a remedial purpose rather than a punitive one, the matter will now be referred to the master to ascertain what loss, expense, or injury the plaintiff has sustained by reason of the misconduct of the defendant, with a view of enabling the court to impose, by way of punishment, a corresponding penalty on the defendant for the benefit of the plaintiff; and as to any further proceeding, the matter is continued until the coming in of the master's report: Craig v. Fisher, 2 Saw. 345; Fischer v. Hayes, 6 Fed. Rep. 63; McCauley v. White S. M. Co., 9 Id. 698; In re Muller, 7 Blatch. 23.

SUPREME COURT OF CALIFORNIA.

WILSON *v.* BAKER ET AL.

Department Two. Filed January 26, 1884.

PROSECUTION IN ONE COURT OF AN ACTION FOR THE RECOVERY OF AN INDEBTEDNESS, in which an attachment has issued against the property of the debtor, can not be stayed by another court of co-ordinate jurisdiction, at the instance of the assignee for the benefit of creditors of such debtor, although the plaintiffs in the attachment suit had agreed to release the property attached and dismiss such suit.

APPEAL from an order of the superior court for Stanislaus county, entered in favor of the plaintiff. The opinion states the facts.

Roche & Desbeck, for the appellants.

W. E. Turner and *Schell & Treat*, for the respondent.

MYRICK, J. This is an appeal from an order made by the superior court of Stanislaus county, enjoining the defendants from taking any further steps in or proceeding with, or in any manner further prosecuting, the action at law pending in the superior court of the city and county of San Francisco, wherein said defendants are plaintiffs and one Love is defendant. The action against Love is an action brought to recover judgment for an indebtedness of about four thousand dollars, in which suit an attachment had been issued and levied upon certain personal property. The plaintiff here, Wilson, claims an interest in the attached property, under an assignment made by Love to him for the benefit of Love's creditors, which assignment, he alleges, was made in pursuance of an arrangement between all the creditors, including the defendants herein, by which the property was to be released from the attachment and disposed of for the mutual benefit of the creditors.

It is the settled law of this state, that the prosecution of a suit in one court can not be enjoined by another court of co-ordinate jurisdiction. Exception to this rule has been suggested in case the court in which the proceedings sought to be enjoined are pending can not afford adequate relief. The case before us is not within the exception, under the statutes of this state: C. C. P., secs. 385, 387, 389. Wilson, if he had the right to have the action against Love stayed, could have obtained the relief in the court in which that action is pending.

The order is reversed.

THORNTON and SHARPSTEIN, JJ., concurred.

WILSON *v.* BAKER ET AL.

Department Two. Filed January 26, 1884.

JUDGMENT WILL BE REVERSED WHEN THE EVIDENCE IS INSUFFICIENT to support the findings.

APPEAL from a judgment of the superior court for Stanislaus county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. This was an action brought by the plaintiff, a creditor of one Love, against the defendants, other creditors of said Love, to compel them to join in an assignment for the benefit of all the creditors of such debtor, and to restrain them from further prosecuting an action in the superior court of San Francisco for the recovery of their indebtedness, in which action an attachment had issued against the property of such debtor. The court found, in conformity with the allegations of the complaint, that the defendants, through their agent, one Caldwell, had agreed to join in the assignment, to release their attachment, and to dismiss their suit, in consideration of the plaintiff's dismissing an action which he had pending against said debtor, and refraining from instituting insolvency proceedings against him; that after the plaintiff had performed his promises, the defendants refused to join in the assignment, and fraudulently induced the plaintiff to refrain from instituting such insolvency proceeding until their attachment lien had become a preferred lien under the statute. The further facts appear in the opinion.

Roche & Desbeck, for the appellants.

W. E. Turner and *Schell & Treat*, for the respondent.

MYRICK, J. The evidence is insufficient to support the findings of the court below in the following particulars: In finding 8, that Caldwell was authorized to act for and on behalf of the defendants at the meeting of creditors, and by his acts to bind the defendants, and to enter into any agreement or contract with Love or his creditors. Finding 10, so far as it is found that the defendants, or any person thereto authorized by them, made or joined in or ratified the agreement set forth in said finding 10. The whole of finding 13. Finding 14, so far as it states or infers that the defendants entered into any agreement. Finding 17, so far as it is found that the defendants at the said meeting of creditors agreed to sign any agreement. Finding 20, as to any fraud on the part of defendants.

The judgment and order are therefore reversed, and the cause is remanded for a new trial.

THORNTON and SHARPSTEIN, JJ., concurred.

WEILL *v.* BALDWIN ET AL.

Department Two. Filed January 26, 1884.

COVENANTS IN RELATION TO THE USE OF WATER, WHEN RUN WITH THE LAND.—Where the owners of two adjoining tracts of land, separated by a stream, covenant and agree between themselves as such owners that the waters of such stream should be taken and conveyed to a reservoir on the land of one owner, by ditches and flumes constructed at their joint expense, and that from such reservoir the other owner might construct ditches across such land and convey one half of the water to his own premises,

such covenants run with the land; and the successor in interest of the owner on whose land the reservoir is situated can not, by going to a point higher up on the stream, and taking water therefrom and conveying it to his land, claim the whole of it for his own use. Nor will such exclusive right be created by the statute of limitations in the absence of an adverse use.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Brunson & Wells, for the appellants.

Glassell, Smith & Patton and *Smith, Brown & Hutton*, for the respondent.

MYRICK, J. This controversy is as to the right of the plaintiff to go upon the land of Baldwin and construct and use a ditch to convey water from a reservoir located on Baldwin's land to and upon the land of plaintiff, for use thereon.

The two ranchos, the Santa Anita and the Duarte, are separated by the Saw Pit canyon stream, being located thereon, the Santa Anita on the west and the Duarte on the east. At the date of the two instruments first herein referred to, plaintiff Weill was the owner of the Duarte, and Wolfskill, Baldwin's predecessor, was the owner of the Santa Anita. On the thirtieth of October, 1869, Wolfskill and Weill executed an instrument reciting the ownership by them, respectively, of the ranchos; that the stream ran between the two ranchos, coinciding generally with the boundary line; and that they had agreed to use the waters of the stream in common for the purpose of irrigating the ranchos, and for such other purposes as they may desire, respectively, each to have an undivided one half interest in the use of said waters; and the parties mutually granted, each to the other, an undivided one half of the right, title, and interest of each, respectively, to the water of the said Saw Pit canyon, to have and to hold by the said parties, respectively, and their heirs and assigns forever. This instrument was acknowledged and recorded.

On the third of January, 1870, the same parties made another instrument, reciting that whereas Wolfskill had at his own cost constructed a ditch and aqueduct to conduct the water of the stream to a point on the Santa Anita, and that it was intended and agreed that the parties were and should be equally interested in the ditch and aqueduct, and in the use of the water in the arroyo and ditch; therefore, in consideration thereof, and of the payment of eight hundred and twenty-five dollars, paid by Weill to Wolfskill, being the proper proportion of the cost of the ditch, the said Wolfskill granted, bargained, and sold to Weill the undivided one half of the ditch and the use thereof from the point where it received the water to the point where it emptied or should empty its contents into the reservoir selected for that purpose on the Santa Anita, together with the equal use and enjoyment of the same and of the water thereof, inclusive of the equal right of way throughout the course of the ditch for all purposes of use and repair, to an equal extent with said Wolfskill, and no further; and it was in said instrument agreed that at a point in the Santa Anita a reservoir should be constructed to receive the water of the ditch, from whence it should be distributed for the equal benefit of both parties, the expense of constructing the reservoir to be equally divided between the parties; and for said consideration Wolfskill granted, bargained, and sold to Weill

the right to construct not more than two ditches leading from the reservoir to and upon the Duarte for the purpose of distributing to his own use and benefit one half of the water so collected or to be collected in said reservoir, also the right of way over the Santa Anita for the reasonable purpose of constructing and repairing said ditches and using and enjoying the said half of the water of the reservoir. And it was agreed that each did convey to the other such interests and rights that each was and should be equally interested in the use of the waters of the arroyo and the reservoir, and the ditch leading into the reservoir, and should have and enjoy all reasonable facilities for the preservation of said rights and privileges. This instrument also was acknowledged and recorded.

It may be here mentioned that to the north of the ranchos, higher on the stream, was a tract of government land, and in constructing the ditch, Wolfskill had gone to a point on the government land about half a mile north of the north line of the ranchos, and had constructed a dam to turn the water of the stream into the ditch, and from that point the ditch led southerly, on the west side of the stream, across the government land to and upon the Santa Anita.

Subsequently, one Newmark became the owner of the Santa Anita, and while the owner, he and said Weill caused to be posted and recorded a notice claiming to appropriate, under the provisions of the civil code, all the waters which flow or which might flow in and out of the Saw Pit canyon, as well by reason of prior appropriation as by the cutting and excavating of ditches, erection of flumes, and building of reservoirs, and use of the same, as also by reason of the natural bed of the stream being upon the lands of said ranchos; they also claimed the said water as belonging to the ranchos, and declared that they claimed "all the water which flows or which may hereafter flow down the Saw Pit canyon and out of the same to the extent of one hundred and ninety-six inches under a four-inch pressure;" that they intended to use the water for domestic, agricultural, irrigating, and manufacturing purposes, and intended to carry and conduct it to, over, and upon the Santa Anita and Duarte ranchos by means of the flumes, ditches, and aqueducts already erected, cut, and dug for that purpose, and to divert it if necessary by means of similar ditches and flumes, and if they be not sufficient, then by pipes sufficient to carry that amount of water.

Subsequently, the defendant Baldwin acquired the title to the Santa Anita rancho, and to the piece of government land above spoken of, through which the stream flows before reaching the north line of the ranchos. During the rainy season, water flowed in the stream down, through, and between the ranchos, but in the dry season it was diminished in quantity, and at times did not reach the line of the ranchos. In order that a larger and continuous supply might be obtained, Baldwin constructed a dam at a point on the stream about a quarter of a mile above the old dam, and constructed a ditch and flume therefrom, across the land above spoken of as government, leading to the reservoir on the Santa Anita, repairing and using portions of the old ditch, and constructing new ditch and flume in places. By means of the new dam, and the ditch and flume so constructed and repaired, a continuous supply of water was obtained, and was used by Baldwin on his rancho. Prior to 1882, Weill, having no occasion to use water, had not attempted to do so; but in March, 1882, he constructed a ditch from the reservoir to convey

water therefrom, over the intervening portion of the Santa Anita, to and upon the Duarte; this ditch was filled up and obstructed by the defendants, was twice reopened by plaintiff, and each time filled up and obstructed by the defendants; and this action was brought to enjoin them from further preventing plaintiff from constructing a ditch from the reservoir, or from taking his share of the water, and to have it adjudged that plaintiff is the owner of an undivided half of the waters, and of the ditch, aqueduct, and reservoir, and of the right of way for two ditches for the purpose of using the waters from the reservoir. The plaintiff had judgment in the court below.

It is not necessary, in this case, to consider any question as to rights of the parties as riparian owners; nor as to the rights of Baldwin to have or use water as owner of the tract of so-called government land; nor is it necessary to determine the effect of the notice of appropriation, further than as a transaction between the then owners of the ranchos, regarding their respective rights, duties, and obligations arising under the two instruments which had been previously executed.

By these two instruments, the owners of the ranchos had covenanted and agreed, as between themselves as such owners, that the waters of the Saw Pit canyon stream should be taken and conveyed to a reservoir on the Santa Anita, by ditches and flumes constructed at their joint expense, and that from the reservoir Weill might construct at least two ditches across the Santa Anita, and convey one half of the water to the Duarte. The covenants contained in these instruments are covenants running with the land; and Baldwin, the successor of one of the contracting parties, could not, by going to a point higher up on the stream and taking water therefrom, and conveying it (even across land not owned by either of the contracting parties) to the Santa Anita rancho, claim the whole of it for his own use. The *water*, so far as the right to its use appertained to either of the two ranchos, was the subject of the contracts, the means of conducting it being secondary; the parties contracted with reference to the use of the waters of the Saw Pit canyon stream.

The statute of limitations does not apply. There is no evidence of adverse use until March, 1882.

It may be that Baldwin is entitled to recover of plaintiff one half of the amount necessarily expended, but that matter is not for consideration here, as payment does not appear to have been made by the parties a condition precedent. Baldwin's action, in filling up plaintiff's ditch, was not based on non-payment.

We have not mentioned in detail all the points presented by appellants; but they are in effect disposed of by the conclusion at which we have arrived.

Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

CITY AND COUNTY OF SAN FRANCISCO *v.* LUX ET AL., EX'RS, etc.

In Bank. Filed January 23, 1884.

MONEY OF AN ESTATE ON GENERAL DEPOSIT AT A BANK IS IN LEGAL EFFECT A LOAN, and is taxable in the county in which the decedent formerly resided, and not in the county where such money is deposited.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Taylor and *Cope & Boyd*, for the appellants.

Walter H. Levy, for the respondent.

MCKINSTRY, J. This is an appeal from a judgment in favor of plaintiff for city and county taxes, and the case is brought here for review upon the judgment roll alone.

The facts of the case as shown by the findings are substantially as follows: Jacob Rosenberg and the defendants are the executors of the will of Michael Reese, deceased, who died in Europe in 1878, being at the time of his death a resident of the county of San Mateo, in this state, where, on the fifth of September of the same year, his will was admitted to probate by the probate court of that county. Letters testamentary upon the will were issued out of that court to the executors; they qualified and entered upon the discharge of their duties, and have ever since then conducted the settlement and administration of the estate of the deceased in the court having jurisdiction of the settlement of the estates of deceased persons in the county of San Mateo, and the estate is still in process of settlement therein.

One of the executors, Jacob Rosenberg, is, and has been ever since his appointment and qualification, a resident of the city of Chicago, in the state of Illinois; another of the executors, the defendant Charles Lux, is, and has been ever since his appointment and qualification, a resident of the county of San Mateo; and the other of the executors, the defendant Joseph Rosenberg, is, and has been ever since his appointment and qualification, a resident of the city and county of San Francisco, in this state.

On the first Monday in March, 1882, the executors had on general deposit in different banks situated and doing business in the city and county of San Francisco, the sum of five hundred and sixty-five thousand five hundred and four dollars, of money of the estate, which was assessed for the fiscal year ending June 30, 1883, for city and county taxes in the city and county of San Francisco, to "Lux, Charles, and J. Rosenberg, executors of M. Reese," and the city and county taxes mentioned in the complaint levied thereon.

The same property was assessed to the executors for state and county taxes levied thereon in the county of San Mateo for the same fiscal year, which taxes were paid by the executors in pursuance of an order of the superior court of the county of San Mateo (where the estate is in process of administration), directing the executors to pay the same.

The question is, whether the property was assessable in San Mateo or in San Francisco.

It is a settled rule that a general deposit is, in effect, a loan, the relation of the bank and depositor being that of debtor and creditor.

Where, then, should the credits—the amounts due from the banks to

the estate—have been assessed? The constitution, article 13, section 10, provides, that all property, except certain railroad property, shall be assessed in the county where it is situated; and section 3629 of the political code requires of the assessor to exact "from each person" a statement in writing showing all property belonging to, claimed by, or in possession of such person, and "the county in which such property is situated, *or in which it is liable to taxation*," etc.

Neither the constitution nor the section of the political code referred to defines the *situs* of any property, and that is to be determined by the application of recognized principles of law. In the absence of statutory provisions on the subject, the *situs* of all personal property would follow the person of the owner. For most judicial purposes, a *debt* or credit has no *situs* or locality: Burrill's Law Dict., *verbum* Situs; 2 Kent's Com. 458, note. But when credits are made the subject of taxation, it is appropriate that their locality should be referred to the residence of the owner.

In People v. Home Ins. Co., 29 Cal. 533, it was held that personal property in this state belonging to a non-resident of the state may be assessed to the owner. As the statute required all property within the state to be taxed, it was held that, as to certain bonds within the state, the provisions of the law could be given effect only by distinguishing between the actual position of the property and its ordinary legal *situs*. Mr. Justice Sawyer said: "We think the bonds, or at least that which is symbolized or represented by them, are property within this state within the meaning of the act. And this view *is not in conflict* with that adopted in People v. Park, 23 Id. 138, and People v. Eastman, 25 Id. 601. In those cases the owner resided in the state, and there was no occasion to consider whether the actual was different from the fictitious legal *situs* of the money loaned or solvent debt, and the owner being a resident of the state, the proper place to tax this species of property, under the statute, was his place of residence."

In People v. Holladay, 25 Cal. 306, it was held that by reason of provisions of the revenue law in force when that case was decided, it was the duty of an assessor to assess cattle which were in his county between the first Mondays of March and August. People v. Holladay was decided at the April term, 1864. That the case did not decide that intangible property, as credits, should be assessed in any other county than that of the residence of the creditor, is apparent from the fact that at the July term of the same year it was adjudged, in People v. Eastman, 25 Id. 601, that an assessment of a debt secured by mortgage should be made where the creditor resides, and not in the county where the mortgaged premises are situated; and that the debt, *when the creditor resides in the state*, has no *situs* for the purpose of taxation apart from the residence of the owner.

In People v. Niles, 35 Cal. 280, it was held that under the revenue law of 1861, a *situs* was assigned to tangible personal property—a schooner—in the county where it remained permanently, although it was not the county of the owner's residence. This case and others are commented upon in People v. Whartenby, 38 Id. 466, where it was said: "A debt, as such, has no *situs*, but follows the person of the creditor. Indeed, it may be stated as a general rule that all personal property, of whatsoever character (which, in the nature of things, is transitory), is in law presumed to follow the person of the owner. * * * In some exceptional cases, however, and for some especial purposes, the rule has been

varied by statute. In this state, for example, visible, tangible property is to be taxed in the county in which it is found at the time of assessment: Stat. 1861, 423. But there is no provision to the effect that 'money at interest,' or debts due to the person assessed, shall be assessed in the county in which the debtor resides; and hence those come under the general rule that personal property follows the person of the owner."

And in People v. Park, 23 Cal. 138, the supreme court said: "We think the proper construction of the revenue law of 1860 is that all personal property of a tangible character was properly taxable in the county where it was actually situated at the time of the commencement of the assessment; but choses in action and property of an intangible character, such as debts and the like, can not be said to be within the district of the assessor, and are therefore taxable in the county where the owner resides at the time. They could not properly be assessed where the debtors reside, as they may be non-residents or reside in several counties; nor where the property on which it may be secured is located, for that might be in several counties; and it is the debt, not the security, which is properly taxable: 16 Cal. 171."

So far as they may affect the question we have considered, there is no substantial difference between the provisions of the political code and those of the several revenue acts which existed prior to its adoption.

If the testator were living and the moneys had been deposited by him, the amount of the debts due by the banks to him would be taxable in San Mateo, the county of his residence. The *situs* of the property, for taxation purposes, does not change upon the death of the owner. The personal property of decedents is taxed at the former domicile of the decedent. "During the settlement of the estate it must have a *situs* somewhere, and none so appropriate as where the decedent lived:" Burroughs on Tax. 224. This is true of the property which would be taxable at the residence of the decedent did he still survive; that is of credits, which have a *situs* attributed to them where they are made taxable.

Judgment reversed and cause remanded.

MORRISON, C. J., and MYRICK, SHARPSTEIN, MCKEE, ROSS, and THORNTON, JJ., concurred.

SWEENEY ET AL. *v.* SUTRO ET AL.

In Bank. Filed January 28, 1884.

BONA FIDE PURCHASER OF WARRANT.—Where a warrant is issued by the auditor of the city and county of San Francisco, in pursuance of the mandate of the court, payable to the plaintiff in the proceeding for *mandamus* or his attorney, a *bona fide* purchaser thereof from such attorney acquires a good title as against such plaintiff. Such warrant is not a negotiable instrument.

APPEAL from a judgment for the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The facts are stated in the opinion delivered in Department Two, 10 Pac. C. L. J. 788.

E. J. Moore, for the appellants.

J. B. Hart, for the respondents.

THE COURT. In this cause the opinion of the department (Two) will stand as the opinion of the court: 10 Pac. C. L. J. 788. We add this

further remark: The decree can not be said to be without jurisdiction. It may have been made by consent of the plaintiffs themselves. The defendants being innocent purchasers for value of Cobb, the judgment and order must be reversed, as directed in the opinion of the department. We do not see that in coming to this conclusion we have overruled any of the cases to which our attention has been called by counsel for respondents. We do not intend to hold that a warrant is a negotiable instrument.

Ross, McKinstry, and McKee, JJ., dissented.

Paige *v.* Carter.

Department Two. Filed January 29, 1884.

Parol Evidence is Admissible to Show that a Promissory Note Sued on was Delivered at a Date other than that which it bears on its face; but a refusal to admit such evidence is not error when the same would have been immaterial.

A Witness may Refresh his Memory by Referring to a Memorandum, although the Same was not Made by Him, nor at the time of the transactions testified to, if it was made under his direction, at any time while the facts were fresh in his memory.

Items of a Counter-claim Which Accrued after the Commencement of the action can not be given in evidence by the defendant.

A Creditor Who has Joined in the Execution of a Composition Agreement with his debtor can not object that the sum due him has not been paid in accordance with its exact terms, if he afterwards agrees to a different time and mode of payment.

Appeal from a judgment of the superior court for Stanislaus county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Schell & Treat, for the appellant.

W. E. Turner and *S. L. Carter*, for the respondent.

Sharpstein, J. If it would make any material difference whether the note sued on was delivered at the date it bears on its face or at some subsequent time, evidence tending to prove that it was delivered at the later date should have been admitted. But in view of the plaintiff's own testimony, we think the date of the delivery of the note immaterial. One of the defenses set up by the defendant is that after making the note sued on he compromised with all his creditors, including the plaintiff, by agreeing to pay them twenty-five per cent. of their respective claims, and that they all accepted that sum in full satisfaction of said claims. The date of that agreement is posterior to the date which the note bears on its face; but the plaintiff claims that the note was not delivered until after said agreement was made, and therefore was not affected by it. By the agreement, all the creditors of defendant, including the plaintiff, promised to accept said twenty-five per cent. of the amount of their claims in full payment and satisfaction of all claims, demands, or other indebtedness of whatever kind or nature then due them from defendant; and plaintiff testified on the trial, that "all the indebtedness of the defendant had matured prior to the date of the agreement of compromise. All his indebtedness to me of whatever kind, whether this note in suit or others, or whatever it was—all had matured prior to the date of the compromise referred to." If the defendant fulfilled the agreement on his part, the indebtedness for which the note was given was paid, satisfied, and discharged before the commencement of this action. That in-

debtedness had matured before the date of the compromise agreement, and was clearly included in it. If the defendant did not fulfill on his part, the indebtedness for which the note was given was not satisfied and discharged. The date of the delivery of the note being immaterial, the exclusion of evidence in regard to it, and the denial of the plaintiff's motion to amend his complaint by alleging a delivery after the composition agreement was entered into, could not prejudice him.

The objection to the defendant's referring to a memorandum to refresh his memory while testifying was properly overruled. Although not made at the time the occurrences took place, nor by witness himself, if made under his direction at any time when the fact was fresh in his memory, it was proper to allow him to refresh his memory by it: C. C. P., sec. 2047.

But in support of his counter-claim he should not have been permitted to testify to work done for the plaintiff after the commencement of the action. And the testimony in regard to the relations which had existed between plaintiff and defendant was irrelevant, and the objection to its introduction should have been sustained.

In regard to the plaintiff's alleged cause of action, the court, in effect, charged the jury: 1. That the note sued on was included in the composition between the defendant and his creditors, of whom the plaintiff was one. 2. That the plaintiff agreed to advance the sums to be paid under that agreement to creditors other than himself, and to advance to defendant the amount necessary to pay the expenses of harvesting and marketing defendant's wheat crop of that year; the same to be shipped to and sold by plaintiff, in order that he might reimburse himself for said advances. 3. That plaintiff made said advances, and defendant shipped said wheat to plaintiff, who sold the same for one thousand three hundred and eighty-three dollars and seventy-seven cents more than the aggregate of the sums advanced by the plaintiff, and if said excess was equal in amount to the sum due plaintiff under said composition, it was a full satisfaction of the note sued on.

These facts are doubtless established by the evidence beyond controversy; and if the fact of the plaintiff's having realized from the sale of the wheat a sum sufficient to reimburse him for his advances, and to pay him twenty-five per cent of the amount due on said note at the date of said composition, satisfied and extinguished the indebtedness for which said note was given, there is nothing in the charge, as we view it, of which the plaintiff can justly complain.

Although by the terms of the composition the payment of twenty-five per cent. of the claims of creditors was to be made on or before the tenth of February, 1876, it is admitted that the plaintiff agreed to advance the money to pay them at the stipulated time, and to wait for reimbursement until the defendant's crop was harvested and sold. It seems to us that the plaintiff can not now be heard to object that the sum due him under the composition was not paid according to its terms.

It was error to charge the jury that the defendant could recover under his counter-claim for services and material furnished by him to the plaintiff during the year 1879. The action was commenced on the twenty-third of October, 1879, and the defendant could only recover so much of his counter-claim as existed at that time: C. C. P., sec. 438.

Judgment and order reversed.

THORNTON and MYRICK, JJ., concurred.

McNAMARA *v.* HAMMERSLAG ET AL.

In Bank. Filed January 29, 1884.

A COMPLAINT IN AN ACTION ON AN UNDERTAKING GIVEN UNDER SECTION 540 of the code of civil procedure, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that the same was given to prevent a levy.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Graves & Graves, for the appellants.

M. C. Hassett, for the respondent.

MYRICK, J. Suit on an undertaking given under section 540, code of civil procedure. The complaint avers the issuance of the attachment, and that under it the sheriff attached "certain property" (not stating what kind or of what value), and that the defendants, being desirous of having the property attached released therefrom, executed the undertaking. A copy of the undertaking is attached to the complaint. The undertaking, after reciting the issuance of the writ and the command thereof, states: "Now, therefore, we," etc., "in consideration of the premises, and to prevent the levy of said attachment, do hereby," etc.

The point presented by the appellants is, that as the undertaking recites that it was given to prevent a levy, the allegation of the complaint being that it was given to *release* a levy, the judgment can not be sustained. The question here involved was substantially considered in the first paragraph of the first opinion in Preston v. Hood, 1 West Coast Rep. 135; though in that case there was an allegation in the complaint that the undertaking was given to prevent the levy, and that upon the delivery of the undertaking the property was released.

We think the point is not well taken.

Judgment affirmed.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

THORNTON and MCKINSTRY, JJ., concurring. We concur in the judgment.

MCKEE, J., dissenting. I dissent. The allegations of the complaint are, that in an action a writ of attachment was issued, which was levied on certain property belonging to the defendant in the action; that for the purpose of having the property attached released from the attachment, "the defendants herein executed and delivered to the plaintiff a written undertaking, a copy of which is hereto attached marked Exhibit A, and made a part of this complaint," and that upon the execution and delivery of the bond, the attachment was discharged and the property was released, yet the defendants have refused, on demand, to pay the amount of the judgment rendered in the attachment suit against their principal in the bond, and hence the suit upon the bond.

Reference in a pleading to an exhibit as part of a pleading is not pleading; it is merely evidential: Mayor and Common Council of Los Angeles v. Signoret, 50 Cal. 298. The cause of action as stated in the complaint is therefore upon a bond given for the release of property which had been attached.

The answer specifically denies the allegations of the complaint.

There was no finding of facts, but judgment was given for the plaintiff. Impliedly the court found all the facts as alleged in the complaint.

But the bond referred to in the complaint was not a bond for the release of property which had been taken in attachment; its recitals are substantially: "Whereas, an attachment has been issued and placed in the hands of the sheriff for execution, whereby he is commanded to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the demand of the plaintiff in the action as stated in his complaint, unless a bond be given in amount sufficient to satisfy the demand, and the defendant is desirous of giving such an undertaking: Now, therefore, we the undersigned, * * * *in consideration of the premises and to prevent the levy of said attachment*, do hereby jointly and severally undertake, in the sum of thirteen hundred dollars, in gold coin, and promise to the effect that if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment, together with the costs, not exceeding in all the said sum of thirteen hundred dollars, in gold coin of the United States."

The bond was therefore "to prevent the levy of an attachment." A bond given to prevent the levy of an attachment does not prove a cause of action upon a bond given for the release of property already attached. Between such bonds there is no identity; the promises to pay may be the same, but they depend upon different considerations. One could not be used to prove a cause of action upon the other. Between such a cause of action and the proof there would be such a variance as would prevent the rendition of judgment in favor of the plaintiff. The allegations, proofs, and judgment in an action must correspond to sustain the judgment.

In Percival v. McCoy et als., 13 Fed. Rep. 379, the complaint alleged that a bond was executed and delivered by the sureties to the plaintiff as sole obligee; but the bond referred to in the complaint recited that it was given to five persons as obligees, one of whom was the plaintiff. "It seems clear," says the court in the case, "that if this bond were offered in evidence under such an allegation there would be a fatal variance between the instrument as set out and the proof. Granting that the plaintiff might sue alone, * * * without joining the other obligees, he must nevertheless set out and state the bond correctly, with proper allegations showing that he alone has received injury by the breach, and therefore that he brings the suit without joining the other obligees as plaintiffs. But he can not set out a bond as running to or made to himself alone, and give in evidence an instrument to himself jointly with other obligees."

I think the judgment should be reversed: Lareager v. Wise, 13 Nev. 29; Coburn v. Pearson, 57 Cal. 306.

HEINLEN *v.* ERLANGER ET AL.

Department One. Filed January 29, 1884.

JUDGMENT WILL NOT BE REVERSED FOR FAILING TO SERVE AMENDED COMPLAINTS on a defendant against whom a default has been entered for not answering the original complaint, where it does not appear from the record that such amended complaints were not served.

APPEAL from a judgment of the superior court for Tulare county, entered in favor of the plaintiff, and from an order denying the defendants a new trial.

E. J. Edwards, for the appellants.

Jacobs & Merriam, for the respondent.

The COURT. In an action to foreclose a mechanic's lien Erlanger and Jacob were made parties defendant: Erlanger as the contractor for whom the work was done and to whom the materials were furnished, and Jacob as the person claiming the property sought to be charged with the lien. To the original complaint Jacob demurred, but Erlanger made no appearance, and his default was duly entered. Subsequently the complaint was amended five times. To the fifth amended complaint Jacob answered, and upon these pleadings a trial was had.

In the brief of appellants it is said that none of the amended complaints were served on Erlanger, for which reason, it is contended, the judgment against him must be vacated; and further, that without a personal judgment against Erlanger there can be none foreclosing Jacob's interest. The reply, which is a good one, is, that it does not appear from the record that there was a failure to serve the amended complaints on both defendants.

Judgment and order affirmed.

HOWARD ET AL. *v.* STRATTON.

Department Two. Filed January 29, 1884.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CERTAIN PROMISSORY NOTES SUED ON WERE GIVEN by the maker to the payee in pursuance of an agreement between them whereby the latter conveyed to the former certain lands in consideration of the grantee's giving him a home and supporting him during the residue of his life, and that such notes were given by the maker to secure the performance of said agreement on his part, and that he had performed the same.

THE ADMISSION OF SUCH EVIDENCE WOULD NOT VIOLATE THE RULE forbidding the introduction of parol evidence to vary or contradict a written contract, as parol evidence is admissible to prove that a written agreement has been totally discharged.

APPEAL from a judgment of the superior court for San Diego county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. This action was originally brought by one Tyson, to enforce a vendor's lien for the purchase price of the rancho Cuyamaca, for which, it was alleged, the defendant had given his promissory notes referred to in the opinion. After the death of Tyson, the action was continued by his trustees. The defendant denied the existence of any vendor's lien, and offered evidence tending to show that the conveyance of said rancho was made to him in consideration of his promise to support the grantor for the rest of his life, and that the promissory notes were given to secure such promise. Evidence was also offered showing that the defendant had fully performed such promise. The court excluded such evidence. The further facts appear in the opinion.

Leach & Parker, for the appellant.

Arnold & Jones, for the respondents.

The COURT. The court erred in excluding evidence tending to prove that there was an agreement between Tyson and Stratton by which the former agreed to let the latter have the rancho on which he lived in con-

sideration of his giving Tyson a home and support during the residue of his life; and that the notes sued on in this action were given by Stratton to Tyson to secure the performance by Stratton of said agreement on his part; and that he had performed the same. The admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the notes were given to secure the execution by Stratton of a promise to support and take care of Tyson, and that promise was fulfilled, the notes were discharged, and parol evidence is admissible to prove that a written agreement has been totally discharged. There is nothing in this which tends to contradict or vary a written contract.

It does not appear that an exception was taken to the ruling of the court on the defendant's motion to strike out the testimony of John Treat, and we can not, in the absence of an exception, review said ruling.

Judgment and order reversed.

HOWARD ET AL. *v.* STRATTON.

Department Two. Filed January 29, 1884.

JUDGMENT REVERSED ON THE AUTHORITY OF HOWARD *v.* STRATTON, *ante*.

APPEAL from a judgment of the superior court for San Diego county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The facts and questions presented in this case were similar to those in Howard v. Stratton, *ante*, p. 562.

Leach & Parker, for the appellant.

Arnold & Jones, for the respondents.

THE COURT. On the authority of Howard v. Stratton, No. 8,975 [*ante*, p. 562], the judgment and order in this case are reversed.

KORNAHRENS *v.* HIS CREDITORS.

Department Two. Filed January 29, 1884.

A PROCEEDING BY CERTAIN CREDITORS OF A DEBTOR TO HAVE HIM ADJUDGED AN INSOLVENT, and that a surrender of his property be made for the benefit of his creditors, may be dismissed upon the motion of the debtor for delay in prosecuting such proceeding, which is unaccounted for and inexcusable.

APPEAL from an order of the superior court for Alameda county, dismissing the petition of certain creditors of one Kornahrens to have him adjudged an insolvent debtor. The opinion states the facts.

R. W. Hent, for the creditors and appellants.

Nusbaumer and Whitmore, for the respondent.

THORNTON, J. In examining this cause, we can not come to the conclusion that the court below abused its discretion in dismissing the proceeding, which was brought by certain creditors of Kornahrens to have him adjudged an insolvent, and that a surrender of his property be made for the benefit of his creditors. The order of the thirteenth of December, 1879, that Kornahrens show cause on the twenty-ninth of the same month why he should not be adjudged an insolvent, etc., was never

served. No steps were taken to have it served. This delay was unaccounted for and inexcusable. There was further delay in serving the subsequent order made on the eighth of September, 1880. This was not accounted for in any way. We are of opinion that this proceeding should have been proceeded with, without the frequent and unaccountable delays which took place. According to the provisions of the statute under which this proceeding was instituted, Stat. 1875–6, p. 581, all attachments upon the property of the debtor, levied within two months before the filing of the petition, are dissolved on the debtor's being adjudged insolvent: Sec. 6 of statute. Many other dispositions of property made by the debtor are also void, if made by him when insolvent or in contemplation of insolvency within two months before the filing of the petition by or against him: Sec. 8 of statute. To sustain the proceeding before us would put a stop to the dealings of the debtor with his creditors during the period of delay, and affect very injuriously other creditors not joining in the petition, who may have secured liens by attachment upon the property of the debtor, and even payment of their claims.

It was not the intention of the law-makers to allow such consequences to occur. The dealings of the debtor with his creditors would be interfered with to a degree which the law givers never intended to permit. The petitioners, if they think proper, can commence their proceeding anew.

The order must be affirmed.

SHARPSTEIN and MYRICK, JJ., concurred.

BLOOM *v.* CITY AND COUNTY OF SAN FRANCISCO.

In Bank. Filed January 29, 1884.

CITY AND COUNTY OF SAN FRANCISCO IS LIABLE FOR DAMAGES TO AN INDIVIDUAL caused by the refuse matter from the city and county hospital flowing on to his land, and injuring his business and health, although no claim for such injury has been presented to the board of supervisors for allowance.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This was an action to recover damages resulting from a nuisance created and maintained by the defendant. The nuisance consisted in permitting the refuse, excrements, secretions, and other foul matters from the city and county hospital, an institution under the control of the defendant, to flow in such a manner as to poison the atmosphere and endanger the health of the neighborhood. Special damages resulted to the plaintiff from such nuisance, in that such refuse, excrements, etc., ran onto his land, polluted his well, and injured his business and the health of himself and family. The defendant set up in defense that the plaintiff had never presented his claim for such damages to the board of supervisors.

John L. Murphy, for the appellant.

Joseph Leggett and *Mich. Mullany*, for the respondent.

THE COURT. We think the city and county of San Francisco had such proprietorship of the city and county hospital as rendered it liable for

damages in the case as presented in the transcript. We also think the claim of plaintiff was not a claim to be presented to the board of supervisors before an action could have been maintained.

Judgment and order affirmed.

DUANE v. NEUMANN ET AL.

In Bank. Filed January 29, 1884.

JUDGMENT WILL BE REVERSED WHEN THE TRIAL COURT FAILS TO FIND on all the material issues.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

George W. Tyler, for the appellant.

Henry Eickhoff, for the respondents.

The COURT. It has been repeatedly ruled here that the trial court must find upon all of the material issues raised by the pleadings. That rule was not observed in the present case, for which reason the judgment and order are reversed, and the cause remanded for a new trial.

SHARPSTEIN, J., dissented.

THORNTON, J., dissenting. I dissent. In my judgment, all the issues raised by the pleadings were found upon by the court below. The plaintiff in his complaint set up a contract with certain terms, and Neumann denied the allegations in regard to it, and set up one with different terms, as the only contract entered into by himself and plaintiff. Thus was issue joined. There was only one contract involved in the case, and the court below, in its findings, affirmed what the contract was; in other words, found it with all its terms. Moreover, the contract was entered into on an assignment made by plaintiff to defendant Neumann, and the court in its findings particularly specifies the contract affirmed by it as the one made in consideration of such assignment. Now, was it necessary for the court to go further, and find that the contract affirmed by it was the only contract entered into by the parties, *and that there was no other?* I think not. By finding the contract specifically as above stated, it in effect found that there was no other: Coveny v. Hale, 49 Cal. 536. I think the judgment and order should be affirmed.

CRITES v. WILKINSON ET AL.

Department One. Filed January 29, 1884.

JUDGMENT WILL BE REVERSED WHEN THERE IS NO EVIDENCE to support a material finding.

APPEAL from a judgment of the superior court for Kern county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Z. G. Peck and *J. W. Freeman*, for the appellants.

Rufus E. Arick, for the respondents.

The COURT. We have read the record attentively, and find no evi-

dence to support the finding of the court below, to the effect that the plaintiff acquired the right to divert from the stream mentioned in the record one hundred inches of its water, measured under a four-inch pressure. The judgment securing him that right, as well as the order refusing the defendant a new trial, must therefore be reversed.

Judgment and order reversed, and cause remanded for a new trial.

RATHGEB *v.* DASSO ET AL.

Department One. Filed January 29, 1884.

WHEN THE EVIDENCE IS CONFLICTING THE JUDGMENT WILL BE AFFIRMED.

APPEAL from a judgment of the superior court for Calaveras county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

G. N. Williams and *J. B. Reddick*, for the appellants.

C. V. Grey, for the respondent.

The COURT. The case as presented is one of evidence, and we can not say that the findings of the court below are unsustained.

Judgment and order affirmed.

BURT ET AL. *v.* COLLINS ET AL.

In Bank. Filed January 29, 1884.

JUDGMENT AGAINST A PARTNERSHIP ON ACCOUNT OF GOODS SOLD AND DELIVERED TO IT will be reversed when the evidence shows that many of the items of such account were furnished to one of the partners individually, and that the same were included in the findings and judgment against the firm.

APPEAL from a judgment of the superior court for San Bernardino county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. This was an action to recover of the defendants, as partners under the name of G. A. Collins & Co., the balance of an account for goods sold and delivered. The further facts appear in the opinion.

Brunson & Wells, for the appellants.

Bicknell & White, for the respondents.

MYRICK, J. Finding 3 is not sustained by the evidence. The evidence of B. F. Burt, one of the plaintiffs, found on page 44 of the transcript, shows that when the account was opened with Collins, the object of using the firm name of G. A. Collins & Co. was for the personal convenience of Collins in his subsequent settlement with the herders and Mrs. Bouton, and not with the expectation that the account was the account of the firm.

Besides, many of the articles sold (and charged in the account of the firm) were for the use of Collins and his family, and bore no relation to the business of the firm; and the plaintiffs did not, on the trial, segregate these items from the general account, nor show which items of the general account were for the benefit of or went to the use of the firm.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, C. J., and ROSS and MCKINSTRY, JJ., concurred.

CITY AND COUNTY OF SAN FRANCISCO v. FLOOD.

In Bank. Filed January 29, 1884.

ASSESSMENT OF MINING STOCK, DESCRIPTION OF.—The rule as to the degree of certainty required in describing personal property in assessments for taxation is, that the property must be so described that tax-payers may know for what they are to be taxed. Tested by such rule, an assessment which describes the property assessed as "mining stock" is sufficiently definite. Such description is also sufficient for the purpose of equalization.

A TAX-PAYER OUGHT NOT TO BE HEARD TO COMPLAIN OF THE INSUFFICIENCY OF THE DESCRIPTION OF PERSONAL PROPERTY assessed to him, when such description was taken from a list furnished by himself, or by some one on his behalf and by his authority, or when made by the assessor without the aid of such list if the description is as certain as could reasonably be required of the assessor under the circumstances.

SHARES IN THE CAPITAL STOCK OF CORPORATIONS ARE TAXABLE PROPERTY under the constitution of 1849 and the revenue laws in force during the fiscal year 1876–7.

SECTIONS 3640 AND 3641 OF THE POLITICAL CODE DO NOT APPLY TO SHARES IN MINING CORPORATIONS constituted under the laws of California, but whose tangible property is situated in another state. The former section by its express terms only exempted shares in corporations from assessment where the entire capital or property of the corporation in which the shares were owned was assessed.

TO SUSTAIN AN ASSESSMENT OF SHARES IN A MINING CORPORATION, IT WILL BE PRESUMED that the assessor in making the assessment acted in accordance with law, and that the circumstances existed which authorized such assessment; and in an action to enforce the same it is incumbent on the defendant to show that the action of the assessor was unauthorized.

TAX-PAYERS SHOULD FURNISH A TRUE AND CORRECT LIST OF THEIR TAXABLE PROPERTY to the assessor, and if they fail so to do, and any loss results to them in consequence of such failure, their complaints on such score should meet with no favor from the courts.

THE ENUMERATION OF THE PROPERTY ASSESSED IN A COMPLAINT, IN AN ACTION FOR THE COLLECTION OF DELINQUENT TAXES, sufficiently complies with the requirement of the statute, Stat. 1877–8, p. 338, when the same is made in words identical with those used by the assessing officer and set down in the assessment book.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd, Newlands & Woods, for the appellant.

John P. Bell, for the respondent.

THORNTON, J. This action was brought to recover of the defendant, as the surviving partner of Flood & O'Brien, certain state and city and county taxes on personal property, claimed to be delinquent and unpaid, for the fiscal year 1876–7. There was judgment for plaintiff, and motion for new trial by defendant, which motion was denied, and the appeal is prosecuted by defendant from the judgment and the order denying the motion just mentioned.

The assessment was for "mining stock," and its value is inserted in the assessment roll or assessment book (such is the term used in the statute, political code, section 3650), as being six hundred thousand dollars. It is argued that the term "mining stock" does not furnish such a description of the property claimed to be assessed as satisfies the requirements of the revenue law.

The statute in relation to the mode of entering personal property on the assessment roll or assessment book is as follows: "All personal property showing the number, kind, amount, and quality, but a failure to enumerate in detail such personal property, does not invalidate the assessment roll:" Pol. C., sec. 3650, subd. 4. As we interpret this section,

the latter clause allows a description as general as "mining stock." The words used in the statute were intended to authorize the assessor to do just what was done here.

The assessment here is sustained by the rules laid down in People v. Holladay, 25 Cal. 300; People v. McCreery, 34 Id. 434; Falkner v. Hunt, 16 Id. 173, and People v. Sneath, 28 Id. 612. In People v. Holladay, it was held that an assessment of personal property, stating its kind, was sufficient. In People v. McCreery, "money loaned" is held to be sufficient. In Falkner v. Hunt, it was said that an assessment stating the different kinds of personal property would be a compliance with the statute. In People v. Sneath, "personal property," held a sufficient description. The rulings in the cases just cited were made under statutes not more liberal in their provisions than the statute under which the assessment in this case was made. If the descriptions in the assessments in the cases cited are sufficient, we see no reason why the assessment under consideration is not. The rule as to the degree of certainty required in describing personalty in assessments for taxation is this, that the property shall be so described that tax-payers may know for what they are to be taxed: People v. Home Ins. Co., 29 Cal. 549; Goddard v. Town of Seymour, 30 Conn. 394; Hamersley v. Franey, 39 Id. 176; Monroe v. Town of New Canaan, 43 Id. 312. In the case last cited the property was described, "twenty bank stock, two thousand dollars;" held sufficient as a description of twenty shares of bank stock, under a statute requiring that "shares owned by any person resident in this state, of the capital stock of any bank," etc., be set in the list of such owner. If the description of the property assessed in the assessment is certain enough to inform the tax-payer for what he is to be taxed, it is sufficiently certain. Mining stocks could scarcely be misunderstood by any man of ordinary intelligence in this state, or indeed in commercial world among all English-speaking people.

It may be observed here that the description in question was made either from a list furnished by defendant or some one on his behalf and by his authority, or no list having been so furnished, it was of necessity made by the assessor. If the description was taken from a list furnished by the defendant or some one on his behalf and by his authority, he ought not to be heard to complain of the insufficiency of the description. If made by the assessor without the aid of such list, the assessor has given a description as certain as could reasonably be required of him, and under such circumstances the defendant's objection to the assessment should not be regarded. We regard the assessment as complying with the statute, and sufficient.

But it is said that shares in the capital stock of corporations were not taxable property under the constitution of 1849 and the revenue laws then in force.

It is not denied that shares in the capital stock of corporations were what is usually styled property, when the assessment in this case was made, and if it was denied, we should nevertheless hold them property. The reasons for such holding are too manifest to require enumeration; and by the thirteenth section of the eleventh article of the constitution of 1849 it was declared that all property in this state should be taxed in proportion to its value, etc. It has been considered as the proper interpretation of the constitution referred to, ever since the elaborate judgment in the case of The People v. McCreery, 34 Cal. 433, that all private

property was taxable in this state, and that the legislature had no power to exempt any of it from taxation. This ruling was approved in People v. Gerke, 35 Id. 678, and in The People v. Black Diamond C. M. Co., 37 Id. 55. The word "property" is used in no peculiar sense in the section of the constitution referred to, but in its popular and ordinary one: People v. Eddy, 43 Id. 336. There is nothing in People v. Hibernia Bank, 51 Id. 243, in conflict with what is here said. Shares in corporations can be easily valued. So much for the constitution. As to the sections 3640 and 3641 of the political code, relied on to show that the shares above mentioned are not taxable, in our opinion section 3640, *by its express terms*, only exempts the shares from assessment where the entire capital or property of the corporation in which the shares are owned is assessed, and it does not appear that the corporation or corporations in which the shares here assessed were owned were assessed at all during the fiscal year for which the assessment herein was made.

And further, if mining stocks under any circumstances were taxable during the fiscal year above referred to, the assessment must be upheld. We have already held that shares in mining corporations constituted under the laws of California, but whose tangible property was situated in another state, were taxable, and that section 3640 does not and never did apply to such corporations: City and County of S. F. v. Fry, 11 Pac. C. L. J. 392. It may be added that the same is true of section 3641.

To sustain the assessment, we must presume the assessor, in making the assessment, acted in accordance with law, and therefore we are authorized to presume that the circumstances existed which authorized the assessment involved in this case, viz., that the entire capital stock or property of the corporation was not assessed, or that the property of the corporation was situate in another state. It is incumbent on the defendant to show that the action of the asssessor is unauthorized by law. If the property of the corporations was in this state, and was assessed, it was susceptible of ready proof. The law requires such matters to be recorded in assessment books: Pol. C., secs. 3650–3654; which are accessible to all tax-payers, and if any assessments of the property of the corporations referred to had been made, that fact could have been established without difficulty by proof obtained from the assessment books.

It is said the description in the assessment roll must be sufficient for the purpose of equalization; that it is the duty of the board of equalization to sit in judgment upon the valuation of the property which they find in the roll; that it is necessary that the roll should furnish such a description as will enable the board to clearly and satisfactorily determine the question of valuation; and a description which fails to furnish the information necessary for such action on the part of the board is clearly insufficient. To sustain this position, People v. Holladay, 25 Cal. 300, is cited.

The action of the board in dealing with the valuation of the property listed in the roll is based upon evidence which may be adduced before the board: See Pol. C., secs. 3673–3677. As to increase of amount of valuation or reduction, the board can only act on evidence: See sections above cited, and section 3681. We can not see how it could act otherwise. We see no difficulty in the defendant's way that could not have been removed by means furnished him by the law in supplying any information, in regard to the value of the property assessed, to the board of equalization. If the mining stock was overvalued, it certainly was

in the power of the defendant to adduce evidence to make it so appear to the board of equalization, that it might discharge intelligently any duty imposed on it by law in regard to such overvaluation. What is said above in regard to description is alike applicable here. Whether the description was furnished by the tax-payer, or was made by the assessor, the tax-payer having failed to furnish a list, the complaint of the tax-payer in regard to it should not be regarded.

In our opinion, it is the duty of the tax-payer to furnish a true and correct list of his taxables to the assessor, and if he fails to do so, and any loss should result to him in consequence of such failure, his complaints on such score should meet with no favor in a court of justice.

Further, in regard to the character of the description of the personal property, and what information it should give to the board of equalization to enable it to perform its functions under the law, it may be said that if the description meets the requirements of section 3650, subdivision 4, of the political code, above cited, it must be sufficient for all purposes. We have already determined that the description here accords with what is prescribed in the section referred to, and this disposes of the question.

But it is said that the complaint is insufficient, in that it does not enumerate the property, as required by the statute: See Stat. 1877–8, p. 338. The property is enumerated as "mining stock." It is enumerated as it is assessed, *in totidem verbis*. We can not think that the lawmakers intended to require any other enumeration. The form of complaint is perscribed by the statute: See statute above cited, p. 339, sec. 2. The following are the words used in the form prescribed, in relation to the property assessed: "Which said taxes were duly assessed and levied upon personal property, to wit [enumerating the property], for the fiscal year [naming it]."

The perusal of these words would scarcely suggest to a man of ordinary intelligence, knowing what is meant by the word "assessment," that the enumeration of the property required would be other and different from that which appears on the face of the assessment. When the statute provides that the personal property assessed should be enumerated, the intention is that it shall be enumerated as the assessing officer has enumerated it in the assessment. It would be a peculiar mode of reasoning to hold that a fuller and more definite enumeration is required of the pleader when we see, in the first section of the act in which the provision as to enumeration is made, language validating the assessment of taxes on all personal property for the fiscal year above mentioned, and declaring it "valid and binding, both in law and equity, against the persons and property assessed," and further declaring the levies of said taxes by the board of supervisors of the city and county of San Francisco "valid and binding, effectual and legal," and that "no error, informality, or irregularity, of whatsoever kind or nature, in the acts of proceedings of the assessor, board of equalization, auditor, or any other officer or officers of said city and county, in assessing, equalizing, levying, or preparing original or duplicate assessment rolls, shall vitiate the assessment or levy of taxes," etc.; "but the same [referring to all the acts of the officers previously mentioned] are for all purposes affecting the assessment, equalization, and levy of taxes validated, ratified, legalized, confirmed, and adopted."

With such provisions as these in the statute, it would be difficult to reach the conclusion that the statement of the property assessed in words identical with those used by the assessing officer, and set down in his

assessment book, would not satisfy the enumeration required by the statute.

If a fuller and more definite statement of the property assessed were required, the intention of the legislature would be in ninety cases in a hundred defeated. The intention of the legislature, in enacting this statute of 1878, was to enforce the collection of taxes by action. The averments of the complaint prescribed were susceptible of proof by the public records—the assessment books or rolls—and accordingly it was provided in the first section of the act, that the duplicate assessment rolls for the years mentioned therein should be *prima facie* evidence of such assessment. If the pleader is to insert in his complaint a full and definite description of the property assessed, he must also aver that the property thus described is the same as the property mentioned in the assessment. If this is required, he must also prove such averments. He must prove that the particular property alleged to have been assessed was assessed, and its identity with that in the assessment. How could it reasonably be expected that such a thing could be done? What memory could retain the matters to be proved? It would impose upon the memory of the assessing officers and their assistants a tax to which the memory of a Macaulay or a Mezzofanti would be unequal. It would follow that the actions could not be successfully prosecuted except in rare instances, and the attempt to enforce the collection of delinquent taxes by suit would fail. Consequently, we say that if any such construction as that contended for in regard to the statement of the property assessed in the complaint is sustained, the legislature would defeat its object by making a requisition which would render the prosecution of such suits for the greater part of no avail.

To sustain the contention just above discussed, appellant's counsel cite and rely on People v. Holladay, 25 Cal. 301. The action in this case was to recover delinquent taxes on personal property, and the statute under which it was instituted (see act of May 17, 1861, Stats. 1861, p. 471) provided that the district attorney (the officer designated to bring the action) should state in the complaint, *inter alia*, "the kind and quantity of the property assessed." This language was plain in its meaning. It left no ground for doubt, no place for construction. The pleader in the case cited merely stated the property assessed, as "personal property," and the court held, and correctly held, that the complaint was substantially defective, and the judgment which had been rendered on it by the court below in favor of the plaintiff ought not to be allowed to stand, and it was reversed. But there is no such requisition in this case, and nothing similar to it. Reading together all the provisions of the act of 1878, we have no doubt that the pleader has enumerated the property assessed, as was required by the statute, and that the complaint is not obnoxious to the criticisms of it preferred by the learned counsel for the appellant.

We think that the validating provisions of the act of 1878, above referred to, strengthen the conclusions reached herein on all the points discussed; but without these provisions, we think such conclusions are sound and well maintained.

It follows from the foregoing that the rulings of the court below are without error, and the judgment and order appealed from are affirmed.

MORRISON, C. J., and MYRICK, McKEE, and ROSS, JJ., concurred.

SHARPSTEIN and McKINSTRY, JJ., dissented.

PEOPLE ETC. *v.* WILLIAMS.

In Bank. Filed January 29, 1884.

THE STATE HAS THE RIGHT TO CONTROL AND REGULATE THE PUBLIC USE OF THE NAVIGABLE WATERS within its boundaries, subject only to restraints upon such right arising out of the power of congress over commerce.

THE RIGHT OF THE STATE TO CONTROL AND REGULATE THAT PORTION OF CHANNEL STREET between Fourth and Fifth streets, in the city and county of San Francisco, which is covered by the waters of the bay of San Francisco, and navigable by vessels engaged in commerce, was not surrendered by the statute of March 26, 1851, granting to the city of San Francisco the tide-lands known as the beach-and-water lots, and establishing a permanent water front for such city; nor by the statute dedicating certain streets in such city to public use as streets: Stat. 1858, p. 324; nor by the statute of March 20, 1868, dedicating a certain portion of Channel street to be an open channel, and authorizing such city to extend streets across it by arched or draw bridges; nor by the statute of March 30, 1868, establishing a board of tide-land commissioners; nor by the statute of April 1, 1872, offering to dedicate such portion of Channel street to the city and county of San Francisco on certain conditions, which have never been complied with.

THE MERE OFFER OF THE STATE TO DEDICATE A PORTION OF THE HARBOR OF THE CITY AND COUNTY OF SAN FRANCISCO to such city, if the latter would deepen and improve it in a manner prescribed by the legislature, did not constitute a dedication *per se*. In order to complete the dedication, it was necessary for the city to accept such offer and make the improvements. Until such acts were done, the state had the right to recall its offer in whole or in part, and to deal with the subject of it in the exercise of its sovereign powers.

THE BOARD OF STATE HARBOR COMMISSIONERS, UNDER THE STATUTE OF FEBRUARY 28, 1876, HAVE JURISDICTION OVER A WHARF ERECTED IN CHANNEL STREET, between Fourth and Fifth streets, in the city and county of San Francisco.

APPEAL from a judgment of the district court for the nineteenth judicial district, entered in favor of the defendant upon an agreed statement of facts. The opinion states the facts.

J. B. Lamar, for the appellants.

M. Mullany, for the respondent.

McKEE, J. Channel street, between Fourth and Fifth streets, in the city and county of San Francisco, is two hundred feet wide, covered by the waters of the bay of San Francisco, and navigable by vessels engaged in commerce. On the north side of this portion of the street the defendant, in the year 1876, constructed a wharf, which he afterwards, on September 12, 1876, sold and conveyed to the plaintiff, by the following description: "All that wharf structure in the city and county of San Francisco situate on the north side of Channel street, between Fourth and Fifth streets, adjacent to and in front of block No. 17, as known on the official map of said city and county of San Francisco." Notwithstanding this transfer, the defendant continued to dock his vessels within the street and discharge their cargoes at the wharf, for which the board of harbor commissioners demanded of him dockage, wharfage, and tolls, from November 10, 1876, until June 10, 1877; but he refused to pay, upon the ground that the wharf was not within the jurisdiction of the board; and that is the question.

There is no doubt of the right of the state to control and regulate the public use of the navigable waters within its boundaries, subject only to restraints upon the right arising out of the power of congress over commerce. But it is claimed for the defendant that the state has, by legislation, surrendered its right over the water highway in question to the city and county of San Francisco.

The first legislation upon the subject is to be found in the statute passed March 26, 1851. By that statute the state granted to the city of San Francisco the tide-covered lands known as the beach-and-water lots, and established a permanent water front for the city: Stat. 1851, pp. 306, 307.

The mere establishment of a harbor line does not deprive the state of the right to control and regulate the navigable waters within the line: Eldridge v. Cowell, 4 Cal. 80; Guy v. Hermance, 5 Id. 73. Nor did the grant of the beach-and-water lots, although it vested the property in them in the city, Holliday v. Frisbie, 15 Id. 630, divest the state of its sovereign rights over the navigable highways on which the lots were bounded. Nor was it intended to have that effect, because section 6 of the statute declared: "Nothing in this act shall be construed as a surrender by the state of its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

All the streets of the city within the harbor line as established by that act, as they were laid down on the map called the official map of the city, and all the streets mentioned and referred to in the act, were afterwards confirmed, established, and dedicated to the public use as streets: Stat. 1858, p. 224, sec. 7. Channel street was one of those streets. It was therefore a public street of the city, dedicated to public use to its full extent, and subject, in that portion of it covered by the navigable waters of the bay of San Francisco, to the control and regulation of the state.

In 1863 the state, in the exercise of its right, established the board of state harbor commissioners, to take possession of and hold all the portion of the bay of San Francisco and its appurtenances, to the extent of six hundred feet from the harbor line, and to collect tolls, dockage, rents, and wharfage thereof for the purposes of commerce: Stat. 1863, p. 406, secs. 1–4; Stat. 1863–4, p. 138. On March 26, 1868, the state also dedicated that portion of the middle of Channel street lying east of and between the easterly line of Harrison street and the water front to be an open channel, sixty feet wide from Harrison to Seventh street, and one hundred and forty feet wide from Seventh street to the water front; and authorized the city to extend streets across it by arched bridges or drawbridges, without the right of demanding or collecting tolls or wharfage thereon: Stat. 1868, p. 355, secs. 1, 2.

Four days afterwards, viz., March 30, 1868, the state established a board of tide-land commissioners, with authority to take possession of the salt-marsh and tide lands, situated in the city and county of San Francisco, to "survey the same to a point not beyond twenty-four feet water at the lowest stage of the tide, to establish the water-line front of the city south of the terminus of Second street, as established by the act of 1851, and to lay off the space within this water-line into lots and blocks, in accordance with the official map and survey of the city, reserving so much thereof for streets, docks, piers, ship channels, drains, or other use necessary for the public convenience and the purposes of commerce as in their judgment will be required; also thirty acres, exclusive of streets, basins, public squares, and docks, lying southerly from Channel street, and outside of the line known as the red-line water front of Mission bay, subject to the rights of the city and county to establish and regulate streets, alleys, docks, wharves, and basins, culverts, and sewers,

and the laying down of gas and water pipes, and to such jurisdiction and control of the city and county over said street," etc. The state, however, did not surrender its right to control and regulate the navigable waters within the space inside of the water front, for it was by the act provided, that " nothing in this act shall be construed to interfere with the collection of dockage and wharfage by the state, nor with the right of the state to construct, adjoining the property granted, such wharves and docks as may be from time to time provided:" Stat. 1868, pp. 716–718, secs. 1, 4, 5.

But in March, 1872, the state vacated all the streets, alleys, and market places within the exterior boundaries of the marsh and tide-lands, as surveyed by the tide-land commissioners, and granted the lands covered by them to the city and county of San Francisco, with full power to regulate, manage, control, and donate or dispose of the same by ordinance for railroad and other commercial purposes: Stat. 1871–2, sec. 1, arts. 71, 72, p. 722; and on April 1, 1872, that portion of Channel street, delineated as a canal on the official map of the city, lying east of the westerly line of Florida street, and between the west line of Florida street and the north-east line of Seventh street, and so much of the channel of Mission creek as lies south of the south line of Channel street, were declared and dedicated to be an open canal for the purpose of drainage and navigation, across which the board of supervisors of the city and county were empowered " to extend the streets abutting upon Channel street and the said canal upon draw-bridges, which would not obstruct the navigation of the canal; to keep the canal dredged to such a depth that the water therein will be two feet deep at the lowest tide, and to construct a bulkhead upon and along both sides of the canal, and for that purpose to condemn private property lying on either side of Channel street or the canal:" Stat. 1871–2, p. 926, secs. 1–4.

Upon this last statute the defendant makes his contention that Channel street and its appurtenances were placed by the state under the jurisdiction of the city and county of San Francisco, and that the state retained no jurisdiction over it.

Conceding that the state had a right to dedicate to the city a portion of the navigable waters of the harbor for the purpose of deepening, improving, and preserving the same, and for the regulation of vessels and wharves therein, and to surrender its right to control and regulate them, the statute relied on *per se* did not operate as a dedication or a surrender. It contained a mere offer to dedicate a portion of Channel street and a portion of Mission creek as an open canal, if the city would deepen and improve it as the legislature prescribed. But it was for the city to accept the offer and complete the improvements. If it did not, the dedication was not complete. The passage of an ordinance setting apart and dedicating a portion of the water front in a harbor for public use as a free public dock for ships is, said the late supreme court, a mere offer to dedicate, and the dedication is not complete, nor does the public acquire any right to the easement, until it has been accepted and used by the public in the manner intended: The City and County of San Francisco v. Calderwood, 31 Cal. 586; Same v. Canavan, 42 Id. 541.

The city did not accept the offer made by the statute of 1871–2; and the improvements were not made. Under these circumstances the state had the right to recall its offer in whole or in part, and to deal with the subject of it in the exercise of its sovereign powers. As part of the water

highway of the state, the proposed canal and the streets connected with it were subject at any time to the exercise of those powers: Polack v. Trustees etc., 48 Cal. 491. And on March 27, 1874, the legislature of the state vacated a portion of Channel street: Stat. 1873–4, sec. 3, p. 711; and afterwards, on February 28, 1876, placed Channel street, as far west as Fifth street, under the jurisdiction of the board of state harbor commissioners: Pol. C., sec. 2524; see also Stat. 1877–8, sec. 4, p. 263.

As it is admitted that the wharf structure in controversy is located in Channel street, and that, although it has not been built by, it belongs to the state; it results that the wharf is within the jurisdiction of the board of harbor commissioners, and that Channel street, in which it is located, is subject to the control and regulation of the state.

The cases of The People v. S. P. R. R., No. 5,607, and The People v. Hooper, No. 5608, are not in conflict with this conclusion. In those cases the wharves were the property of the respective defendants, built by them on their own soil, bounding on Channel street, of which they were in possession under titles from the state. The cases did not involve the jurisdiction of the board within the water highway of Channel street; and they are not analogous to the case in hand.

Judgment reversed and cause remanded.

MORRISON, C. J., and MYRICK, SHARPSTEIN, and ROSS, JJ., concurred.

DE CELIS ET AL *v.* PORTER ET AL.

Department Two. Filed January 29, 1884.

IMPLIED PROMISE—LIABILITY EX ÆQUO ET BONO—VALUABLE CONSIDERATION.—Where in the final judgment in a suit for the foreclosure of a mortgage, the court, with the consent of the plaintiff—the mortgagee—allows to the defendant—the mortgagor—as a credit upon or part payment of the mortgage debt, a sum which had not actually been paid, and which the mortgagee was not, as between said parties, equitably bound to pay, but which the mortgagor himself was equitably bound to pay to a third person, and which was therefore a virtual advance by the mortgagee to the mortgagor, and the final decree so made is executed by a sale of the mortgaged premises in satisfaction of the debt so reduced, so that the mortgagor obtains and enjoys the full benefit of the credit as a virtual advance, the mortgagor defendant thereby becomes bound *ex æquo et bono* to refund to the mortgagee plaintiff the amount so credited, and the law implies a promise on his part to make such repayment, which is a valuable consideration sufficient to sustain and validate a second mortgage, executed previously to the rendition of said judgment, by the same mortgagor—defendant—to the same mortgagee—plaintiff—to secure the repayment of the said sum so finally credited. And it makes no difference with this result that at the time of rendering said final judgment, the mortgagor defendant refused to consent to said credit, since his subsequent acceptance of the judgment and enjoyment of its benefits was a waiver of his previous objection, and was itself a legal consent.

STATUTE OF LIMITATIONS—CAUSE OF ACTION.—In such a case, the liability to repay the amount of said credit, and the cause of action to recover the same, arose and accrued at the date of the rendition of the final judgment when the credit was made, and an action begun within two years from that date is not barred by the statute of limitations.

IMPLIED PROMISE NOTWITHSTANDING THE DEBTOR'S OBJECTION—CONDUCT AMOUNTING TO CONSENT.—Whenever, in any transaction or under any form, one person receives a sum of money which he is bound, *ex æquo et bono*, to refund to another, the law implies a promise by him to make such repayment. Such promise is implied under the same circumstances, even though the debtor party objected to receiving the money, provided he nevertheless does actually receive it and use it for his own purposes, or so

deal as to retain and enjoy its benefits. Such conduct waives the objection, and amounts in contemplation of law to a previous consent.

MISJOINDER OF PLAINTIFFS IN A MORTGAGE FORECLOSURE SUIT.—In a suit to foreclose a mortgage, where, in addition to the proper plaintiffs, other parties were unnecessarily and improperly joined as co-plaintiffs, and a demurrer was interposed to the complaint on that ground, the supreme court, on appeal, may render a final judgment in favor of the proper plaintiffs, and direct the court below to amend the complaint by striking out the parties improperly joined as co-plaintiffs, with such provisions as may be necessary to protect their rights.

APPEAL from the superior court in the county of Los Angeles. This was an action to foreclose a mortgage for five thousand two hundred and fifty-five dollars and thirty cents, executed by the defendant, George K. Porter, dated June 14, 1876. The facts, necessary to present the questions decided, were as follows: In August, 1874, E. F. de Celis, administrator of the estate of Eulogio de Celis, conveyed all the interest of said estate in a certain rancho to Charles Maclay, and Maclay, on the same day, gave back his note and a mortgage on the premises for thirty-seven thousand five hundred dollars, the unpaid balance of the purchase price. In September, 1874, Maclay conveyed the entire premises to George K. Porter, who immediately conveyed back to Maclay an undivided fourth thereof. Through all the subsequent transactions Porter and Maclay were thus owners in common of the said premises. Some time prior to these transfers a suit for the partition of said rancho had been brought against divers persons, including the administrator and heirs of Eulogio de Celis, deceased; and a judgment of partition had been entered, which directed that the costs of the partition suit should thereafter be ascertained, and should be apportioned, and should be a lien on the respective interests of the parties. Such proceedings were afterwards had in this partition suit that the amount of costs was determined, and the amount thereof apportioned and belonging to the De Celis estate, then held, as above stated, by Porter and Taylor, was, on the fourteenth of June, 1876, the sum of five thousand two hundred and fifty-five dollars and thirty cents. In December, 1875, a suit was begun by the said administrator to foreclose the mortgage for thirty-seven thousand five hundred dollars, Porter and Maclay being made defendants. This suit was afterwards carried on by the De Celis heirs, who intervened. While this suit was pending, disputes arose, and negotiations were had concerning the state of accounts between Porter and Maclay, and the portion of the mortgage debt which each ought to pay. On March 14, 1876, a stipulation was made between the parties to said foreclosure suit relating to these matters, and to an entry of decree, but it was afterwards abandoned. On June 14, 1876, another stipulation was made by said parties, that the five thousand two hundred and fifty-five dollars and thirty cents costs in the partition suit should be credited on the thirty-seven thousand five hundred dollar mortgage, and Porter and Maclay agreed that they would pay said costs, in certain shares, to the plaintiff in the partition suit. Porter thereupon gave the mortgage now in question upon his interest in the ranch to secure payment of the sum he had agreed to pay, and also to secure payment by Maclay of the sum which he had promised to pay. The foreclosure suit was twice tried, without reference to these stipulations, and was twice carried to the supreme court. On the seventh of June, 1879, the supreme court rendered a final decree, in which it was directed that the five thousand two hundred and fifty-five dollars and thirty cents—the amount of costs in the partition suit—

should be credited upon the mortgage debt, as had been agreed in the stipulation of June 14, 1876. This provision, it appears, was agreed to by Maclay, but Porter refused to consent to it. The judgment so rendered by the supreme court fixing the amount of the mortgage debt, and allowing the five thousand two hundred and fifty-five dollars and thirty cents as a credit thereon, was afterwards entered by the court below and became the final decree. This decree was executed, and the mortgaged premises were sold in satisfaction of the debt so ascertained and fixed, and Porter and Maclay thus had the benefit of the credit. The further facts appear in the opinion.

Glassell, Smith & Patton, for the appellants.

F. H. Howard, and *Graves & Chapman*, for the respondents.

THORNTON, J. In the view we take of this case, we lay out of it the stipulations of March 14, 1876, and of June, 1876, except so far as is hereinafter pointed out. They were disregarded by the district court in pronouncing the judgment of July, 1877, which judgment was modified by this court so far as to allow the credit on the note and mortgage for thirty-seven thousand five hundred dollars of the five thousand two hundred and fifty-five dollars and thirty cents, being the amount of costs and interest thereon, in the partition case of the San Fernando Farm Homestead Association v. De Celis et al. This allowance was for the benefit of Porter and Maclay, and was in effect an advance by the De Celis plaintiffs to Porter and Maclay. It was not intended as a gift by the De Celis plaintiffs to Porter and Maclay. They had not previous to this action paid any part of the sum allowed to the De Celises. The judgment, as entered by the district court, under the order of the supreme court made on the seventh day of June, 1879, allowing the sum of five thousand two hundred and fifty-five dollars and thirty cents, was not set aside, nor this credit stricken out. Admitting that Porter and Maclay did not consent to it, they did not move to set aside. This judgment was executed, their indebtedness in the foreclosure suit was paid, and they got the full benefit of this credit.

Under all these circumstances, it is clear that they received so much money which *ex æquo et bono* they were bound to refund to the De Celis plaintiffs and that the law would imply a promise to pay this sum. It makes no difference that they did not consent to the judgment as entered in the supreme court, and by its direction in the district court. They got the benefit of the money.

The amount was credited on the note and mortgage, the judgment of foreclosure was so entered, and as thus entered was executed. It is equivalent to receiving so much money which they used for their own purposes. Let it be conceded that they objected to receiving the money on the credit allowed (a most unusual objection), still they avail themselves of it, and can not now be heard to object to paying it back. If A. objects to receiving the money of B., still if he receives it, and more especially if he uses it for his own purposes, his objection to receiving it would count as nothing in defense to B.'s action to recover it. By using the money, he gives all the consent required. By such conduct his objection is waived and displaced, and consent and approval take its place. It is equivalent to consenting originally, when the judgment was entered by the supreme court.

Although it does not clearly appear by the judgment finally entered

by this court why the credit was allowed, still it is found that in this court a form of decree was prepared by order of the court (called in the findings the Bishop judgment), in which blanks were left for the amounts to be inserted. After the preparation of the form of decree by Mr. Bishop, Porter and George H. Smith, Esq., attorney for the plaintiffs (the De Celises), met to determine the amounts, and the result of their conference was that Porter agreed orally that if the judgment for costs in the partition case was allowed as a credit in the Bishop judgment, he would carry out the contract made June 14, 1876, and thereupon Smith agreed to allow this credit, and it was accordingly allowed and inserted in the judgment. This revived the stipulation of June 14, 1876, and the contract made then, including the mortgage sued on in this action, as far as regards Porter, and he became bound by all the obligations of such contract which he had by it assumed. In fact, the main object of such stipulation and contract as between Porter and the other contracting party, to whose rights the plaintiffs De Celis have succeeded, was to secure the credit of the partition costs in the mortgage then in suit, and to obtain security for the repayment of those costs and anything allowed beyond the amount of costs.

Afterwards, when Maclay objected (on what ground does not appear) to the Bishop judgment, and the same was modified, but still allowed the credit above mentioned, though Porter objected to it, for what reason we are not informed, still as he received the consideration of the agreement made between him and the plaintiffs at the conference in regard to the Bishop judgment, we do not think that we should be justified in holding that he was thereby let out of his agreement reviving the contract made between him and Smith, representing the De Celis plaintiffs. As far as we can get any light from the findings as to the objections of Porter and Maclay to the judgments above mentioned, they seem to have had relation to the state of the accounts between themselves, in which De Celis plaintiffs had no interest. As said above, it appears from the findings that the judgment as finally entered by the order of this court was fully executed, and Porter and Maclay received all the benefit of the credit.

It appears from the above that the mortgage sued on was sustained by a sufficient consideration in its inception, was also sustained by the agreement made at the conference on the Bishop judgment that such consideration has never failed, but that the full benefit of this agreement has been received by Porter, the mortgagor, by the credit in the decree and the sale under it, by which the indebtedness secured was paid off in full.

The court held that Maclay's indebtedness which was secured by Porter's mortgage, was barred by the statute of limitations as it arose from a parol promise. We do not think that it is barred. The action to recover it did not accrue earlier than the seventh day of June, 1879, when the final judgment was entered in the supreme court, and this action was commenced on the fourteenth day of July, 1880, on which day the complaint was filed.

It is contended that the mortgage sued on was extinguished by the foreclosure of the mortgage for thirty-seven thousand five hundred dollars. We can not perceive how this can be. The mortgage in this action originated from a credit on the foreclosed mortgage. How it can then be extinguished or merged does not appear. The ground of the existence of the mortgage herein is the credit allowed on the one fore-

closed. The existence of one is consistent with the payment and satisfaction of the other. How, then, can there be extinguishment or merger of any kind?

With regard to the question of parties arising on the demurrer to the complaint, we think it only necessary to say that in our view the De Celis plaintiffs are the proper plaintiffs in this action, by reason of the assignment of Eulogio to them of the indebtedness herein, which carried the mortgage and the distribution of the indebtedness to those plaintiffs by the probate court. On the return of this cause to the court below, the complaint may be amended by striking out all the parties plaintiff except the De Celis plaintiffs, and the court will then proceed to enter judgment for the De Celis plaintiffs, foreclosing the mortgage sued on herein, and, if on the sale of the property mortgaged any deficiency arises, that such deficiency be docketed, three fourths of it against Porter and the remaining one fourth against Maclay.

The amount of the indebtedness for which the mortgage herein is security is five thousand two hundred and fifty-five dollars and thirty cents, with legal interest from the seventh day of June, 1879.

The judgment is reversed, as well as the order denying the motion for a new trial, and the cause remanded with direction to the court below to enter judgment in favor of the De Celis plaintiffs against Porter and Maclay, as above indicated, the elements of which judgment distinctly appear in the findings.

If it becomes necessary to protect the interest of the other persons improperly joined as plaintiffs herein, the court can, on their motion, require the money to be paid into court, and make such order distributing it as shall appear to be proper in view of the rights of all the parties.

Ordered as above.

SHARPSTEIN and MYRICK, JJ., concurred.

MOUND CITY LAND AND WATER ASSOCIATION ET AL. *v.* PHILLIPS ET ALS.

In Bank. Filed January 29, 1884.

PARTITION OF GRANT BY JUDGE OF FIRST INSTANCE—POWER OF TO MAKE.—In a proceeding before the judge of first instance for the partition of land granted by the Mexican government to several grantees within larger and unlocated boundaries, the attempt of such judge to fix the boundaries of the land granted could give no additional force to the judgment of partition. If juridical possession had previously been given, its effect would be to confine all the rights of the grantees within the limits of such juridical possession, and the judge could not, *pendente lite*, or by his judgment, extend their rights beyond such limits. If juridical possession had not been given, the right of the grantees or their assigns to the temporary possession of all the lands, as the same appeared from the *deseño* and grant, could not be extended beyond the exterior limits thus appearing.

SUCH JUDGMENT OF PARTITION was binding and conclusive, if at all, only with respect to its subject-matter. It affected merely the right to the temporary possession previously held in common. The lands beyond the boundaries which the United States, as successor of Mexico, established, continued to be government property until such boundaries were established. The right of the grantees to possess the same was not an equitable right which ripened into a legal title to the same lands upon final measurement; it was contingent, and limited in time, as to the lands which should be excluded by the final measurement.

SUCH PARTITION AS TO LANDS WITHOUT THE LIMITS OF THE FINAL SURVEY AFTERWARDS MADE had effect, even as to the parties to it, only while their occupation lasted

with the consent of the government, and ceased to operate, as a whole, if it made no provision for the separate disposition of the specific portion with respect to which the rights of the grantee ultimately became perfect, when the boundaries of such specific portion were determined.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. This was an action for the partition of the ranchos San José and San José Addition. All of the parties claimed under a common title, by virtue of two inchoate grants from the Mexican government for lands within larger and unlocated boundaries. As a defense to such action, the defendants set up a former partition of such land by the judge of the first instance. The further facts appear in the opinion.

Thom & Stevens, for the appellants.

R. M. Widney, for the respondents.

MCKINSTRY, J. Vejar, Palomares, and Arenas obtained a grant of the "San José" rancho and the "addition" thereto. Dalton acquired the interest of Arenas. In 1846 certain proceedings were had before the judge of first instance, which (as claimed by appellant) resulted in a judgment of partition of the lands granted, between Vejar, Palomares, and Dalton. In 1853 Vejar and Dalton presented their petitions to the board of land commissioners for confirmation of the tracts claimed to have been set aside to them respectively by the judgment of partition, and Palomares presented his petition for the confirmation of his claim to an undivided one third part of the "San José" and "addition." The decree of the district court (on appeal from the commissioners) confirmed to each of the persons named an undivided one third part of the "San José" and "addition." The appeal to the supreme court of the United States having been dismissed and final surveys of the lands made, each of the confirmees obtained a patent from the United States for an undivided one third part of the lands, the claims to which were confirmed by the decree. One of the patents was issued in December, 1875; the other January 26, 1875. This action for a partition of the lands described in the patents was commenced January 19, 1880.

It would seem that in the proceeding before him the judge of first instance undertook to perform the task reserved to the political department of the government, to wit: the task of fixing definitely and finally the boundaries of land granted. He then divided the lands within such boundaries. His attempt to fix, for the government, the boundaries of the lands granted gave no additional force to his alleged judgment of partition. If juridical possession had previously been given, and its effect was to confine all the rights of the parties within the limits of such juridical possession, the judge could not, *pendente lite*, or by his judgment, extend their rights beyond such limits. They were not owners, as tenants in common or otherwise, of any lands finally ascertained to be part of the public domain. If juridical possession had not been given, the right of the grantees or their assigns to the temporary possession of all the lands, as the same appeared from the deseño and grant, could not be extended beyond the exterior limits thus appearing.

Even if the survey, made under the supervision of the judge of first instance in the partition proceedings, can be treated merely as an ascertainment of the exterior boundaries as the same were laid down on the

deseño, and described in the grant and petition therefor, the partition of the lands temporarily possessed by the grantees, or their assigns—that is to say, of the lands which they had the right to possess in common until the lands granted should be measured by the government—was operative only until such measurement. A decree of partition does not give a new title to the parties among whom the possession is distributed in severalty: Wade v. Deray, 50 Cal. 376. Neither the judge of first instance nor the parties in interest could then know where, within the exterior limits, the government would select the specific tract in and to which their complete tide would ultimately vest. Until such selection the grantees and their successors in interest retained, as against trespassers, a right to the possession of the whole: Ferris v. Coover, 10 Cal. 589.

But this possession they held subject to the power of the government to segregate a specific tract, and thus to deprive them of all right beyond the limits of such tract. Like every other judgment, the judgment of partition (if there was one), was binding and conclusive only with respect to its subject-matter. It was the right to the temporary possession, previously held in common, which was affected by the judgment. The lands beyond the boundaries which the United States, as successor of Mexico, established, continued to be government property until the boundaries were so established. In the mean time the grantees occupied to the exterior limits by license of the government; a license which was revoked, as to lands without the final survey, when the final survey was approved. The right of possession was not an equitable right which ripened into a legal title to the *same lands* upon final measurement. It was contingent and *limited in time*, as to the lands which should be excluded by the final measurement.

The judgment in partition did not and could not anticipate the action of the political power and divide in advance the lands which should subsequently be surveyed. It operated upon the existing *status*, and gave to each of the parties the right to enjoy in severalty the same temporary possession of all the lands, within the exterior limits, which they had previously enjoyed in common.

Until final survey by the United States of the "San José" and its "addition," there was no specific tract to which attached a complete proprietorship in favor of the grantees and those deriving from them. Whatever the nature of the grant or grants, the petitioners to the board of land commissioners submitted themselves to the jurisdiction of the tribunals created by the act of 1851 for the ascertainment of the rights protected by the treaty, and the patent they obtained is a solemn record of an adjudication binding upon them, that the lands granted were never finally segregated from the body of the public lands by the Mexican government.

It would seem to be sufficiently manifest that the judgment of partition of lands, without the limits of the final survey afterward made, had effect, even as to the parties to it, only while their occupation lasted with the consent of the government. As the decree did not provide for the separate disposition of the specific portion of the lands, with respect to which the rights of the grantees ultimately became perfect, the decree, as a whole, ceased to operate when the boundaries of such specific portion were determined.

Suppose a decree of partition between tenants in common for a term

of years, and, at the expiration of the term, that the lessees should acquire from the lessor the fee to a specific portion of the land demised, would it be said that the decree of partition would estop one of the grantees from claiming an undivided interest in the lands conveyed? Or, take a case more proximately analogous to the one at bar. Two persons asserting an equity in lands agree to a decree of partition. Afterward, they secure from the holder of the legal title a conveyance of his title to a portion only of the lands which lies entirely within the limits set apart to one of them by the partition. Does the other get nothing by the conveyance?

Three "grantees" of the former government have, by its permission, the common possession of a tract, with full knowledge that the government may take from them such possession, except in a smaller tract, and confer upon them the full proprietorship of such smaller tract. A decree is entered parting the possession, so that each shall possess exclusively a specific portion of the larger tract. In the case before us between six hundred and seven hundred acres of the land patented was not partitioned by the judge of first instance, while about ten thousand acres, *not* embraced within the tract patented, were set apart to the parties by the decree of partition. Not only was the *right* or estate, which was changed by the judgment from a common to a separate right, different from that asserted by the parties to the present action, but the tract of land which is the subject of the present action is a different tract from that the common possession of which was made a separate possession by the judgment.

The alleged separate occupation of the respective parties, whether referred to the judgment of partition or to a supposed oral agreement for partition, must, in the absence of evidence to the contrary, be held to have had relation to the temporary possession, and right of possession, of which we have spoken.

It is well settled, as argued by counsel for appellant, that confirmation and patent, under the act of 1851, only settle the legal title, and that such title inures to the benefit of the parties beneficially interested. But the acceptance of this proposition only brings a return of the question, Had appellant acquired a title, legal or equitable, to a specific portion of the land described in the complaint, which he could assert against the co-patentee of his grantor? This inquiry we have tried to answer.

The precise question we have been considering has never been determined, but intimations have been made by our predecessors which indicate that they were in accord with the views we have expressed: See Hathaway v. De Soto, 21 Cal. 191; Mahoney v. Van Winkle, Id. 580; Carpentier v. Thirston, 24 Id. 268.

Some of the findings are somewhat informal, but the court passed upon the material issues.

Judgment and order affirmed.

THORNTON, MCKEE, and SHARPSTEIN, JJ., concurred.

MYRICK, J., dissented.

ROSS, J., being disqualified, did not participate.

CITY AND COUNTY OF SAN FRANCISCO *v.* SHARON.

In Bank. Filed January 30, 1884.

JUDGMENT AFFIRMED ON THE AUTHORITY OF CITY AND COUNTY OF SAN FRANCISCO V. FLOOD, *ante*, 567.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd, Newlands & Woods, for the appellant.

John P. Bell, for the respondent.

The COURT. The questions presented in this case are the same as those passed on in City and County of San Francisco v. Flood, No. 7831 [*ante*, 567], and the judgment in that case determines this.

Judgment and order affirmed.

CITY AND COUNTY OF SAN FRANCISCO *v.* FLOOD.

In Bank. Filed January 30, 1884.

JUDGMENT AFFIRMED ON THE AUTHORITY OF CITY AND COUNTY OF SAN FRANCISCO V. FLOOD, *ante*, 567.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd, Newlands & Woods, for the appellant.

John P. Bell, for the respondent.

The COURT. The questions presented in this case are the same as those passed on in City and County of San Francisco v. Food, No. 7831 [*ante*, 567], and the judgment in that case determines this.

Judgment and order affirmed.

CITY AND COUNTY OF SAN FRANCISCO *v.* PHELAN.

In Bank. Filed January 30, 1884.

JUDGMENT AFFIRMED ON THE AUTHORITY OF CITY AND COUNTY OF SAN FRANCISCO V. FLOOD, *ante*, 567.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd, Newlands & Woods, for the appellant.

John P. Bell, for the respondent.

The COURT. The questions presented in this case are the same as those passed on in City and County of San Francisco v. Flood, No. 7831 [*ante*, 567], and the judgment in that case determines this.

Judgment and order affirmed.

City and County of San Francisco *v.* Baldwin.

In Bank. Filed January 30, 1884.

Judgment Affirmed on the Authority of City and County of San Francisco v. Flood, *ante*, 567.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd, Newlands & Woods, for the appellant.

John P. Bell, for the respondent.

The Court. The questions presented in this case are the same as those passed on in City and County of San Francisco v. Flood, No. 7831 [*ante*, 567], and the judgment in that case determines this.

Judgment and order affirmed.

Daley v. Ah Goon et al.

Department Two. Filed January 30, 1884.

A Tax Certificate of Sale Which Recites that the Property was Assessed to G. A. H., "and to all owners and claimants known and unknown," is void.

Such Certificate is Admissible in Evidence for the Purpose of Defeating a Tax Deed founded thereon, which is valid on its face by reason of the omission of such recital.

Appeal from a judgment of the superior court for San Diego county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

John R. Jones, for the appellant.

Conklin & Hunsaker, for the respondents.

The Court. The only question in this case which it is necessary for us to decide relates to the validity of a certain tax deed offered in evidence by defendants.

The action was ejectment, and the plaintiff made out a *prima facie* case. To defeat his right of recovery, defendants relied upon a sale of the land for taxes, and a deed in pursuance of such sales. The certificate of sale shows that the lot in controversy was assessed to G. A. Hemenway, *and to all owners and claimants known and unknown.*

It has been held, in several cases, that such an assessment is void, and the question is, Does such a void certificate affect and defeat a deed valid upon its face? We think it does. Section 3786 of the political code requires that "the matters recited in the certificate of sale *must* be recited in the deed, and *such* deed, duly acknowledged and proved, is primary evidence." This requisition of the statute must be complied with: Grimm v. O'Connel, 54 Cal. 522; Anderson v. Hancock, 1 West Coast Rep. 349.

If the deed offered in evidence, in this case, had followed the law, and contained the recital found in the certificate, it would have been void on its face, and it was competent for the plaintiff to defeat it by evidence *aliunde*.

The motion to dismiss the appeal was denied October 10, 1883.

Judgment and order reversed.

TAYLOR ET AL. *v.* McLAIN.

In Bank. Filed January 30, 1884.

WHERE, ON A FORMER APPEAL, THE COURT HAS HELD THAT THE ACTION WAS ONE to redeem a mortgage, it will hold the same on a subsequent appeal, when no changes have been made in the pleadings.

IN AN ACTION TO REDEEM A MORTGAGE, WHERE MORE THAN FOUR YEARS HAVE ELAPSED since the maturity of the indebtedness, a decree quieting the plaintiffs' title and possession, and enjoining the defendant from asserting any claim to the premises, is erroneous, when not authorized by the plaintiffs' pleadings.

A DEFENDANT IN AN ACTION TO HAVE A DEED ABSOLUTE IN FORM DECLARED A MORTGAGE, and to redeem the same, who asserts, by cross-complaint, that such deed is not a mortgage but a conveyance indefeasible, may ask, and if he maintains his averments by proof or if the plaintiff fails to establish his case is entitled to, a judgment for possession of the premises.

A DEED ABSOLUTE IN FORM, GIVEN MERELY TO SECURE A DEBT, is to be deemed a mortgage, as between the parties thereto, and as to subsequent purchasers with notice; and parol evidence of such facts is admissible in actions at law as well as in equity.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The facts are stated in the opinion rendered on a former appeal reported in 60 Cal. 651.

Smith & Brown, *A. W. Hutton*, and *Bicknell & White*, for the appellant.

Barclay & Wilson and *Brunson & Wells*, for the respondents.

THE COURT. 1. When this case was here before, we held the action to be to redeem a mortgage, and as such it was barred by the statute of limitations: Taylor v. McLain, 60 Cal. 652. On the return of the cause to the court below the complaint was not amended, and it is the law of the case that the complaint is to redeem. On the last trial below the court held that more than four years had elapsed after the maturity of the indebtedness from plaintiff to defendant before this action was commenced.

There was therefore no pleading on the part of plaintiff on which the court was authorized to base its decree quieting the plaintiffs' title and possession, and enjoining the defendant from asserting any claim to the premises.

2. The court below also decreed that the defendant was not entitled to maintain "a cross-action at law in ejectment to plaintiffs' action in equity," etc. We think that when an action is brought to have a deed absolute in form declared a mortgage, and to redeem the same, the defendant, who asserts by cross-complaint that the deed is not a mortgage but a conveyance indefeasible, may ask, and if he maintains his averment by proof (or plaintiff fails to establish his case) is entitled to, a judgment for possession of the premises. He seeks "affirmative relief relating to the transaction upon which the action is brought:" C. C. P., sec. 442. The section is broader, and authorizes a defendant to file a cross-complaint whenever he seeks affirmative relief "affecting the *property* to which the action relates." This would seem to permit the assertion of a title independent of and paramount to that which the plaintiff had when he executed his deed. *Non constat*, in the case at bar, so far as appears from the cross-complaint, that the defendant claims to deraign title from the plaintiff.

3. The court erred, therefore, in refusing to consider the cross-com-

plaint. If on the trial of the issues made by the cross-complaint and the answer thereto it had appeared that defendant claimed title only under the deed from plaintiff to Mayes, and that said deed was executed only as security for an indebtedness from plaintiffs to defendant, the court below would have been justified in finding that the legal title did not pass from plaintiffs. If a deed absolute in form is given only to secure a debt, it is to be deemed a mortgage as between the parties thereto, and as to subsequent purchasers without notice: C. C., secs. 2924, 2925. The sections of the civil code (and it was so declared by the code commissioners) were intended to restore the rule laid down in Cunningham v. Hawkins: Annotated Code, sec. 2925. In Cunningham v. Hawkins, 27 Cal. 604, it was held parol testimony is admissible to prove a deed absolute in form to have been intended as a mortgage in actions *at law* as well as in equity.

4. From what has been said above, it follows that the defendant should have had judgment in the court below as to the action to redeem, as the action was barred by the statute, but that the court should have proceeded to try the action in the nature of ejectment.

On the return of the case to the court below the parties will of course have an opportunity to make application for leave to amend their pleadings in such manner as they may be advised, and it will be for that court to deny such applications or to grant them with or without terms.

Judgment reversed and cause remanded for new trial.

TAYLOR ET AL. *v.* MCLAIN.

In Bank. Filed January 30, 1884.

JUDGMENT REVERSED ON THE AUTHORITY OF TAYLOR V. MCLAIN, *ante*, 585.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The facts appear in Taylor v. McLain, *ante*, 585.

Smith & Brown, *A. W. Hutton*, and *Bicknell & White*, for the appellants.

Barclay & Wilson and *Brunson & Wells*, for the respondent.

THE COURT. On authority of Taylor v. McLain, No. 8902, order reversed and new trial granted.

SOUTHERN PACIFIC R. R. CO. *v.* GARCIA.

In Bank. Filed January 30, 1884.

A SETTLER ON PUBLIC LANDS WHICH HAD BEEN WITHDRAWN FROM SALE, and consequently were not open for pre-emption, acquires no title thereto, as against a subsequent grantee of the government, by virtue of his settlement.

A PATENT FOR LANDS PREVIOUSLY WITHDRAWN FROM SALE, IF AT THE TIME OF WITHDRAWAL the same were within the exterior limits of a Mexican grant *sub judice*, is invalid.

THE PUBLICATION AND APPROVAL BY THE SURVEYOR GENERAL OF A PLAT AND SURVEY of a Mexican grant, under the act of congress of June 14, 1860, in the absence of an application to have the same returned to the district court, has the same effect in law "as if a patent for the land so surveyed had been issued by the United States." After that the grant was in no sense *sub judice*.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. This was an action of ejectment. The plaintiff claimed as a pre-emptor. The further facts appear in the opinion.

Glassell & Smith, for the appellants.

H. T. Hazard, for the respondent.

SHARPSTEIN, J. If the demanded premises were not, on the thirteenth day of April, 1871 (the date of the withdrawal from sale, etc., of public lands granted to the plaintiff), within the exterior boundaries of a Mexican grant (the Tajanta), the plaintiff is entitled to recover in this action, and the judgment and order appealed from must be reversed. The defendant did not settle on this land until December 18, 1873, and if it had previously been withdrawn from sale, etc., it was not open for preemption, and the defendant, by virtue of said settlement, acquired no right to it as against the plaintiff. If this land, at the date of said withdrawal, was within the exterior boundaries of a Mexican grant, the grant to the plaintiff did not include it, and the patent which purports to convey the title to it to the plaintiff is invalid for that purpose: Carr v. Quigley, 57 Cal. 394; McLaughlin v. Heid, 10 Pac. C. L. J. 80.

It appears that the rancho Tajanta was surveyed in 1858 by Henry Hancock, deputy United States surveyor, and the survey approved on the seventeenth of September, 1860. At the time of such approval the act of June 14, 1860, entitled "An act to amend an act entitled an act to define and regulate the jurisdiction of the district courts of the United States in California in regard to the survey and location of confirmed private land claims," was in force. The act provides, "that whenever the surveyor general of California shall, in compliance with the thirteenth section of an act entitled, 'An act to ascertain and settle [the] private land claims in the state of California,' approved March 3, 1851, have caused any private land claim to be surveyed, and a plat to be made thereof, he shall give notice that the same has been done, and the survey and plat approved by him, by a publication * * * once a week for four weeks in two newspapers, one published in Los Angeles, and one of which the place of publication is nearest the land."

It further provides that the district court of that district may upon the application of any party interested make an order requiring such survey to be returned into said court for examination and adjudication, and if in its opinion the location and survey are erroneous it may set aside and annul the same, or correct and modify it. But if, "after publication as aforesaid, no application shall be made to the said court for the said order, or when said order has been refused, or when an order shall have been obtained as aforesaid, and when the district court by its decree shall have finally approved said survey and location, or shall have reformed or modified the same, and determined the true location of the claim, it shall be the duty of the surveyor general to transmit, without delay, the plat or survey of the said survey to the general land office, and the patent for the land as surveyed shall forthwith be issued therefor, and no appeal shall be allowed from the order or decree as aforesaid of the said district court, unless applied for within six months from the date of the decree of said district courts, but not afterwards; and the said plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land

so surveyed had been issued by the United States:" 12 U. S. Stats. at Large, 33. It does not appear that any application was made to have said location and survey returned into court, and it therefore became final; "and the said plat and survey so finally determined *by publication*" had "the same effect and validity as if a patent for the land so surveyed had been issued by the United States:" Id.

Speaking of the effect of this act, the United States attorney general said: "It is perfectly clear that this publication having been made, and no steps having been taken to invoke the jurisdiction of the district court, the title to this land, as covered by the survey and plat, vested absolutely in the claimant, and that the repeal of the statute, after the title so vested, can not be construed to have divested that title:" 12 Opinions of Attorneys General, 250.

Therefore, the finding that the demanded premises were within the exterior boundaries of the private grant Tajanta, and were claimed as a part of said grant, and that said claim was pending before the land department of the United States at the date of the defendant's settlement, is not supported by the evidence. The publication and approval of the Hancock survey, in the absence of an application to have it returned to the district court, had the same effect and validity in law "as if a patent for the land so surveyed had been issued by the United States." After that the grant was in no sense *sub judice*. It was the duty of the surveyor general to transmit said survey to the general land office; and of that office to forthwith issue a patent for the land in accordance with said survey. The grant became segregated from lands lying outside of said survey. As that occurred more than ten years before the lands granted to the plaintiff were withdrawn from sale, etc., it follows that the grant of the plaintiff attached to the demanded premises; and as the defendant had previously initiated some claim thereto, and it does not appear that he attempted to do so until about two years after the right of plaintiff had attached,

Judgment and order reversed.

MORRISON, C. J., and MYRICK, MCKINSTRY, and MCKEE, JJ., concurred.

ROSS, J., concurring. I concur in the judgment.

EX-PARTE SONTAG.

In Bank. Filed January 31, 1884.

A GRAND JUROR CAN NOT BE COMPELLED TO TESTIFY, under sections 903, 920, and 926 of the penal code, as to how he voted with respect to the finding of a particular indictment; nor is such testimony permissible under section 995 of the penal code, which authorizes a motion to set aside an indictment where it has not been "found" as prescribed by such code.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

Sullivan and *Darwin & Murphy*, for the petitioner.

Tyler and *Flournoy*, *contra*.

MCKINSTRY, J. The petitioner was committed to prison by the superior court, as being guilty of contempt in refusing to answer the question (upon motion to set aside an indictment) whether he as grand juror voted for finding the indictment.

The form of the oath, in general use for centuries, binds the grand juror to preserve inviolate the secrets of the grand-jury room. Public policy would seem to forbid vain disclosures made to gratify idle curiosity. "But," says Thompson and Merriam, "when, for the purposes of public justice, or for the protection of private rights, *it becomes necessary*, in a court of justice, to disclose the proceedings of the grand jury, the better authorities now hold that this may be done. It is obvious that there are certain transactions of the grand-jury room which it can never be for the interests of justice to disclose; for example, *what particular jurors* concurred in or opposed the finding of the indictment, what opinions were expressed by various members of the body. In respect to such matters the injunction of secrecy may well be perpetual:" Thom. & Mer. on Juries, sec. 703.

The furthest any of the cases cited by the text-writers from whom we have quoted have gone towards permitting an inquiry by means of the testimony of grand jurors themselves, into the mode of finding an indictment, is to allow the question, Did twelve grand jurors concur in finding the indictment? Thus in Low's Case, 4 Me. 439, that question was permitted, but both the judges who delivered opinions in that case were careful to exclude any inference that it would be proper to inquire how a particular juror voted. Weston, J., said: "The oath of the grand juror requires him to keep secret the state's counsel, his fellows', and his own. Of this character may be, what particular jurors agreed or dissented, upon the questions whether a true bill or not. * * * But the fact whether twelve or more concurred or not in the bill is *not a secret*. It is a result which they are required, through their organ, the foreman, to make known." And Preble, J., added: "*How* any juror voted is a secret no juror is permitted to disclose; but whether twelve of their number concurred in finding a bill *is not* a secret of the state, their fellows', or their own. It is a fact they, of necessity, profess to disclose every time they promulgate their decision upon any bill laid before them." The supreme court of Maine in effect held that the fact whether twelve concurred in finding an indictment could be inquired into by the testimony of the grand jurors, on motion, but that, in pursuing such inquiry, the grand juror could not be required to state whether he voted for or against the indictment.

In other courts, however, the inquiry has been limited still more. "By such courts grand jurors will not be permitted to testify whether they voted at all, how they or their companions voted, or whether twelve concurred in the finding:" Thom. & Mer. on Juries, sec. 704, and cases cited in note.

No case has been called to our attention in which it has been held that a grand juror could be compelled to answer how he voted with respect to the finding of a particular indictment. In this state the whole matter is regulated by statute. The oath of the grand juror is: "You will keep your own counsel and that of your fellows and of the government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted on any matter before you:" Pen. C., sec. 903.

Section 926 of the penal code reads: "Every member of the grand jury must keep secret whatever he himself or any other grand juror may have

said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor."

Section 926 specifies the exceptional cases in which a court may require a grand juror to disclose any matter transpiring in the jury-room, and provides that he must keep secret other matters, including "in what manner he or any other grand juror may have voted on a matter before them." Reading together sections 903 and 920, it is apparent that the exception stated in the former section is intended to apply only to the clause which immediately succeeds it—"You will not, except *when required* in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor [will you disclose] anything which you or any other grand juror may have said, nor the manner in which you or any other grand juror may have voted," etc.

Thus read, the subsequent section 926 may be given its effect; the last clause specifying the matters with respect to which a grand juror may be required to make disclosure "in the due course of judicial proceedings."

The inquiry must be confined to such matters, that is to say: the grand juror can only be required to state what was the testimony of a witness examined before the grand jury.

It has been argued with much ingenuity that the provision of the law which authorizes a motion to set aside an indictment where it has not been "found" as prescribed by the code, is of no benefit to a defendant unless he is permitted to prove that it was not duly found by the testimony of the grand jurors themselves, who are alone present when an indictment is voted upon: Pen. C., sec. 995. It is contended that the right to move on the ground that the indictment was not properly found necessarily includes the right to prove the fact by the testimony of those only who can know the fact. But there are many legal rights which can not be established by certain witnesses. Thus it is well settled that a petit juror can not impeach his verdict, although a defendant may move for a new trial on the ground of unfairness in its rendition: People v. Wyman, 15 Cal. 70.

We can imagine cases in which it might be possible to prove that less than twelve voted for an indictment without resorting to the testimony of the grand jurors themselves. The mere inconvenience or difficulty of proving the fact ought not to overrule the many grave objections to a procedure not only not directly authorized, but expressly forbidden by the code, which may interfere with the complete freedom of exposure of alleged offenses which it is the design of the institution of grand juries to secure, and conflict with other principles of public policy which are subserved by keeping inviolate the secrets of the grand-jury room—except when their disclosure is absolutely necessary. No serious injury can arise from prohibiting the question asked the petitioner. The cases must be rare indeed in which a foreman will dare attempt to practice fraud upon his fellow-jurors by indorsing and presenting a bill not in fact found, and if such a fraud is practiced, the law will provide a proper punishment by direct proceedings against the party guilty of the fraud.

Finally, as said by Ryland, J., in State v. Baker, 20 Mo. 338, an innocent person will not be injured by limiting the inquiry, for he can always vindicate himself in a trial on the merits.

Let the petitioner be discharged from custody.

MORRISON, C. J., and SHARPSTEIN, ROSS, THORNTON, MYRICK, and MCKEE, JJ., concurred.

SAVINGS AND LOAN SOCIETY *v.* GERICHTEN.

Department Two. Filed January 31, 1884.

FINDING THAT A TENANT WAS AUTHORIZED BY HIS LANDLORD TO MAKE CERTAIN REPAIRS to the leased premises held not to be supported by the evidence.

DECLARATIONS OF AN AGENT ARE NOT ADMISSIBLE IN EVIDENCE to prove the agent's authority.

APPEAL from a judgment of the superior court for San Diego county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

A. B. Hotchkiss, for the appellant.

Leach & Parker, for the respondent.

THORNTON, J. This action was brought to recover of defendant the value of the use and occupation of certain real estate situate in the city of San Diego, for a period extending from the seventeenth day of November, 1880, to the seventeenth day of May, 1881, and also for a period commencing with the day last named and ending on the seventeenth day of August, 1881. Judgment was rendered for the defendant. There was a motion for a new trial by plaintiff, and an order denying it. Thereupon plaintiff appealed from the judgment and order.

The facts of the case, as found by the court below, are these: On the second day of August, 1880, a judgment was rendered in the superior court for the city and county of San Francisco, in an action brought by the plaintiff herein against A. E. Horton and others, defendants, among whom was the defendant herein, in favor of plaintiff and against the defendant for the foreclosure of a mortgage made by Horton in favor of plaintiff on the eighth day of December, 1873, upon the property described in the complaint herein. On the nineteenth day of October, 1880, an execution was issued on the judgment, and placed in the hands of the sheriff of San Diego county, who, by virtue of the same, on the seventeenth day of November, 1880, sold according to law the property above mentioned to the plaintiff, gave it a certificate of sale therefor, and on the next day filed a duplicate of the certificate in the recorder's office of the county just named. The defendant had notice of this judgment and sale. He used and occupied the premises from the seventeenth of November above mentioned to the seventeenth of May, 1881, which use the court finds was of the value of fifty dollars per month.

The court also finds that plaintiff was the owner of the property from the seventeenth of May, 1881, to the eighteenth of August, 1881 (having become such by the acquisition of the sheriff's deed on the sale above mentioned, as shown by the testimony), and that during said period last named the defendant occupied the premises by permission of the plaintiff, and that the use of the property during such period was worth three hundred dollars; that Horton was the owner of the property from

the twenty-third of December, 1876, to the seventeenth of May, 1880; that on the said twenty-third of December, he leased the same to the defendant for the period of two years thereafter, at the rental of fifty dollars per month, and on the fourteenth of April, 1880, he extended this lease to the first of May, 1881, on the same terms, and received the rents for the property up to the day last named; that on the thirtieth of July, 1879, defendant notified the plaintiff that the buildings on the property had become dilapidated, and that many necessary and permanent repairs were necessary to be made to preserve the building (the Horton house) on the property and make it habitable, and demanded of the plaintiff that it should make such repairs.

The court then proceeds to find that the plaintiff failed to make these repairs, but thereafter, on the eleventh day of August, 1879, and at divers and sundry times between the day named above and the eighteenth day of August, 1881, the plaintiff authorized and directed the defendant to make all necessary repairs on the premises on its account, the value of such repairs, however, not to exceed the value of the rents of the premises; that the value of the rents during said period up to the seventeenth of May, 1881, was fifty dollars per month, and for the three months thereafter one hundred dollars per month; that at divers and sundry times between the eleventh of August, 1879, and the eighteenth of August, 1881, the defendant, by the authority of plaintiff, as above stated, made necessary repairs on the premises of the value of one thousand four hundred dollars, of which plaintiff has paid no part. The court set off these repairs against the use and occupation of the premises during the periods mentioned in the complaint, and gave defendant judgment for costs.

It is urged here by plaintiff, that there was no direction or authority to make these repairs given to any one by it, as found by the court, and that the evidence is insufficient to sustain such finding. We are of opinion that this contention is maintained. The evidence relied on to sustain the finding consists of a letter from E. F. Northam, vice-president of the plaintiff, to the defendant, bearing date the eleventh day of August, 1879, and the testimony of defendant and Horton. It will be observed that Northam's letter bears date nearly a year before the judgment was rendered in the foreclosure suit, when the plaintiff was not the owner of the property, and no one could say with any certainty that it would ever become the owner. Horton was the owner and landlord of defendant, and was in San Diego where this property was situated and where defendant resided. This letter was in reply to one from the defendant in relation to these repairs. So far as it refers to this subject, its contents are as follows: "The mortgage covering the Horton house does not authorize the making of repairs. It is not yet in judgment, owing to delay in serving some defendants, but probably will be soon. Until sale under the judgment, it is not certain that this bank will become the owner. In the mean time the bank is not disposed to meddle with the affairs of the house, but against the rent or use I should think you might make the mentioned repairs."

The defendant says in his testimony: "I was governed by this letter all the time." We can not see in the words above quoted any authority to make these repairs. On the contrary, there is a careful avoidance of committing plaintiff to any such authority. The last clause in the letter gives utterance to an opinion of the writer, speaking for himself and not

for the plaintiff, and this certainly does not bind the plaintiff, nor give any direction on the subject to which it pertains.

Except the above letter, no communication appears to have been had with plaintiff until after the sale under the foreclosure judgment, which, as seen above, occurred on the seventeenth of November, 1880. Horton testified that he saw the directors in relation to this property after the sale took place. At that time most of the repairs had been made. The account presented by the defendant showed that the repairs made when the sale took place amounted to about one thousand six hundred and fifty dollars. The conversation between Horton and the directors was in regard to the condition of the property. The repairs that had been made by defendant were spoken of. But we do not find in this conversation any authority to any one to allow for such repairs or to authorize any to be made. Horton did not pretend to act for the defendant. It does not appear that he had any authority to act for him. Nor does it appear that he was authorized by the plaintiff to act for it in making any agreement with defendant as to repairs, or that he ever did act for it or assume to act for it in any way. There is no testimony whatever that he ever communicated the conversation had with the directors to the defendant. The conversation shows no admission by the directors that the plaintiff was bound for any such repairs or had in any way authorized them, or ever intended to authorize any repairs to be made. Besides, a corporation does not usually act in such a loose manner in making contracts. They are usually made by a resolution of the board of directors, adopted and entered in their minutes. This testimony of Horton is too loose and unsatisfactory on which to charge the plaintiff.

As to the testimony of the defendant: He never saw the president and directors of plaintiff until May, 1881. In his conversation with them, no agreement was come to. He states that they refused him a lease, and further stated: "The house needed repairing, and they wanted to know the expense that would be. I showed them a statement which made it come to three or four thousand dollars. They said that was more money than they would spend. I said: 'We can't do it for much less; come down and look at the premises.' And they promised they would send a man down. Mr. King promised faithfully he would come. Mr. Boswell, who was a director, came on the fourth of July. He said he would give no lease, and he had come down specially about this property."

But it nowhere appears that Boswell had any authority from the plaintiff to allow for repairs already made, or to direct repairs to be made. It would not be a just inference from Boswell's saying that "he had come down specially about this property," that he had any such authority. Besides, Boswell's authority could not be proved by his declarations. Such evidence is not admissible to prove an agent's authority. If it tended to prove his authority, the plaintiff moved to strike it out, and excepted to the ruling of the court denying the motion. So far as it proved any authority in Boswell to act in regard to repairs, the court erred in letting it in.

There is testimony by defendant that in the conversation deposed to by him, they (the directors) said they would allow him to spend five hundred dollars on the sewer. How much was spent on the sewer does not appear in the findings, and does not clearly appear in the testimony. Nor does it appear at all whether this allowance of five hundred dollars

referred to repairs on the sewer made before this conversation or to such as should be subsequently made. Under these circumstances, we can not discern if any allowance should be made for repairing the sewer, or what this sum should be. We can not, therefore, direct what judgment should be entered.

The result to which we are led by the foregoing is that the finding of the court as to the authority of defendant to make these repairs above stated is not sustained by the evidence, and a new trial must therefore be directed. In this state of the case, we do not think it necessary to pass on the other questions argued.

The judgment and order are reversed, and the cause remanded for a new trial.

MYRICK and SHARPSTEIN, JJ., concurred.

SUPREME COURT OF COLORADO.

NEW YORK AND BROOKLYN MINING CO. *v.* GILL.

Filed December 14, 1883.

DEFECTS IN THE SERVICE OF SUMMONS ARE WAIVED BY THE DEFENDANT'S APPEARING and answering.

APPEAL from a judgment of the district court for Summit county. The opinion states the facts.

Abbott & Bullis, and *M. B. Carpenter*, for the appellant.

Mullahey & Lipscomb, and *T. M. Hardenbrook*, for the appellee.

BECK, C. J. The appellant company was defendant below, and by its counsel moved the district court to quash the service of the summons, which was by publication. This motion was denied. The answer of said company was thereupon filed, and a trial of the issues had before a jury, resulting in a verdict and judgment for the appellee, from which judgment the said company has prosecuted this appeal. All the errors assigned relate to the refusal of the court below to quash the service of the summons. The alleged errors were all waived by the appearance and answer of the defendant company.

The judgment is therefore affirmed, with costs.

Judgment affirmed.

WILSON *v.* DENVER, SOUTH PARK & PACIFIC R. R. CO.

Filed December 14, 1883.

RAILROAD COMPANIES OWE A DUTY TO THEIR EMPLOYEES TO KEEP THE TRACKS OF THEIR RAILWAYS FREE from obstructions that would endanger the lives of the latter. The duty thus imposed is that of ordinary care, to be determined by the danger of the service, and proportioned to it, but such company neither warrants nor insures against defects.

ALLEGATION THAT AN INJURY TO AN EMPLOYEE WAS OCCASIONED BY AN OBSTRUCTION OF THE TRACK does not make out a *prima facie* case of liability against a railroad company; but when it is further alleged that such obstruction was upon the track by reason of the negligence of the company, and that the employee was in the discharge of his duty, and exercising due care and skill at the time of the injury, such allegations are sufficient to constitute a *prima facie* case against the company.

ERROR to the district court for Arapahoe county. The opinion states the facts.

Brown & Putnam, for the plaintiffs in error.

Ovahood & Teller, for the defendant in error.

BECK, C. J. The amended complaint in this case was held insufficient upon demurrer in the district court, and the plaintiffs, declining to amend further, judgment was given for the defendant, the said railroad company. The complaint charges that the accident, which is the ground of the action, occurred by reason of the engine on defendant's railroad coming in contact with a log lying across and upon the track of said railroad at or near Deansbury station, whereby the engine was thrown from the track into the river adjacent, and the deceased thereby instantly killed.

It alleges that the deceased was in the employ of the railroad company as a fireman upon said engine, but at the time of the accident, by request of the engineer, he was running the engine, and was doing so with due care and skill. That the accident occurred while the deceased was in the discharge of his duty, and that it did not occur by reason of any want of skill or care on the part of the engineer in charge of the engine or of the deceased, but on account of the negligence of the defendant, alleging in this connection, "that said log was on and across said track by reason of the negligence of the defendant."

The complaint then alleges that a fire had been raging for the space of twenty-four hours immediately preceding the accident, in a dense growth of pine timber, on either side of the track, near the scene of the accident, and that several hours before the accident defendant was notified of the fire, and that in consequence thereof trees were liable to fall upon and obstruct the track, but that defendant neglected to take any precautions to give notice of danger, or to remove obstructions, and that the accident occurred in consequence of said negligence of the defendant, and not otherwise. It is not alleged specifically that the log got upon the track by reason of the fire, and in this particular the complaint is imperfect, and liable to criticism. We are of opinion, however, that this defect was not properly reached by the demurrer. A demurrer admits all facts well pleaded, and there are sufficient facts well pleaded in this complaint to constitute a cause of action, and to require an answer from the defendant.

The allegations of the employment of the deceased by the defendant; that at time of the accident he was in the discharge of his duty; that the accident did not occur by reason of negligence or want of care or skill on part of either the engineer in charge of the engine, or of the deceased, but that it did occur in consequence of the negligence of the defendant in failing to keep its track free from obstruction at the point mentioned—are statements of facts which present an issue. Such issue can not be met by a demurrer; certainly not by the demurrer filed herein, the grounds of which are substantially as follows:

1. That deceased was out of the line of his duty as fireman, without the knowledge or consent of the defendant, at the time of the accident.

2. It is not alleged that any officer or agent of the defendant, whose duty it was to look after the railroad and guard against obstructions, was notified of any danger from falling timber at the place where the accident occurred.

3. The complaint shows that defendant did not have notice of any danger likely to arise from falling timber.

4. The complaint does not state facts sufficient to constitute a cause of action.

Courts have held, where negligence has been alleged in general terms, that while the pleading is not for this cause obnoxious to a demurrer, yet if the plaintiff possesses more specific information, he may be required, on motion, to make his complaint more definite and certain: Fitts' Adm'r v. Waldeck, 51 Wis. 569; Hayden v. Anderson, 17 Iowa, 162; O. & M. R. Co. v. Callarn, 73 Ind. 265; Railway Co. v. Lavally, 36 Ohio St. 225.

It is a duty which railroad companies owe to their employees, to keep the tracks of their railways free from obstructions that would endanger the lives of the latter. This duty is not absolute, but has its limitations,

which are clearly stated by Mr. Justice Elbert, in Colorado Central R. R. v. Ogden, 3 Col. 510.

The learned judge says: "The company must use all reasonable precautions and care to secure the safety of its employees, by keeping the roadway in repair. It can not through want of watchfulness expose them to unreasonable risks in this respect and escape liability, but the duty imposed is that of ordinary care. This ordinary care must be measured by the danger of the service and proportioned to it. Considering the dangerous force which a railway company puts in motion, the term 'ordinary care' towards its employees imposes, without doubt, a high degree of diligence in keeping the road and all its appliances in perfect repair, but it neither warrants nor insures against defects."

While the mere fact that an injury to an employee was occasioned by an obstruction of the track does not make out a *prima facie* case of liability against the railroad company, yet when, as in the present instance, it is further alleged that the obstruction was upon the track by reason of the negligence of the company, and that the employee was in the discharge of his duty, and exercising due care and skill at the time the injury was received, such allegations do constitute *prima facie* a case of liability against the railroad company.

The late Chief Justice Breese, in commenting upon the liability of railway companies to their employees, upon a review of authorities, said: "The result of which rulings is, not to hold those companies as insurers that their road and appurtenances and instrumentalities are safe and in good condition, but that they must do all that human care and vigilance and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition and to keep them so. * * * On the other hand, they are not answerable for latent defects in materials employed in the construction of their machinery, which the usual and well-recognized tests of science and art afford for the purpose but fail to detect; nor are they liable for accidents occurring by which injury ensues, when skill and experience are not able to foresee and avoid them:" T. P. & W. R'y Co. v. Conroy, 68 Ill. 567, 568.

One of the principal objections urged in this court to the complaint is, that the charge of negligence made against the railway company is not sufficient to admit proof of facts fixing the liability of the defendant, for the reason that it is not alleged that notice of the danger to be apprehended was given to the person or officer whose duty it was to oversee and provide against obstructions. This position is not maintainable. The charge of negligence is made directly against the defendant, and the effect of the demurrer is to admit that the obstruction which caused the death of the deceased was upon the track by reason of the defendant's negligence.

In Hildebrand, Adm'r, v. The Toledo etc. R'y Co., 47 Ind. 406, the court say: "The counsel on both sides have filed long, able, and searching briefs. The brief on behalf of the appellee is chiefly confined to the question of the liability of the company for the negligence of its servants, by which a co-servant was injured or killed; but we think this is not the case made by the first and third paragraphs of the complaint, as they directly charge negligence against the defendant itself. This is admitted by the demurrer, and we think that no authority can be found where negligence has been directly charged against the defendant, that

a demurrer for want of sufficient facts has been sustained. How this charge may be avoided by an answer on the evidence is not before us, but only as to whether these paragraphs of the complaint, all allegations therein being admitted by the demurrer, required an answer. We hold that these paragraphs of the complaint required an answer."

In 2 Thompson on Negligence, p. 1246, it is said that negligence on the part of the defendant is the gist of the action, and must be charged in the plaintiff's petition, but that an allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient: See also Id., pp. 1248 and 1254; and Grinde v. The M. & St. P. R. R. Co., 42 Iowa, 376.

It is clear from the principles announced and authorities cited that the following further objections to the complaint, made by counsel for defendant in error, are not available under this demurrer, viz.: That sufficient time had not elapsed after notice of the fire for defendant to have provided a guard at that place, either to give notice of danger or remove obstruction; that it does not show how long such obstruction had been on the track, or that defendant knew or ought to have known it was on the track; that it does not allege when such notice was had upon the defendant, nor upon what officer or agent of the company, nor how the tree got upon the track.

Chief Justice Breese, in T. P. & W. R'y Co. v. Conroy, 68 Ill. 569, in speaking of the strong obligation resting on railroad companies to use all reasonable means to acquire knowledge of the condition of their roads, says: "The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires; and further, it is their duty to keep a sufficient force at command, and of capacity sufficient to discover defects and apply the remedy. Neglecting to keep it in the best condition, if injury occurs thereby, the companies will be liable, and they ought to be so liable. From this responsibility they can not be relieved except by showing that the defect was one which could not be discerned or remedied by any reasonable skill or foresight."

Such is the state of the law upon pleadings of this character, and we must hold that as against the demurrer filed the complaint is sufficient. The defendant may have a perfect defense to the action, but if so, the facts constituting such defense must be pleaded.

The judgment is reversed, and the cause remanded.

Reversed.

ALDEN ET AL. *v.* CARPENTER.

Filed December 14, 1883.

WHERE A MOTION FOR A CONTINUANCE IS MADE ON ACCOUNT OF THE ABSENCE OF A WITNESS, an offer of the adverse party to admit that such witness, if present, would swear to what was stated in the affidavit for a continuance may be allowed, at the discretion of the court, as well after the court has decided that such evidence is material as when the motion is first made.

ADMITTING THE TESTIMONY OF AN ABSENT WITNESS IN ORDER TO AVOID A CONTINUANCE is not an admission of the truth of such testimony, nor does such admission preclude the party admitting it from rebutting the same on the trial.

IN ACTIONS UPON CONTRACTS WHICH DO NOT IMPORT A CONSIDERATION, and where the consideration must, therefore, be averred in the complaint, a denial in the answer of such averment forms a complete issue, and needs no reply; and where the consideration

is implied, as in an action on a promissory note, the implication stands in the place of the alleged consideration, and an answer averring want of consideration is, in effect, but a denial of such implication, and needs no reply.

PENDING THE CONSIDERATION OF A MOTION, WHICH THE COURT HAS TAKEN UNDER ADVISEMENT until a subsequent day, it is not an irregularity, assignable for error fatal to the judgment, for the court to try another case, unless a party has been prejudiced thereby or deprived of some right affecting the fairness and verity of the judgment.

APPEAL from a judgment of the county court of Pueblo county. The opinion states the facts.

John M. Waldron and *T. T. Player*, for the appellants.

Patton & Urmy, for the appellee.

STONE, J. Appellee brought suit against the appellant, E. K. Alden, and one A. L. Price, upon a promissory note, of which the following is a copy:

"$1000. PUEBLO, COLORADO, January 5, 1882.

"One month after date, we jointly and severally promise to pay to the order of A. V. Carpenter one thousand dollars, without interest, at the Stockgrowers' National Bank. Value received.

"ALDEN AND PRICE.
"E. K. ALDEN.
"A. L. PRICE."

The separate answer of Alden denies that he, or any authorized person for him, executed said note, and denies that the said note was executed and delivered to plaintiff by the defendants. The separate answer of Price alleges that the note was given without any good or valuable consideration whatever. Defendant Alden filed an affidavit for continuance, on the ground of the absence of a certain witness by whom he expected to prove that said defendant alone "authorized said Price to sign a note for the indebtedness to plaintiff, on the express condition that the said note should contain a provision for its renewal at the option of defendants at maturity, and that this provision was afterwards omitted from the note when executed by said Price as aforesaid, without said Alden's consent."

The motion for continuance was argued by counsel and taken under advisement by the court, and afterwards, when the court was about to announce its decision granting the continuance, the plaintiff offered to admit that the witness if present would swear to what was stated in the affidavit it was expected to be proved by him, whereupon, against the objection of defendant Alden, the court allowed the offer of plaintiff and denied the continuance. This ruling of the court was excepted to and is made one of the grounds of error, counsel for appellants objecting that the offer of appellee was not made in apt time.

We see no error in this ruling of the court; such offer is a privilege of the party against whom the continuance is sought, and the allowance of the offer as made is within the discretion of the court, and we see no good reason why such discretion may not be exercised as well after the court has decided that the evidence is material as when the motion is first made. It certainly would be unreasonable to expect that a party would admit the assumed testimony while he was at the same time contesting the insufficiency of the grounds for continuance. It is only when he knows that the continuance will otherwise be granted that such adverse party has any reason for admitting the supposed testimony

sought. The ruling of the court below by the continuance was in accordance with provisions of section 158 of the civil code practice.

Another point made by counsel for defendants is, that the offer of plaintiff should have been to admit the truth of the supposed testimony, and not merely that the absent witness would swear to the same if present. For the same reason, error is assigned to the ruling of the court in allowing plaintiff on the trial to introduce evidence contradicting the admitted testimony of the absent witness. There was no error in this. Admitting the testimony of an absent witness in order to avoid a continuance of the cause is not to be taken as an admission of the truth of such testimony. Nor does such admission preclude the party admitting it from rebutting the same on the trial: Boggs v. The M. N. Co., 14 Cal. 358; Blakeman v. Vallejo, 15 Id. 639; O'Neil v. N. Y. & C. Co., 3 Nev. 141; State v. Geddis, 42 Iowa, 264.

The principal authority cited in support of this assignment is the case of Supervisors etc. v. M. & W. R. R. Co., 21 Ill. 368, where the court below had held that such admitted testimony was liable to contradiction, and the supreme court, in passing upon the question, say: "We think, on principle, this view of the court was correct, as all parol testimony should be open to contradiction and to rebuttal; but this court, having, at a very early day, Willis v. The People, 1 Scam. 402, established a different rule, * * * adhered to up to this time, we do not feel justified in disturbing it."

Another ground of error assigned is, that since the plaintiff filed no reply to the separate answer of Price averring want of consideration for the making of the note, this averment must be taken as admitted to be true, and that as such defense extended to both defendants, the plaintiff was not entitled to judgment.

Two questions arise upon this assignment: 1. Could the defendant Alden, who, by his own plea, had merely denied the execution of the note, claim the benefit of this separate plea of the defendant Price? 2. Was this plea one which required a reply?

As we think this last question must be answered in the negative, it is unnecessary to pass upon the first.

In *assumpsit* at common law, evidence of the want of consideration for the contract declared upon was admissible under the general issue, and hence there was no necessity for the defendants pleading it specially.

The practice, however, under which almost everything had come by degrees to be allowed as a defense under the general issue in actions of *assumpsit* and debt, was naturally changed by the rules of the English courts, known as the Hilary term rules, under the statute of 4 Wm. IV., for the purpose of preventing an abuse by which the plaintiff was frequently misled as to the special defense intended to be relied upon under the general issue. And for some such reason, probably, a statute of Illinois, under which decisions are found, required a want of consideration, as well as a failure in whole or in part of the consideration, in that class of contracts upon which the forms of action referred to will lie to be specially pleaded.

The statute of Colorado of 1868, on the subject of bonds, bills, and promissory notes, Gen. Laws, sec. 97, provides that in actions upon notes, bonds, bills, etc., "it shall be lawful for the defendant, against whom such action shall have been commenced by the obligee or payee, to plead such want of consideration, or that the consideration has wholly

or in part failed;" with certain provisions as to *bona fide* assignees. In New York, it is held that evidence of payment, release, accord and satisfaction, and such like defenses, is not admissible under a general denial, but must be specially pleaded, and this ruling is put upon the ground that the general denial under the code is wholly unlike the general issue at common law: See the leading case of McKyring v. Bull, 16 N. Y. 297.

In California, however, in a suit upon a promissory note, where the complaint averred that the note was unpaid, and that there was due upon it a specified sum, it has been held that evidence of payment is admissible under the general denial: Davanny v. Eggenhoff, 43 Cal. 395. This decision is based upon that in the case of Fish v. Caler, 21 Id. 71, where the defense of payment was pleaded specially, to which plea there was no replication, and upon the question whether the want of such replication admitted the plea, the court held that the plea amounted to a simple traverse of the averment in the complaint, that the note was due and unpaid, and hence needed no replication: See also McArdle v. McArdle, 12 Minn. 98.

The question respecting the office and scope of a general denial in code pleadings does not arise in the case before us, since there is no such thing as a general denial in the Colorado code, a specific denial being required to each and every allegation in the complaint intended to be controverted. It was therefore proper, under the requirements of the code, and in accordance with the provisions of the statute before referred to, respecting suits upon bonds, bills, and promissory notes, to plead the want of consideration by specific averment.

But although an affirmative averment that the note was made "without any good or valuable consideration whatever," can it be taken to amount to more in effect than a simple traverse of the complaint? True, it is not a denial of any specific allegation in the complaint, but the instrument in suit being one of a class which imports a legal consideration *prima facie*, it was not necessary to aver the consideration in the complaint.

The consideration of a contract is but the inducement for the obligation. It stands upon a different footing from a failure of consideration, which must always occur subsequent to the making of the contract, and which, if pleaded as a defense, may well be regarded as new matter in avoidance of the original cause of action, and calling for a reply. "If a cause of action has once accrued or existed, and has been satisfied or defeated by reason of something which has occurred subsequently, that is new matter, which must be pleaded in order to render it competent as evidence:" Evans v. Williams, 60 Barb. 346.

In actions upon contracts which do not import a consideration, where the consideration must therefore appear in the complaint, a denial in the answer of such averment forms a complete issue, and hence needs no reply, where the consideration is implied, as in this case; the implication stands in the place of the alleged consideration in the other class, and an answer averring want of consideration is in effect but a denial of this implication; hence no reason is perceived, upon principle, why under such denial as complete an issue is not found in one case as in the other.

In the one case the answer is a traverse of the expressed, and the other a traverse of the implied, consideration, and a replication would be merely "a traverse upon a traverse:" Stephen's Plead. 197. In the case of Goddard v. Fulton, 21 Cal. 430, in construing the nature

and effect of code pleadings in a case involving substantially the same question as the one before us, it was laid down that where the allegations of an answer, although stated in an affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute new matter within the meaning of the practice act; and therefore where an answer to a complaint in the usual form on a promissory note admitted the making of the note, but averred that it was made, not on account of any indebtedness between the parties, but for the purpose of being used as collateral security for a debt due a third person from the maker and payee jointly, that the joint debt was subsequently paid, and that the note, having thus become *functus officio*, should have been canceled, but through fraud was taken and held by the payee, and by him transferred to the plaintiff without consideration, it was held by the supreme court of that state that these allegations in the answer were not new matter which was admitted by a failure to reply; that their only effect was to deny that any obligation of the character stated in the complaint was ever created by the signing of the note, and thus to traverse its essential allegations. In other words, these averments of the answer were decreed to be a mere traverse of the implied consideration of the note sued upon.

We are aware that in the numerous discussions of similar vexed questions arising upon the construction of pleadings under the code system, conflicting views are held by text-writers and courts of different states, from some of which conclusions are found opposed to that reached by us upon the point under consideration, but upon both principle and authority we feel warranted in holding that the averment of the answer in question amounts to no more than a denial or traverse of the obligatory character of the note as set out and counted upon in the complaint, and which needed no reply in order to form an issue, and a failure to reply was therefore no admission of the truth of such denial.

It is also assigned for error, that pending the consideration of the court upon a motion made in the case, and which the court had taken under advisement until a subsequent day, said court allowed another case to be called up, heard the same, and rendered judgment therein. This was no sufficient cause for assignment of error. It was at most a mere irregularity, which could not have prejudiced the appellant in the least.

The trial in this case was had to the court without the intervention of a jury, while the *ad interim* proceedings in the other case, as appears from bill of exceptions and briefs of counsel, were for the purpose of decreeing a divorce between one George Crummy and Mary his wife; a matter which was probably treated as of no unusual importance, and the case possessing, we may suppose, some elements of urgency, since it occupied the attention of the court but a small part of one day. However much such irregularities in the mode and order of proceedings by a trial court are to be condemned when they operate to delay pending trials, or prejudice parties therein, they may at other times be inevitable, or even in furtherance of justice, but at all events are matters of procedure within the sound discretion of the court, and not assignable for error fatal to a judgment rendered, unless an abuse is shown, such as has prejudiced or deprived a party of some right affecting the fairness and verity of the judgment.

The foregoing are all the alleged errors that need be noticed.

Judgment affirmed.

MANVILLE *v.* PARKS ET AL.

Filed December 21, 1883.

A MINING PARTNERSHIP IS NOT RESTRICTED TO CASES WHERE THE MINE IS OWNED by the parties working it. Such partnership may exist as well where the parties have a joint interest and co-operation merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself.

THE RELATION OF MINING PARTNERSHIP BETWEEN THE DEFENDANTS, WITH RESPECT TO THE MINING OPERATIONS, for the carrying on of which the debt sued for was created, held to be established by the facts.

CO-WORKERS IN A MINING OPERATION, TO THE EXTENT OF THEIR INTEREST IN THE PROPERTY, are tenants in common, and in the working of the mine are considered as partners.

ONE MEMBER OF A MINING PARTNERSHIP HAS IMPLIED AUTHORITY TO BIND THE FIRM for articles purchased, essential to the carrying on of the business and the accomplishment of the purpose of the partners in working the mine, notwithstanding there is a secret agreement between such partners by which some of them were not to be liable for the expenses of the business. Such agreement could not affect the rights of those who dealt with the partnership without any notice of the limitation upon the individual liability of particular members.

DEFENSE OF SPECIAL PARTNERSHIP AND NOTICE THEREOF BY THE PLAINTIFF must be pleaded, or evidence thereof is inadmissible.

THE TAKING OF A DEFAULT AGAINST A DEFENDANT UPON FAILURE TO PLEAD IS A PRIVILEGE of the plaintiff, and if he chooses to waive it previous to trial it is not a matter of which the party in default can complain, nor can it affect the validity of the judgment. The only purpose of a default is to limit the time during which the defendant may file his answer, and such time never extends beyond a trial and judgment.

ERROR to the county court of Lake county. The opinion states the facts.

Louis Branson, for the plaintiff in error.

R. D. Thompson, *T. A. Dickson*, and *W. H. Nash*, for the defendants in error.

STONE, J. The plaintiff Manville sued the defendants to recover the price of certain goods sold and delivered, for which the complaint alleged a joint and several promise to pay on the part of defendants. Two of the defendants, Parks and Yates, answered on their own behalf, denying the sale and delivery to them, and denying any promise to pay by them or either of them.

The defendant Smith filed a separate answer, denying the sale and delivery, and denying a promise to pay by all or any of the defendants of the sum alleged to be due. The other two defendants, Bush and Henderson, filed no answer.

The testimony brought up by the record discloses the following facts: Bush proposed to Parks and Yates that they go into a mining operation together to make some money; Parks and Yates knew that one Brandon had a mine, one half interest in which could be secured to develop and purchase, whereby money could be made if it turned out well, and it was proposed that Parks and Yates make the necessary arrangement with Brandon for this purpose. Accordingly Parks and Yates made a preliminary arrangement with Brandon, and afterwards a meeting was had at the office of Parks and Yates, in Leadville, where were present Brandon, Parks, Yates, Bush, Smith, and Henderson, at which meeting an agreement was made, and a bond for a deed of a one half interest in the mine in question, called the Tip Top mine, was executed, giving the

defendants the privilege of working the mine for ninety days, with the option of purchase within that time.

The several interests which the parties were to have in the mine were agreed upon, and mentioned in the bond. A day or two afterwards this bond was taken up by agreement of the parties, and a deed in lieu thereof was executed by Brandon, which was deposited in escrow, conditioned like the bond, for payment of the agreed price of the half interest in the mine within ninety days, during which time the grantees were to have possession for the purpose of working and development, for taking out ore which should be found therein.

The grantees named in the deed were Bush, Smith, Henderson, and Parks and Yates, and the interest of each respectively was expressed as in the bond previously. This matter being arranged, it was proposed by Bush that Henderson take charge of the mine as manager or foreman, and prosecute work thereon, and no one objecting to such a proposition, it was assented to, and accordingly Henderson immediately employed men, purchased the necessary supplies of tools, etc., and prosecuted work on the mine for two or three months. Parks and Yates both testified that by an understanding between them and Bush they were to pay no money for their interest in the mine, nor for working the same, but that such interest was paid for by their legal services in procuring the contract with Brandon, drawing up the papers, etc., and that they had not paid nor been called on to pay a dollar in money for such interest or for working the mine.

Henderson testified that he was to be allowed five dollars per day for his services in superintending the work, and that these wages were to apply in payment of his share in the mine. He also testified that Smith furnished one hundred and twenty dollars towards the expenses of the work, and that Bush furnished all the rest of the money that was paid on account of such expenses.

In pursuance of his authority as manager or foreman of the working of the mine, Henderson purchased of the plaintiff certain supplies, consisting of tools, powder and fuse for blasting, etc., necessary for working the mine, which goods were so purchased by Henderson on behalf of the parties interested, and were sold by the plaintiff, as testified to by him, on the credit of said parties, Henderson informing him at the time of the purchase who the parties in interest were, and naming each of the defendents as parties in the enterprise.

Plaintiffs knew the defendants personally, and Bush was present with Henderson when some of the purchases were made in the store of plaintiff. Henderson testified that he knew nothing of any understanding that Parks and Yates were to pay no part of the expenses, as testified to by them, and the plaintiff had no knowledge or notice of such fact or condition until after the controversy arose respecting payment for the goods purchased from him by Henderson on behalf of all the defendants.

The county court, which tried the case without the intervention of a jury, found as follows: 1. That, from the evidence, it is not shown that the said defendants ever entered into a mining copartnership for the purpose of working, carrying on, or developing the said Tip Top mine; 2. That the defendants never gave the said Henderson any authority to purchase the said goods from the plaintiff in their names, and that in fact said Henderson never had any authority, in law or fact, to purchase said goods, or any part of the same, or to bind them in any way or

manner for the price and value of said goods, or any part of the same; and, 3. That the said defendants are entitled, under the facts proven and the law, to a judgment against the plaintiff for their costs in this action by them paid, laid out, and expended, and that the plaintiff take nothing by this action.

Judgment was rendered in accordance with those findings, and the principal question to be determined upon the errors assigned is a mixed question of law and fact: Were the findings and judgment in accordance with law, under the state of facts disclosed by the evidence?

The case was tried below and is argued here upon the theory that the liability of the defendants depends upon whether the relation existing between them, in respect to the mine and its working, constituted a partnership. In Charles v. Eschelman, 5 Col. 107, it is said that "a mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine," and the court proceeds then to point out some of the differences between a mining partnership and an ordinary trading partnership; but we apprehend that this language of the court, while applicable to the case before it, was not intended to restrict the definition of such partnership solely to cases where a mine is owned by the parties working it, for it is evident that a mining partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself. Indeed, in the cases where the question of mining partnership first arose in the English courts, it was doubted whether the joint or joint and several owners of mines who combined to realize and enjoy the profits of the estate, under a general system of management, should be considered other than joint tenants, or tenants in common of the land, not subject to the laws of partnership; while, on the other hand, a combination for the working of mines merely, or as a paramount object, and trading and dealing in the products, would constitute a partnership for such purpose. But these views were subsequently modified, so that for many years both English and American authorities have held that co-tenant owners, as well as lessees or parties having only equitable interests in the property, or holding under license to work, or develop, or where the owner furnishes the mine and another the capital and labor, under an agreement to share the profits of the mine jointly—in all such cases there may be a partnership for mining purposes.

For a concise review of rules and decisions upon this subject, see Rockwell on Mines, chapter 5, and the case of Skillman v. Lachman, 23 Cal. 200, and where, as also in the case of Charles v. Eschelman, 5 Col. 107, the distinguishing differences between a mining and ordinary partnership are pointed out. Whether a partnership exists, is a question of fact; what a partnership is, is a question of law: Parsons on Partnership, 7. We think the facts in this case fully establish the relation of partnership between the defendants with respect to the mining operations, for the carrying on of which the debt here sued for was contracted. It was one of those mining partnerships, so common in this country, formed for the purpose of carrying on mining operations in a particular adventure, combining some of the incidents of an ordinary partnership and some of the incidents of a tenancy in common. See Settember v. Putnam, 30 Cal. 493.

To the extent of their interest in the property they were tenants in common, and in the working of the mine they are to be considered as

partners: Dougherty v. Creary, 30 Cal. 300; Duryea v. Burt, 28 Id. 569; Skillman v. Lachman, 23 Id. 200.

Upon the contract with the owner of the mine, the defendants had an option of the property in which the respective interests of each were defined and understood, while the working of the mine was for their joint benefit and profit, establishing such a community of interest in the adventure as constitutes a mining partnership: Parsons on Partnership, 67; Duryea v. Burt, *supra*.

Mr. Parks himself testifies that the bond was to purchase the property, and contained a condition "that Mr. Bush and his party desired to purchase the property, and were purchasing it *to take out* mineral, and it run for sixty or ninety days or more *for working the property*, and pay money for the mine." Mr. Yates, in his testimony, says: "Mr. Bush inquired of Mr. Brandon about the working of the mine, and Brandon explained to Bush exactly how the mine ought to be worked; that there ought to be a tunnel run to connect with a certain shaft on the hill, and Bush and Brandon settled the thing finally."

Yates further stated, on cross-examination, that the matter of working the mine was perfectly understood; that Bush and Henderson made the office of Parks and Yates their headquarters; that he, Yates, frequently inquired of Henderson how the mine was getting along, and that he made such inquiries on account of his interest in the mine. We think this and the other testimony in the case upon this point fully establishes the fact that there was a joint interest and co-operation of all the defendants in the working of the mine, and such interest and co-operation constitutes a mining partnership. "A partnership may be implied from the acts of the parties as well as by express intent and agreement. It is not necessary that the intention of being partners should be expressed in words, for the law supplies the want of these words:" Parsons on Partnership, 87. And even although parties may not intend to become partners, yet if they enter into such business relations, and carry on such acts as, in law, constitute a partnership, they are no less partners than if they had fully intended to become such: Id. 86.

In seeking to establish a partnership relation, it is a rule of evidence that less strictness of proof is required where partners are sued than where they themselves sue as such: Greenl. Ev., sec. 483.

And while the members of these mining partnerships may not possess implied authority to bind the company or firm by a promissory note, or for money borrowed to carry on the business, yet as an incident of such partnership they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines: Skillman v. Lachman, *supra*.

In this case, the articles purchased of the plaintiff were essential to the carrying on of the business and the accomplishment of the purpose of defendants in working the mine; and the debt being created in the necessary and usual course of the business, and within the scope of the partnership adventure, the individual member who made the purchase had lawful authority to contract the debt and to bind his copartners thereby.

The general principle which lies at the foundation of a partner's liability is, "that every partner has full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the

firm, in the same manner and to the same extent as if he held full powers of attorney from all the members:" Parsons on Partnership, 95.

This rule rests upon the doctrine of principal and agent, and indeed, it may be said that partnerships are but modified forms of the relation of principal and agent. Aside from the differences which exist between a mining partnership and an ordinary commercial partnership, none of which are involved in this case, the principles and rules of law applicable to the latter also govern the former. Hence the defendant Henderson did not require special or express authority from the other partners in order to bind them in the purchase of the goods from the plaintiff. His authority, implied by the law of agency arising out of the partnership relation between the defendants, was ample. True, this authority of each partner to bind the others is an implied one, and as between the partners themselves there may exist by express agreement a limitation upon the general implied authority, but third persons, dealing with the firm without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business: Parsons on Partnership, 95.

Hence it is no defense in this case that it was agreed between the partners, if such be the fact, that the defendants Parks and Yates were not to be chargeable with the expenses of the business beyond their contribution of legal services as claimed; for however binding this might operate upon the partners *inter sese*, it could not affect the plaintiff, who dealt with them without any notice of instruction upon the individual liability of particular members: Parsons on Partnership, 94, 130; Wood & Oliver v. Vallette et als., 7 Ohio St. 172; Burgan v. Lyell et al., 2 Mich. 102; Lyell & Teller v. Sanborn, Id. 109; Fisher v. Bowles, 20 Ill. 396; Greenl. Ev., sec. 481, and cases cited.

As is said in Winship v. Bank of U. S., 5 Pet. 561: "It is usual to buy and sell on credit, and if this be so, the partner who purchases on credit in the name of the firm must bind the firm. This is general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world with whom the company is in perpetual intercourse can not, individually, examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct the usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law."

None of the defendants in their answers set up a special partnership, or averred any limitation of liability as partners, and hence evidence of any such restriction was inadmissible. To render such evidence admissible, it was essential to plead such limitation, and also aver notice thereof to the plaintiff previous to purchase of the goods: Greenl. Ev., sec. 485; Lomme v. Kintzing, 1 Mont. 295. Upon the uncontradicted evidence in the case, both the partnership of all the defendants and their liability as such to the plaintiff for the amount claimed were established

as conclusions of law, and the plaintiff was entitled to the judgment demanded.

Another question presented relates to the subject of default. It is argued by counsel for defendants that no judgment could have been properly rendered against those defendants who failed to answer, for the reason that a default was not first taken against them for failure to answer. We do not regard this as a valid objection. The default could as well be recited and entered at the time of the rendition of final judgment as before. The taking of a default against a defendant upon failure to plead is a privilege of the plaintiff, and if he chooses to waive it previous to trial, it is not a matter of which the party in default can complain. The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment: Drake v. Davenick, 45 Cal. 455.

There is no difference in principle between a final judgment against a defendant in default for failure to answer, and a judgment against a defendant *nil dicit*. And it has been held that when a final judgment has been rendered against one who was in default, the taking of a default, "if it was essential to the orderly conduct of the proceedings," will be presumed when the contrary does not appear: Miller v. Miller, 33 Cal. 353.

Under common-law practice, the summons first issued, and the declaration was not filed until the first day of the ensuing term, or under our former practice, ten days before the term, and thereafter the defendant answered only when he was ruled so to do by order of the court. Under the code practice the conditions of the default are prescribed by statute. If the plaintiff fails to take a default before trial, this is a favor to defendant of which he can not complain nor reap advantage. The validity of a judgment, upon trial had, can not be made to rest upon a withholding by the plaintiff of a favor to defendant or a waiver of a statutory privilege.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

HUGHES *v.* CUMMINGS ET AL.

Filed January 4, 1884.

JURISDICTION OVER THE PERSONS AS WELL AS SUBJECT-MATTER IN CONTROVERSY WILL ALWAYS BE PRESUMED in support of the judgments and orders of courts of general jurisdiction, when the same are questioned in collateral actions, and the record shows nothing to the contrary, although such jurisdiction does not affirmatively appear.

VALIDITY OF AN ORDER MADE BY THE COUNTY JUDGE SETTING ASIDE A JUDGMENT OF DISMISSAL, and reinstating a cause on the docket of the county court, can not be questioned in a collateral action, although the record fails to show that the requisite notice was given to the judgment creditor, or his assignee if the judgment has been assigned. If erroneous, the error can only be corrected in a direct proceeding.

THE JURISDICTION OF THE COUNTY COURT OVER ITS JUDGMENTS IS NOT LOST upon filing and recording a transcript of the judgment of the justice of the peace in the office of the clerk of the district court. The object of such filing and recording is merely for the creation of a lien on the real property of the judgment debtor.

ERROR to the district court of Clear Creek county. The opinion states the facts.

C. C. Post and *W. T. Hughes*, for the plaintiff in error.

R. S. Morrison, for the defendants in error.

By COURT. The controlling question presented by this record is whether the district court had the power, in a collateral proceeding, to pass upon the validity of an order made by the county judge, reinstating a certain cause upon the docket of the county court. If the district court did not possess such power, it is immaterial, so far as the present action is concerned, whether the action of the county judge was erroneous or otherwise. For if erroneous, the error can only be corrected in a direct proceeding.

This is an action upon an appeal bond, executed by the defendants in error to perfect an appeal from a judgment of a justice of the peace to the county court. One Henry B. Beighley recovered a judgment before a magistrate, for the sum of two hundred dollars and costs of suit, against the defendant in error, Owen Cummings. From this judgment Cummings took an appeal to the county court, but failing to prosecute his appeal, it was dismissed for want of prosecution, and for failure of the appellant to comply with a rule entered against him by the county court, requiring payment of certain costs.

The complaint in the present action avers that said judgment was assigned by the plaintiff, Beighley, to Hughes, the plaintiff in error, on the same day on which the appeal was dismissed. The defendants in error set out in their answer, by way of abatement of this action upon the appeal bond, an order of the county judge reinstating the appeal upon the docket of the county court, alleging in this connection that there was no final judgment in the cause so appealed, but that the same is still pending and undetermined in said county court. Plaintiff in error replied, averring, among other matters, that he is and has been the sole and exclusive owner of the judgment from the day of the dismissal of the appeal, and that neither he nor said Beighley had notice of the institution of proceedings to reinstate the appeal. To this replication the district court sustained a demurrer, and gave judgment that the defendants go without day.

This being a collateral action, the ruling of the district court was correct, unless it appears from the records of the county court that the latter court acted without jurisdiction in reinstating the appeal. If the county court can be said to have acted within its jurisdiction, the district court had no power to either revise or nullify its action. The order was made by the county judge at chambers, seventeen days after the adjournment of the term at which the appeal was dismissed. Statutory authority for such an order is found in section 75 of the code of civil procedure (1877), which provides, among other things, that "the court may * * * upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding, taken against him through mistake, inadvertence, surprise, or excusable neglect, and when for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term."

The rule applicable to the judgments and orders of courts of general jurisdiction is stated to be, that in collateral actions, when the record discloses nothing to the contrary, jurisdiction over the person as well as the subject-matter will always be presumed: Wells on the Jurisdiction of Courts, secs. 32, 37; Baker v. Champlin, 12 Iowa, 204; Housh v. The People, 66 Ill. 181; Wenner v. Thornton, 98 Ill. 168.

In the leading case of Peacock v. Bell, 1 Saund. 74, the rule is thus stated: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged."

This general rule, as qualified by the supreme court of the United States in Galpin v. Page, 18 Wall. 365, is, "that a superior court of general jurisdiction, proceeding within the scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record service of process upon the defendant, or his appearance in the action. But when the former exists, the latter will be presumed." This rule has been held applicable to the county courts of this state by former decisions of this court: Martin v. Force, 3 Col. 199; Gomer v. Chaffee, 5 Id. 383.

The order of the county judge, reinstating the appeal, is set out in the record before us, and while it does not show affirmatively that the requisite notice was given, we are not advised that the records of that court contain anything to the contrary. The county court clearly had jurisdiction of the subject-matter, and in a collateral proceeding it must be presumed to have had jurisdiction of the parties also.

The position of the plaintiff in error, based upon decision of the supreme court of California on a statute essentially different from our own, that jurisdiction to set aside a judgment or to reinstate a cause ceases at the close of the term, can not be entertained without willfully ignoring the statute above cited. Equally untenable is the proposition that the county court lost jurisdiction over its judgment upon the filing and recording a transcript of the judgment rendered by the justice of the peace in the office of the clerk of the district court. The statute which authorizes such transcript to be so filed and recorded specifies when and for what purpose the same may be done, viz., when the defendant has not sufficient personal property to satisfy the judgment, and the plaintiff desires to have the same levied upon real property. It is for this purpose that a judgment of a justice of the peace is given the effect of a judgment of the district court.

In respect to the point raised by the plaintiff in error, that when a judgment has been assigned it can not be legally vacated without notice to the assignee, it is only necessary to say the point is not available in the present action. The jurisdiction of the county court must be tested by its own record in collateral actions, and can not be impeached by allegation merely. It does not even appear that there was any record in

said court of the assignment of the judgment, nor does it appear that the court had any knowledge of the assignment. Whatever relief the plaintiff in error may be entitled to receive must be sought in a direct proceeding to review the rulings and judgment of the county court.

Judgment affirmed.

DENVER, WESTERN & PACIFIC R'Y CO. *v.* CHURCH.

Filed January 4, 1884.

THE JURISDICTION OF THE COUNTY COURT TO HEAR AND DETERMINE A PROCEEDING FOR THE CONDEMNATION OF LAND for the use of a railroad is primarily determined by the allegations of the petition. When, however, the award of the jury shows that the amount of compensation to be paid to the owner exceeds the amount to which the jurisdiction of such court is limited, the apparent jurisdiction thereof no longer exists, and the court should dismiss such proceeding at the cost of the petitioner. Nor is jurisdiction regained by the action of the court in setting aside the verdict as a prelude to the dismissal.

APPEAL from a judgment of the county court of Jefferson county. The opinion states the facts.

Charles & Dillon, for the appellant.

G. B. Reed, for the appellee.

STONE, J. The appellant filed its petition in the county court of Jefferson county, praying a condemnation for right of way for its road through certain lands of the appellee, under the provisions of the statute in that behalf. In order to bring the proceedings within the limited jurisdiction of the court, the petition contained the necessary averment that the amount of compensation and damages to be ascertained for the right of way aforesaid would not exceed the sum of two thousand dollars. A jury of freeholders, having been demanded by the appellee, was impaneled and sworn, and said jury, having examined the premises, returned a finding and verdict into court that the value of the land taken by the petitioner was four hundred and forty-four dollars and seven and one half cents, and that the damage to the residue of the land was two thousand seven hundred dollars, amounting altogether to three thousand one hundred and forty-four dollars and seven and one half cents, and that the benefit to the property by reason of the construction of said road was nothing. Thereupon appellant moved that the verdict be set aside and a new trial granted. After argument and consideration of the motion, the court set aside the verdict, refused a new trial, and dismissed the proceedings at the cost of the petitioner. From this judgment the petitioner appealed to this court, and assigned for error: first, the refusal of proper testimony; second, the admission of improper testimony; third, the overruling the motion for new trial; and fourth, the dismissal of the cause and the judgment for costs against the appellant. The errors relating to the testimony we have means of examining into, since no testimony whatever is presented in the abstract of the record, nor any exceptions thereto, nor rulings, nor instructions of the court thereon; nor is any question arising upon these assignments discussed in the briefs filed.

The third and fourth grounds of error may be considered together. It is insisted by counsel for appellant that the averments of the petition filed in the proceedings presented a case within the jurisdiction of

the court, and that "the jurisdiction or power of the court to hear and determine a cause is invoked by the allegations of the petition, complaint, or claim filed in the cause, and that it is the duty of the court to hear and finally determine such cause in the exercise of the jurisdiction so acquired." The first part of this proposition is undoubtedly true, but the latter part is correct only as a general rule, and an exception to such rule is necessarily created where, pending the proceedings prior to the final judgment, some fact or matter arises judicially which discloses that the apparent jurisdiction of the court up to that time no longer exists. This is illustrated in actions in justices' courts relating to real estate, where, when it is made to appear, pending the proceeding, that the title or boundaries are in dispute, or that the value of the property in controversy is in excess of the jurisdiction of the court, the proceedings are by statutory provision suspended, and the cause certified to the district court. Or take an action in replevin in a justice's or county court: the plaintiff may in his complaint allege the value of the property to be within the jurisdiction of such court, yet if in the course of the proceedings it should appear that the actual value of the property, at the time the action was brought, was greater than the amount of which such court had jurisdiction, this fact would operate to divest the court of the apparent jurisdiction of the subject-matter, which up to that stage of the case had been rightfully assumed.

Now in these statutory proceedings for condemnation of land for right of way or other authorized purposes, while the value of the land to be taken can be estimated with approximate certainty before the commencement of the proceeding, the damages which are to be awarded, if found to accrue, are likely to be very differently estimated by the parties to the proceeding, and can be actually determined only by judicial ascertainment; this, together with the compensation for the land taken, being one of the main objects of the proceeding. In these cases the nominal plaintiff is in a certain sense the real defendant, who goes into court to ask for an ascertainment and adjudication of how much he shall pay to the nominal defendant. And in such cases the plaintiff, if he brings his proceedings in a court of limited jurisdiction, takes the risk of an award which will oust the court of jurisdiction to proceed further than such ascertainment.

It is contended by counsel for appellant, in the argument filed, that since the petition when filed disclosed a case within the jurisdiction of the court, it was error to dismiss the case "upon extraneous matters outside the record," and to avoid the effect of the verdict, which certainly became a part of the record as soon as entered upon the rendition thereof; counsel further argue that "upon setting aside the verdict, the jurisdiction of the court became perfect and complete, as shown by the record, and it then became the duty of the court, in the exercise of the jurisdiction averred in the petition, to grant a new trial and hear and determine the cause." This contention of counsel, while plausible as thus stated, we think is manifestly unsound.

As appears by the record of the ruling of the court upon the motion to set aside the verdict, and for new trial, and the judgment of dismissal, the verdict in this case was not set aside because it was a result of passion or prejudice of jurors, nor because the amount of damages and compensation awarded was larger than warranted by the evidence; on the contrary, the record expressly shows that the court regarded the verdict

as a reasonable determination of the amount to be awarded, and dismissed the action because the excess of jurisdiction was thereby disclosed, and the setting aside the verdict, for whatever reason it was done, as a prelude to the dismissal, did not avoid the jurisdictional fact disclosed by the recorded verdict.

While this proceeding is a statutory one, to afford a provisional remedy for a special purpose the same principles must apply to it which are applicable to ordinary actions where the court has judicially ascertained that it is without jurisdiction of the subject-matter of the action. In such case, whether there is disclosed a want of such jurisdiction *ab initio*, or whether the matter made to appear operates as a divestiture of a jurisdiction rightfully acquired or assumed in the beginning, it is the duty of the court to dismiss the action.

The case of the Louisville, N. A. & Chicago R. R. Co. v. Johnson, 67 Ind. 546, is analogous in principle. Suit was brought to recover the value of an animal killed by the cars of the railway company under a statute which provided that such actions should be brought in justices' courts unless the value of the animal exceeded fifty dollars, in which case they should be brought in the court of common pleas, or in the circuit court. The action was commenced in the circuit court, upon a complaint alleging the value of the animal to be sixty dollars. The jury returned a verdict of forty-seven dollars as the fair market value of the animal killed. A motion to dismiss was overruled, and upon appeal to the supreme court it was held that the value of the animal, as a criterion of the jurisdiction of the court, was to be determined, not by the value alleged in the complaint upon which jurisdiction properly attached in the first instance, but by the real value as found by the court or jury upon trial; and that, therefore, when upon the trial the fact was judicially shown by the verdict that the case was not within the jurisdiction of the court, there was no authority to proceed further therein, but that the court should have dismissed it.

In the case at bar, the costs, upon dismissal, were properly taxed to the petitioner company, which brought the action in the county court at its own risk, when it might have been brought and determined in the district court which has concurrent and unlimited jurisdiction in such cases. There being no error in the judgment appealed from, it will be affirmed.

Judgment affirmed.

SUPREME COURT OF NEW MEXICO.

BOREL ET AL. *v.* MEAD ET AL.

Filed January, 1884.

EQUITY WILL DECREE THE SPECIFIC ENFORCEMENT OF A WRITTEN AGREEMENT FOR THE SALE OF LAND, in the absence of fraud, undue influence, or want of actual consideration, notwithstanding such agreement provides for the payment of a penalty upon the breach of the condition thereof.

WRITTEN AGREEMENT UNDER SEAL FOR THE SALE OF LAND IMPORTS A VALUABLE CONSIDERATION IN EQUITY as well as at law; and in a suit for the specific performance thereof, the want of consideration can not be raised by demurrer, although it may be by answer.

SPECIFIC PERFORMANCE OF SUCH AGREEMENT MAY BE DECREED AGAINST THE DEFENDANT WHO HAS SIGNED the same, although it has not been signed by the plaintiff.

ERROR to the third judicial district court for Grant county. The opinions state the facts.

T. F. Conway, for the plaintiffs in error.

John D. Bail, for the defendants in error.

AXTELL, C. J. This is a case of an option, or what is sometimes called bonding a mine. The owners of the mine, defendants herein, desiring to sell their mine, entered into a written agreement, in form of a penal bond, with plaintiffs, that upon payment by them to defendants at a future day of a stipulated sum of money, defendants would convey to plaintiffs their mine. This agreement is in writing, is certain and fair in all its parts, is capable of being performed, and is under defendants' hand and seal. Plaintiffs signed no agreement. Upon the day stipulated in said agreement, plaintiffs tendered the sum of money agreed upon and demanded the mine; defendants declined the money and refused to comply with their agreement. Plaintiffs bring this suit in equity, and ask the court to enforce the contract. Defendants demur to plaintiffs' bill for want of equity, and set up as specific ground of demurrer that the bill does not show upon its face what the consideration was, if any, that defendants had, or were to receive, for entering into the contract to convey; also, that there was no mutuality, that the contract was unilateral, that defendants alone were bound. The court sustained the demurrer and plaintiffs appealed.

To the first point it is sufficient to say, the contract, being under seal, imports a consideration; to sustain the demurrer on the ground that there was not a valuable consideration was not only assuming the fact, but also depriving the plaintiffs of an opportunity of proving a consideration. The contract being under seal, we must presume that there was a valuable consideration till the contrary is shown. The court in sustaining the demurrer prevented the plaintiffs from doing this.

As to the second point, the condition of mutuality is in general sufficiently satisfied if there be any consideration on the one side as well as the other. It is also held that a court of equity, in actions for the specific performance of optional contracts and covenants to lease and convey lands, will enforce the covenant although the remedy is not mutual, provided it is shown to have been upon a fair consideration. So it is also held not to be necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it; if the agreement is certain, fair, and just in all its parts, and signed by the

party sought to be charged, that is sufficie objection to its enforcement. The very na one party has property to sell, the othe make sales. The skill and ability of the induces the other to bond the mine. If t respect, and neither party was deceived i objection to enforcing it. There is certai port it if we take the facts as stated in the demurrer does. See Wait's Actions and authorities there cited.

We are of opinion that the court bel murrer, and the case is remanded for furt this opinion.

BELL, A. J., concurring. This is an a court below, sustaining a demurrer of th for specific performance. The suit is formance of what is claimed in the bill t interest in a mining claim, situated in the the county of Grant, executed by one Will plaintiffs. The instrument is one that is c The defendants demurred to the bill, and demurrer: 1. That the said bill contains this court can grant any decree, or give c any relief against defendants, or either of facts stated in the said bill, the complaina complete remedy at law for their allege 3. The bond, memoranda in writing, con to in said bill, and upon which the said without consideration or mutuality betwe posed no valid, binding, or equitable obli the court will enforce.

We shall not consider the first ground disposed of by the reasoning applicable t we proceed to consider. We do not thi cause for demurrer is well founded. We have a plain, adequate, and complete re grievance.

In considering the question, we are cal sible, what the real intent of the parties of the instrument in question. It seems time the intent of the parties was that th entitled, upon the payment of the sum of dollars, within the time limited, to the sufficient conveyance of a one third int to in the instrument. This intent is, from an inspection of the instrument it proof of fraud, undue influence, or want strument is binding and valid, and can b of equity. That a court of equity has p ance of such an instrument, is well settle

In the case of Ensign v. Kellogg et al., are satisfied that no subject is more pr

chancery in decreeing specific performance than a contract for the sale of real estate; for what is agreed to be done ought in conscience to be done. Nor is the remedy at law for damages complete or adequate, for the thing contracted for is wanted, and the value in money may often be unsatisfactory compensation." That case was one brought upon a bond in a penal sum conditioned for the conveyance of certain real estate upon the payment of a stipulated price. In that case, a part of the consideration was paid upon the making of the bond, and the remainder on the last day named in the condition; and in the case at bar, the consideration for the mine was tendered within the time limited by the condition of the bond, and is to be regarded in law as paid when tendered.

Upon this subject Judge Story says: "What these courts seek to be satisfied of is, that the transaction in substance amounts to, and is intended to be, a binding agreement for a specific object, whatever may be the form or character of the instrument. Thus, if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the payment of the penalty, although it has assumed the form of a condition only. Courts of equity, in all cases of this sort, look to the substance of the transaction and the primary object of the parties; and where that requires a specific performance, they will treat the penalty as a mere security for its due performance and attainment:" Story's Eq. Jur., sec. 715, citing numerous authorities in support.

In the case of Dooley v. Watson, 1 Gray, 414, Chief Justice Shaw says: "The promise of the defendant, to pay plaintiff one hundred dollars, if the defendant should fail to perform his agreement to convey the land, was a mere security for the performance of that agreement. Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out."

It seems to us, upon principle and upon careful examination of the authorities cited, that in the suit at bar it was clearly the intention of the parties, that the plaintiff's assignor should have a right to a conveyance of the property, and should not be relegated to his action at law upon the bond for damages; and that that was the principal object of the parties, and should be carried out.

We come now to consider the third ground of demurrer, which is, that the bond, memoranda in writing, contract, and agreements referred to in the bill are without consideration or mutuality between the parties. We shall have to treat the questions of consideration and mutuality separately. And first, as to consideration. The instrument itself, which is the basis of the suit, is in the form of a bond. It is under seal. Can it be urged upon demurrer that such an instrument is without consideration? We think not. The seal imports consideration. It imports valuable consideration. In a case at law, the presumption of consideration is so strong that the defendant would be estopped from denying it, or offering proof tending to impeach it.

In a case in equity, this presumption of consideration imported by the seal still remains; and while in such suit the court will permit a party to rebut that presumption by proof of the facts, yet until the presump-

tion is met by an answer alleging the actual want of consideration, it must stand, and a party will not be permitted to say of an instrument executed by him, and under seal, that no consideration is shown upon its face. We are therefore of opinion that the question of want of consideration is not properly before us on the demurrer, and for that reason the demurrer must be overruled.

We now come to the question of the alleged want of mutuality between the parties. This is a question of some difficulty, and its meaning appears to have been variously understood by the courts.

Parsons in his work on Contracts has collated the authorities in a note appended to page 409 of vol. 3, of the sixth edition. Reference to some of those cases is pertinent here. "The meaning of the rule of equity requiring that contracts must be mutual is not very clear; nor is it easy to make a classification of the cases in which it has been announced as the ground of decision. By mutuality seems sometimes to be intended mutuality of *remedy*, in other cases mutuality of *agreement;* and in neither sense is the rule of universal application: South Eastern Railway Co. v. Knott, 10 Hare, 122, 17 Eng. L. & Eq.

"It is now perfectly established that a purchaser may compel a conveyance, although the vendor could not have enforced specific peformance, because of some infirmity in the title: Southerland v. Briggs, 1 Hare, 34.

"And in cases within the statute of frauds, it is now clear (although a contrary opinion upon this point was expressed by Lord Redesdale) that the circumstance that the defendant only signed the agreement so that he could not have compelled the plaintiff to perform it constitutes no good ground of objection to the plaintiff's suit: Backhouse v. Mohun, 3 Swans. 434, note, and other authorities cited."

In one case cited in the note in question, it was held that the plaintiffs filing a bill for specific performance is a sufficient assent to remove an objection of a want of mutuality: Goodman v. Lightbody, Daniel, 153; see Field v. Borland, Dr. & War. 46.

The case of Stansberry v. Fringer, 11 Gill & J. 149, strongly supports the views above expressed. There it was agreed between A. and B. that A. should hold certain lands of B. for a term of years, paying taxes and making certain improvements; and it was further agreed that A. might at any time during the term, at his pleasure, become the purchaser of the lands, at a stipulated price, and A. having tendered the price, filed a bill to compel B. to make the conveyance. It was objected that the contract was not mutual, because there was no obligation to purchase upon the plaintiff. But the court held that by occupying the land, paying taxes, and making the stipulated improvements, he had given a consideration for his privilege to purchase the land, and specific performance was decreed.

In the case of the Western Railroad v. Babcock, 6 Met. 346, it appears that the owner of a certain parcel of land entered into an agreement under seal with the railroad company, by which he granted them the privilege of running their road through his land, upon payment of a certain compensation for the soil appropriated and the damage occasioned. In the bill filed by the company for a specific performance, it was contended that the contract wanted mutuality, inasmuch as the plaintiffs were under no obligation on their part to take the lands or pay the price. But the objection was overruled.

From a portion of the opinion of Chief Justice Shaw in this case, it

can be inferred that it was held that a positive agreement existed on the plaintiff's part to act under the contract, where, in the event of his acting under it, there will be a certain obligation upon him to pay a consideration. In other words, that the license to act is sufficiently supported by the promise to pay for using the license, in case he does use it. The circumstance that a substantial consideration did not need to be shown *at law*, the contract being under seal, was also adverted to.

The doctrine of the common law, that mutuality is only necessary where the want of mutuality would leave one party without a valid or available consideration for his promise, seems to express all the mutuality in the *agreement* of the parties, as distinguished from reciprocity of remedy that equity requires as a necessary condition to a specific performance.

"It is the general rule, that where the obligation to perform rests upon one of the parties only, equity will enforce the contract with caution:" Vandoren v. Robinson, 1 C. E. Green, 256. But in that same case, the chancellor held, that "the principle does not apply when the contract, *by its terms*, gives to one party a right to the performance which it does not give to the other; as where a lease contains a covenant on the part of the lessor for a renewal of the lease at the expiration of the term. It is now settled that such a covenant may be enforced against the lessor, though there is no reciprocal obligation on the part of the lessee to accept the renewal: Citing Fry on Specific Performance, sec. 948." Such a contract, being founded on good consideration, can and should be enforced, when it was evidently the intent of the parties, as in this case, to give to the obligee the right to take the property, upon the payment of the stipulated price.

The question of the consideration we have already passed upon.

In the case of Young v. Richards, 8 C. E. Green, the following paper was held to be a contract which could be specifically enforced:

"Received from Mrs. Catherine Green one hundred (100) dollars, on account of payment on house No. 71 Ferry street. Due on account of rent one hundred and twenty (120) dollars.

"(Signed) THOMAS E. RICHARDS."

Indorsed on the foregoing receipt was the following:

"This is to show that I agree to sell to Mrs. Captain Green the house and lot, No. 71 Ferry street, for the sum of twenty-five hundred (2,500) dollars; and that when there is five hundred (500) dollars paid, and the back rent, I will give her a deed, and take a mortgage for two thousand (2,000) dollars. (Signed) T. E. RICHARDS."

The chancellor, in this case, says: "This is a contract certain and definite as to the subject-matter, the price, and the condition precedent. * * * This agreement does not come within the decisions which hold that an agreement to entitle to specific performance must be mutual, and such that the defendant could have had that remedy. These decisions themselves are controverted and conflicting." But they do not apply to a case where the complainant has paid a part or the whole of the consideration, *or a consideration for the defendant signing the agreement;* or to a case of a lease for years with the option of purchasing during the term; or to cases where the contract by its terms gives one party a right to the performance, which it does not give to the other: Citing Vandoren v. Robinson, *supra*. In such cases specific performance is constantly decreed. In a well-considered case in the same state (New

Jersey), Chancellor Pennington says: "In
upon unilateral contract, the complainan
paper [an instrument under seal to conve
tended that he should; but the papers c
which the evidence shows he faithfully pe
party signs an agreement to do certain thi
performed on his part conditions which ar
being performed, upon requiring the party
fulfill his part, he says, 'I am not bound,
agreement.' I can see no propriety in su
was mutuality in the very terms of the a
N. J. Eq. 229."

Optional contracts are not favored in
consideration and free from objection in
Pimer v. Sharp, 23 N. J. Eq. 274. Any
make such unilateral contracts binding in
see also Reynolds v. O'Neil, 11 Id. 223. I
cited, and upon principle, we see no rea
good consideration bind himself to do a t
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jection to it, we think that it should be en
it does not appear but that there was a per
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I have dwelt thus at length upon the sul
ality, because my learned associate, in his
principally bases the result arrived at the
there was no promise to pay or actual p
was no mutuality and no completed contra
That opinion seems to have been based u
in the case of Smith and Downs v. Reynold
case, which was one brought upon a simila
us, but where the question was before hin
swer setting forth want of consideration
seems to have proceeded upon the assum
maintained upon an instrument unless the

He cites no authorities, but says: "Was
be bound to sell, while the other party was
not pretend to have considered the law w
final hearing and upon a more extended e
his views might be modified. After all, th
was whether or not an answer to an action
an instrument similar in form to the one
sideration was a good answer, and he hol
opinion that he was right, but this case
that question.

The case of Gordon v. Darnell, 5 Col. 3
court below as upholding the doctrine that
sued upon is void for want of mutuality.
case does not sustain the position.

The court in that case says, in regard t
character to the one before us: "Until ac
performance of some act equivalent to an

terms mentioned therein, it is *nudum pactum*. Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money or performance of its conditions, whatever they may be, within the time stated and before the seller withdraws the offer to sell." It therefore holds that such a contract becomes binding, at least if within the time limited the party desiring to purchase makes tender of the purchase money.

We simply go further, and say that such a contract, if based upon good considerations, is binding upon the obligor until the time limited by its terms has expired and there has been a failure on the part of the obligee to avail himself of the privilege granted.

It follows from the views here expressed, that the judgment sustaining the demurrer below should be reversed.

BRISTOL, A. J., dissenting. This case is here on a writ of error to the district court for the third district and county of Grant. Suit was instituted in the court below for the specific performance of what is claimed in the bill—a contract to convey a certain mining claim. A demurrer was interposed to the sufficiency of the bill, which demurrer was sustained by the court below, and the suit dismissed without prejudice. The case having been argued and submitted before this court, and a majority thereof having reversed the judgment of the lower court, I hereby dissent therefrom for the reasons specified in this opinion. In addition to the allegations of the bill in reference to the contract to convey, there is a reference therein to what the complainants designate as a memorandum in writing of the contract sought to be performed, a copy of which is attached to the bill, and made a part thereof. This writing is as follows:

"Know all men by these presents, that I, William Mead, of Hillsborough, Doña Ana county, New Mexico, am hereby held and firmly bound unto Miller & Teal of Lake Valley, Socorro county, New Mexico, in the sum of ten thousand (10,000) dollars, lawful money of the United States of America, to be paid to the said Miller & Teal, their executors, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents. Sealed with my seal and dated the fifteenth day of March, one thousand eight hundred and eighty-one.

"The condition of the above obligation is such, that if the above-bounden obligor shall on the fifteenth day of June, one thousand eight hundred and eighty-one, make, execute, and deliver unto the said Miller & Teal, or to their assigns, provided that said Miller & Teal, their heirs or assigns, shall on or before that day have paid to the said obligor the sum of three thousand and three hundred (3,300) dollars, lawful money of the United States of America, the price by said parties agreed to be paid therefor, a good and sufficient deed for conveying and assuring to the said Miller & Teal, their heirs or assigns, free from all incumbrances, all his right, title, and interest, estate, claim, and demand, both in law and equity, as well in possession as in expectancy, of, in, or to that certain portion, claim, and mining right, title, or property on a certain vein or lode of rock containing precious metals of gold, silver, and other minerals, and situated in the Lake Valley mining district, county of Grant, Doña Ana, or Socorro, and territory of New Mexico, and described as follows, to wit:

"All say one third (⅓) interest in the Columbia mine of the Lake

Valley mining district of Grant, or Socorro, Mexico; then this obligation to be void, othe and virtue.

"Signed, sealed, and delivered in the pre

The foregoing instrument in writing doe acknowledged by Mr. Mead, the obligor, ye filed for record and recorded in the proba 1881.

This instrument in writing is something m dum, as styled in the bill. It must be taken ing the actual terms of the transaction bet necessarily control the allegations of the bi bill that are outside of or inconsistent with instrument must be disregarded.

There is no latent ambiguity about this wr dation for parol testimony to explain its m embodies the entire transaction. And what import? As I understand it, it is simply a part, without consideration either received o months option to buy a mining claim for thr dollars. He not having received that sum, or any promise to pay it, or any part of it, in co option bond, it could not therefore becom something had been paid and accepted or accepted on Mr. Mead's part as a consideratic was at liberty to withdraw the option. An c as binding as any other contract, but a valua essary to the validity of this kind of contrac contract of option to buy a piece of proper contract of purchase of the same property.

The usual consideration of an option co money, or some designated property of value in case the proposed purchaser does not conc erty constituting the subject of the option. any show of reason that the obligees named in bound to purchase this mining property for t whatever?

Is it equitable that these obligees shall s the exclusive privilege of purchasing valuab tied up and out of market for months, and purchasing it? After placing themselves i reasonably ask a court of equity to enforce a tained after the obligor has refused to accept of bond, called mining bonds, are quite well eral mining states and territories.

They are of comparatively recent origin. the interest of mining speculators, whereby t due advantage over the unwary prospector a for such time as they may discover that the p value than supposed, when they will purchas to value, they may refuse either to purchase option—a scheme, I apprehend, that can not favor of a court of equity.

The complainants can not rightfully claim as innocent purchasers without notice. This option bond was assigned to them on the twenty-first day of May, 1881, by a brief indorsement on the bond. But before this assignment, and less than a month after executing the bond, Mead and his wife, by bargain and sale, and deed of conveyance, had conveyed the premises in controversy to the respondent, Crittendon. This deed was executed and duly acknowledged on the twelfth of April, 1881, and duly recorded on the twenty-fifth day of the same month.

This conveyance operated as a repudiation on Mead's part of the gratuitous option contained in his bond of the fifteenth of March, 1881, to Miller & Teal; and the same having been recorded prior to the assignment to the complainants, it was notice to them of such repudiation. It is true that the bill contains allegations that "it was agreed between the said William Mead and the said Miller & Teal that the price of three thousand three hundred dollars should be paid by the said Miller & Teal, their heirs or assigns, to said William Mead, on or before the fifteenth day of June, 1881," etc.

But the said bond of the fifteenth of March, 1881, which must be considered as embodying in its terms the entire transaction between the parties, contains no such agreement. This bond must be regarded as conclusively negativing such allegations. This bond is not signed by Miller & Teal, or by either of them, and it contains no stipulation on their part, or of either of them, to pay any sum of money, or to do or not to do any act whatever to the advantage of Mead or assigns. Had Mead not conveyed to Crittendon or any one else, so that on the fifteenth of June, 1881, it would have been in his power to execute a good and sufficient deed of conveyance, no action at law even could have been maintained by him against Miller & Teal or their assigns, upon tendering a deed and demanding said sum of three thousand three hundred dollars, and a refusal on their part to pay it, for the simple reason that the bond does not show that they ever promised to pay that or any other sum.

For this want of mutuality between the parties, there was no such completed contract as equity will enforce by decree of specific performance: Smith and Downs v. A. E. Reynolds, U. S. Circuit Court, 1 Col. 89.

It is contended in this suit, that the seal affixed to the bond by Mead to Miller & Teal imports a consideration. This is true; but in suits for specific performance a mere seal is not a sufficient showing of the consideration to justify the chancellor in granting a decree to specifically perform. In any action at law where the point was raised, the consideration imported by a seal would be considered as *prima facie* sufficient. But this rule does not apply to suits in equity for specific performance of contracts, though they be executed under a seal. A mere seal may import no other consideration than moral duty and affection, and while that might be considered as sufficient to sustain a deed of conveyance, it is never so regarded for the purpose of compelling a conveyance by a court of equity.

Before decreeing specific performance, the chancellor must be advised of what the consideration consists, that he may see that the contract sought to be enforced is just, equal, and fair as between the parties. A mere seal is not sufficient: Adams' Eq. 78; 6 Iowa, 279; 6 Mich. 364; 12 Ind. 539; 14 La. Ann. 606; 17 Tex. 397.

Upon demurrer for insufficiency to a bill for specific performance, a

failure to show a consideration other than
fatal to the bill.

Service upon demurrer to the bill in this
must allege all the facts which, if true, wc
out further proof.

It is true, as claimed on behalf of pl
equity will regard the *substance* rather tha
support this view, authorities are cited sh
penalty is made upon the condition to c
ment of a certain price, it will be deemed
vey the land at all events." But that doe
case. Such authorities only go to show
over the *validity* of the bond, but an effort
by paying the penalty specified in the bc
direct acknowledgment of the validity of t

In the case now under consideration, th
bond executed by Mead to Miller & Teal
vey *at all events;* but the real question is,
tum, there being no stipulation on the par
price *at all events.* If the price, or any par
ever had been paid and accepted, then th
valid contract to convey, and equity woul
performance. Up to the time of such a
the right to withdraw from and repudiate

It also would have been a valid contra
had paid or promised to pay anything for
if upon a valuable consideration they had
to purchase the mining interest in contro
then upon proof of tender of the price with
would have decreed specific performance.

The complainants have not brought the
categories. Decrees for specific performa
demanded as an absolute right. Bills fo
dressed to the sound discretion of the cha
742, 749. A refusal to grant any such dec
complainant to his remedy at law.

All the facts and circumstances consid
wherein there was an abuse of discretion
in refusing specific performance on the fa
taining the demurrer thereto; and I am sti
ment below ought to have been affirmed.

SUPREME COURT OF OREGON.

BRANSON ET AL. *v.* OREGONIAN RAILWAY COMPANY.

Filed January 14, 1884.

THE POWER OF THE CIRCUIT COURT OVER AMENDMENTS TO PLEADINGS, after a remand from the supreme court, is not affected by the circumstance of an appeal having been taken; and while the supreme court may send a case back for amendment of pleadings and retrial generally, it has no power to prescribe the character of the amendments to be allowed or the mode of conducting subsequent proceedings.

PROPERTY PURCHASED FROM A PRIVATE CORPORATION, in good faith and for an adequate consideration, is not subject to a trust in the hands of a purchaser for the satisfaction of unpaid debts of the corporation, although the purchaser had notice of such debts at the time of the purchase. And the rule is the same whether the purchase includes all the property of the corporation or only a part of it.

A WRITTEN INSTRUMENT PURPORTING TO BE AN AGREEMENT between parties, but understood and intended to be a mere form, and never delivered to take effect as an actual agreement, is of no force as between such parties, and parol evidence is admissible to prove such facts.

APPEAL from a judgment of the circuit court for Yamhill county, entered in favor of the plaintiffs and certain of the defendants. The plaintiffs in the lower court and respondents herein, brought suits against the Oregonian Railway Company, limited, the Oregon Railway Company, limited, William Reid, Ellis G. Hughes, James B. Montgomery and Joseph Gaston and the Dayton, Sheridan & Grande Ronde Railway Company, and the Willamette Valley Railroad Company, to enforce payment of certain obligations known in the case as freight receipts, and sought to charge the property of the D. S. & G. R. R. R. Co. with a trust for the payment of these obligations. Also, to charge the liability on the stock. The D. S. & G. R. R. R. conveyed its property to the W. V. R. R. Co., as consideration for the payment of the debts of the D. S. & G. R. R. R. Co. The W. V. R. R. Co. conveyed to the Oregon Railway Company, limited, for the same consideration, and the Oregon Railway Company, limited, conveyed the property to the Oregonian Railway Company, limited, without consideration. Joseph Gaston subscribed for one hundred thousand dollars of the stock in the D. S. & G. R. R. R. Co., and five hundred thousand dollars in the W. V. R. R. Co., and subsequently assigned to E. G. Hughes, as set out in the opinion. The case was heard and determined in the circuit court, and went to the supreme court on appeal, when the Oregonian Railway Company appeared by new counsel and charged bad faith on its attorney and asked his removal, and also that William Reid and Ellis G. Hughes had acted in bad faith as their agents, and to such an extent as to make them liable in the case without recourse. And further, that if their case was properly presented, there would be no liability on it, and moved to remand to same to the court below. The defendants Hughes and Reid and the Oregon Railway Company, limited, made no objection thereto. The supreme court accordingly remanded the cause to amend pleadings and take further proofs upon and touching the question of bad faith on the part of William Reid and E. G. Hughes. There was set up an agreement between William Lowsen and P. M. Cochrane and the Oregon Railway Company, limited, whereby the Oregon Railway Company, limited, agreed to convey the property and stock, free of debts. The Oregon Railway Company, limited, claimed the agreement was a new form. The case came

before the supreme court again on the app
Company, limited, as against the plaintiffs
ants. The issue was mainly upon the cha
Railway Company, limited, as against its
E. G. Hughes, and the Oregon Railway C

Effinger & Bourne and *Edmund Robertso*

James K. Kelley, for the plaintiffs and re

George H. Williams and *C. B. Bellinger*,
ent Hughes.

J. M. Bower, for the defendants and r
Company.

H. T. Bingham, for the defendant and r

WATSON, C. J. The decision heretofore
278, leaves but few questions for detern
Those still open for investigation will now

1. The power of the circuit court to al
ings after the remand of the cause was
appeal was taken. The remand was order
exercise this power, and this court had
character of the amendments or the term
think this view is in full accord with a fair
employed in the opinion upon the subject

2. But conceding the power of the low
ment to the complaint, which the appellan
ents, plaintiffs below, can have no relief o
introduced. It is doubtful if the allegatio
if they do, the proofs wholly fail to esta
which the complaint appears to have been
duced in respect to this cause of suit, seei
private corporation are equitable liens up
discharged by a purchase in good faith an
tion even if made with notice of unpaid de

The position taken by the respondents i
counsel in his supplemental brief: "No a
this corporation property, no matter what
posed by the law, short of the actual payn
to this doctrine, the debt of a private co
every portion of its property, and a purch
a good title while such debt remains unpa

It is true such corporation holds its pr
and stockholders: Field on Corp., sec. 14
v. Howard, 7 Wall. 392. But this is perfe
to sell any portion or all of its property f
free from the incumbrances of its debts, t
erty taking its place as the trust fund: P
Co., 42 Mo. 63; Hill et al. v. Fogg et al.,

As the case made by the pleadings and
no bad faith nor want of adequate consid
purchased by the appellant from the Wil
pany, we hold that the property in the h
subject to any trust for the satisfaction of t
although chargeable with notice of them

3. The evidence shows that Joseph Gaston subscribed for one thousand shares of the capital stock of the Dayton, Sheridan & Grande Ronde Railroad Company, of the par value of one hundred dollars per share; and also subscribed for five thousand shares of the capital stock of the Willamette Valley Railroad Company, of the par value of one hundred dollars per share; all of which he afterwards assigned to Ellis G. Hughes, to hold in trust for any person or corporation who or which might become a purchaser of the property and stock of such corporations upon the terms specified in such assignment.

Said stock is unpaid stock, and the legal title thereto is still in Hughes. After the assignment, and on or about the fourth day of February, 1880, Thomas Lawson, Peter Moire Cochrane, and other parties, residing in Scotland, contemplated the incorporation of the appellant, and on its behalf agreed to take said property and stock, and furnished the money used in its purchase prior to the incorporation of the appellant. As a means of carrying out this scheme and advancing the interests of the appellant, the Oregon Railway Company, limited, was incorporated and organized under the laws of Oregon. The property purchased, except the stock, was conveyed to and temporarily vested in this corporation, until the appellant should be fully incorporated and organized, and ready to receive title to the same. On the eleventh day of December, 1880, the property was formally conveyed to the appellant, which was all the time the real owner.

4. We have already decided that the indebtedness of the Dayton, Sheridan & Grande Ronde Railroad Company, which forms the basis of this suit, is chargeable to the holders of the legal title to such unpaid stock. See opinion, 10 Or. 278.

In addition to the authorities there cited, to the effect that the remedy of the creditors of the corporation is against the holders of the legal and not equitable title, we refer to the following: Worral v. Judson, 5 Barb. 210. In the matter of the Empire City Bank, 18 N. Y. 199; Burr v. Wilcox, 6 Bosw. 198; S. C., 22 N. Y. 557; Richardson v. Abendroth, 43 Barb. 162; Crease v. Babcock, 10 Met. 525; Grew v. Breed et als., Id. 569; Holyoke Bank v. Burnham, 11 Cush. 183.

Gaston and Hughes are therefore both liable to the respondents in this suit, by reason of having held the legal title to such stock; but Hughes, as last holder, stands first in the order of liability.

5. But the acts of the promoters of the appellant in making this purchase on its behalf, are seen to have been fully ratified by it after its incorporation. These acts are therefore to be treated as its own, and place Hughes in the position of an agent or trustee in taking and holding the legal title to the unpaid stock. Such being the relation of these parties, as we declared in our former opinions, the appellant must save Hughes from loss or damage, on account of his liability on such unpaid stock, unless it can show some abuse of authority or misconduct, on his part, justifying its release from such obligations: Story on Agency, sec. 339; Powell v. Trustees of Newburg, 19 Johns. 284; Ewell on Agency, *353; Moore v. Appleton, 26 Ala. 633; Coventry v. Barton, 17 Johns. 142; Hoery v. Halsay, 14 Pick. 174; Drummonds v. Humphreys, 39 Mo. 347.

It does not appear from the evidence that Hughes was the agent of the promoters of the appellant, or so considered by any of the parties in making the purchase. He seems to have been anxious to see the purchase effected, and exerted himself to secure a favorable consideration of

the scheme by the appellant's promoters, tion. He may have anticipated some bene possible consequence of its adoption by th a mere volunteer, not entitled to the com responsibilities of an agent. He may h "freight scrip" debts being an incumbran purchase he advocated, but there is nothin expresses on this subject was not earnestly

We do not think that it can be even pl evidence in the case, that Hughes acted in towards the appellant or its promoters. A to justify the appellant's release from its against loss, through a transaction in whic that in respect to some other matter, when may have voluntered an erroneous though by following which, appellant has been mis

We think the appellant should be compe such loss, and that it may properly be requ we have already held. See opinions in 10 sec. 72, et seq.; 1 Daniell's Ch. Pl. & Pr., wood v. Atkinson, 5 Sim. 419; Camp v. Williams v. Bankeval, 19 Wall. 563.

6. The appellant's claims, to be itself i and the Oregon Railway Company, limited, equity. Reid also was a volunteer, althoug expected to be benefited indirectly by the There is no ground, however, in the evi either neglect of the interests of the appell sort of misconduct or bad faith throughout

And the Oregon Railway Company, lim mere instrumentality in the hands of th friends for effecting the purchase and trans uous effort has been made to hold this c seller of the property to the appellant, a purporting to be an agreement between it promoters, Lawson and Cochrane, signed 1880, and by the two promoters some time seller, in fact, and all the parties concerned dence fully satisfies us that this instrum understood by any of the parties concerned but was, in fact, a mere form to appear i posed corporation, which the promoters w Scotland, to publish.

If we have drawn a correct conclusion f point, then such written instrument never ing agreement between the parties, and nei upon it, as against the other, in this suit. a state of facts showing that a written inst agreement, has not gone into effect, and i clearly competent.

We are satisfied the decree of the circu correct, and it is therefore affirmed.

SUPREME COURT OF UTAH.

SKEWES *v.* DUNN.

Filed July 17, 1882.

PLAINTIFF WHO IS NOT THE REAL PARTY IN INTEREST in an action on a promissory note can not assign the same so as to entitle his assignee to prosecute such action in his own name.

SUBSTITUTION OF A DIFFERENT PLAINTIFF WILL NOT BE ALLOWED when it would result in injury to any right of the defendant.

SUBSTITUTION OF A WIFE AS PLAINTIFF IN THE PLACE OF HER HUSBAND SHOULD NOT BE ALLOWED when the effect of such substitution would be to permit her to testify in her own behalf, unless such substitution is made on condition that she does not testify.

APPEAL from a judgment of the district court, entered in favor of the plaintiff. The opinion states the facts.

M. M. Kaighn, for the appellant.

R. B. Tripp, for the respondent.

TWISS, J. This action was commenced before a justice of the peace in Salt Lake county. The complaint, among other things, alleges that the defendant made two promissory notes, each payable to Sarah Skewes, that they had been indorsed to the then plaintiff, William Skewes; that neither of them had been paid, except the sum of twelve dollars and fifty cents upon each.

The answer set up several defenses, a specification of which is not necessary here. Upon trial the justice rendered judgment for the plaintiff for the balance due on the notes. The defendant appealed to the district court, where he was entitled to a trial anew, on the same cause of action and pleadings as in the justice's court, and was liable to be confronted with the same testimony that could have been introduced on the trial before the justice, and no other.

In the district court the former plaintiff, William Skewes, joined by his wife, Sarah Skewes, moved the court, upon his affidavit, to allow Sarah Skewes to be substituted as plaintiff, and that the cause be continued in her name. In the affidavit he says: "The said notes were indorsed to me without consideration; that the said Sarah Skewes was and is the owner of said notes, and is really the party beneficially interested in this action; that I have this day transferred the judgment in the court below to her, and now have no beneficial interest whatever in this action, and consent to the substitution and further prosecution of this action in the name of Sarah Skewes as plaintiff, and ask that the same may be done." The court, against the objection of the defendant, allowed the motion; and Sarah Skewes was substituted plaintiff, and the cause continued and prosecuted in her name.

Although William, in his affidavit, says he has transferred to Sarah the judgment, he also says that she "was and is the owner of said notes, and is really the party beneficially interested in this action." It is clear from this statement that the judgment obtained by him in the justice's court was not his property; that although in his name, it was the property of his wife; that at the commencement of the suit he had no interest in the cause of action, and acquired none at any time thereafter, therefore she, pending the suit, neither acquired nor succeeded to any interest whatever of her husband; that the cause of action, at the time of making the motion, was her property, as it was at the commencement of the suit;

that the action was not commenced and had
name of the real party in interest: See section

The court below erred in substituting her a
time of the commencement of the case in the j
by the affidavit of William Skewes on the m
iam was not the real party in interest in the
51 Cal. 153; Eaton et al. v. Allger, 59 Barb. 1
Id. 556.

Assuming that the cause of action, whateve
time the motion was made, whether it was the
or the notes sued upon, was the property of
record, and was by him duly assigned to Sarah
could rightfully, upon the motion sustained by
be substituted in the place of her husband, the
action be continued in her name only upon th
be so done as not to wrong or prejudice the
remedy involved in the action. If such sub
prejudice or injury to any right of the defenda
error, and ought not to have been allowed: H
How. Pr. 350; S. C., 5 Duer, 604. Section 1
provides, that "a husband shall not be a witne
nor a wife a witness for or against her husband

The unconditional substitution of Sarah fo
wife for the husband, as plaintiff, permitted S
objection of the defendant, to testify as a witn
behalf. This would not have been permitte
From the record it appears that her testimony
dice of the defendant. The only reason appa
desiring the substitution was that the testimo
be available on the trial of the cause. In Ha
220, the assignee of the causes of action m
Upon the motion the court said: "The m
on condition that it be stipulated that the p
examined as a witness; on that stipulation it

If a third party to whom a plaintiff has as
can be substituted as plaintiff only upon a sti
plaintiff (who could not be a witness while a
be examined as a witness, it would seem with
a third party (who can not be a witness unles
can be made plaintiff only upon the stipula
examined as a witness. The fact that Sarah
beneficially interested in the cause of action
remove the objection: Dubbers v. Goux, *supra;*

The case is reversed and remanded to the d

HUNTER, C. J., and EMERSON, A. J., concur

MARTIN *v.* HILL.

Filed November 27, 188

ERRORS IN THE CHARGE TO THE JURY CAN NOT B
unless they are material, or calculated to mislead the j

REFUSAL TO GIVE AN INSTRUCTION WHICH HAS A
is not error.

AFFIDAVIT FOR A NEW TRIAL ON THE GROUND OF SURPRISE SHOULD BE MADE BY THE ATTORNEY of the beaten party, and not by his client. Such affidavit must show that the facts constituting the surprise had a material bearing upon the case, and that the verdict was mainly attributable to them.

APPEAL from a judgment of the third district court, entered in favor of the plaintiff. The opinion states the facts.

R. N. Baskin and *C. M. Blandin*, for the appellant.

Marshall & Royle, for the respondent.

EMERSON, J. The alleged errors are all based upon the instructions to the jury, and refer principally to the portions included in the brackets. All the testimony produced upon the trial is brought up in the record, and we have examined it in the light of objections to the charge, and the arguments of counsel. The clear preponderance of proof establishes the contract as claimed by the plaintiff, and the jury must have so found. The applicability of the whole of this branch of the charge, including the portion objected to, depended upon finding that this "new contract of storage," as claimed by the defendant, was made. The jury found against the defendant upon this point. There is no claim but what the testimony relative to the contract between the parties was fairly left to the jury under proper instructions.

The objection under consideration relates to clauses in two instructions which can have no bearing upon the case, because the jury did not find the facts to which the instructions themselves apply. So that even if it be true that there was no testimony as to the condition of the materials at the time the alleged contract of storage was made, yet the instructions did not prejudice the defendant's case.

The portion objected to in its connection with the balance of the charge could have had no tendency to mislead the jury, or "withdraw their attention from the legitimate points of inquiry involved in the issue." It was not a substantive direction upon a supposed or conjectured state of facts, but rather a limitation upon this action in the event they found the contract of storage was made. Finding that some other contract was made, and that this for storage was not, this whole branch of the charge, including the objectionable portion, was withdrawn from the attention of the jury, and could not have affected the result. Even if there was error in the charge, it can not be made available on an appeal unless it was material, or calculated to mislead the jury or to produce a wrong result. There was no error in refusing the request asked by the defendant and refused by the court. The substance of this request had already been given in another part of the charge, and it was not error to refuse to repeat it.

As another ground for a new trial, the defendant claimed that he was surprised by the instructions of the court included within the brackets, and heretofore mentioned.

The affidavit showing this is made by the defendant himself. This should have been shown by the affidavit of the attorney and not of the client. The party alleging facts constituting legal surprise is bound to show them by the best evidence within his reach: Schellhouse v. Ball, 29 Cal. 605.

But aside from this, the judgment ought not to be reversed on this ground. In order to reverse a judgment, the fact or facts from which a surprise resulted must be shown to have had a material bearing upon the case, and the verdict mainly attributable to them.

We have already seen that the verdict can tributable to the instructions objected to.

Judgment affirmed, with costs.

HUNTER, C. J., and TWISS, J., concurred.

SNELL ET AL. *v.* WASATCH & JORDAN VALL

Filed January 9, 1883.

GRANT OF A PRIVATE RIGHT TO QUARRY ROCK ON THE of way to and from the quarry for the purpose of its remo an exclusive right of possession, or a right to any possess poses of the grant. Such grantee can not authorize a rail the ordinary purposes of its business, and if he does so, t of the land, may maintain ejectment against it.

APPEAL from a judgment of the third district the plaintiffs. The opinion states the facts.

Sutherland & McBride, for the appellant.

J. L. Rawlins, for the respondents.

EMERSON, J. There was no error in striking c indenture referred to. It was neither material that the defendant entered upon and took pos premises and built their railroad upon it, betw years before the grant was given under which t holding. The demanded premises is a strip of premises described in said indenture, and oth mentioned in it. The road was not constructe for his use and benefit, any more than that of patron of the road.

The defendant is a common carrier, doing a for any and all who may require its services and as a part of its common business, it transporte consigned to Taylor. In doing this it was no sense as would give it any right under the gra

The defendant places its whole defense upon to Taylor. With this out of the case, and with court properly instructed the jury to find for t the damages at the sum confessed by the ans tends that the instrument excluded was materi permitted to go to the jury, for the reason that title in a third person. The grant did not gi right of possession, or the right to any possess right to quarry and take away rock from and c the plaintiffs' premises. He can not authorize else, to occupy plaintiffs' land for any other p in the grant. The instrument is a grant of a nected with the right to quarry, and plaintiffs against all but the grantee and those occupyi the grant, and for the sole purpose of enjoyin created by it. The fee to the soil is still in th

The facts that the plaintiffs had granted to rock on their land, and a right of way to and fr

pose of its removal, does not prevent them from maintaining ejectment against the defendant for the unauthorized use of the land. The owner of the soil over which even a public highway passes may maintain ejectment for an unauthorized use and occupation of the highway. The decisions, rulings, and instructions of the court were right, and the judgment is affirmed.

HUNTER, C. J., concurred.

EILERS *v.* BOATMAN ET ALS.

Filed January 9, 1883.

FINDING OF THE COURT THAT THE NOTICE OF LOCATION OF A MINING CLAIM CONTAINED A SUFFICIENT DESCRIPTION of the location, by reference to natural objects and permanent and well-known monuments, to identify the same, will be presumed to be correct when the record contains no copy of the notice.

LOCATION OF A MINING CLAIM IS SUFFICIENTLY DEFINITE WHEN THE ACCESSIBLE BOUNDARIES THEREOF are plainly marked on the ground by stakes and natural objects, and the inaccessible boundaries described by courses and distances sufficient to point out to any one honestly endeavoring to ascertain where such boundaries were.

RIGHT OF THE OCCUPANTS OF MINING GROUNDS ON THE PUBLIC DOMAIN WILL BE UPHELD, when the appropriation thereof has been made by means which substantially comply with the law, and which in view of the surrounding circumstances, convey notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private person.

LOCATOR OF A MINING CLAIM, IN MARKING HIS CLAIM ON THE GROUND so that its boundaries can be readily traced, is not held to absolute exactness in running the lines or in fixing the corner or other posts. The difference of a few feet or a few points between the monuments fixed by an actual survey for a patent and those fixed at the time of location is immaterial, and does not affect the validity of the original location.

THE LOCATION OF A VEIN OR LODE MADE UPON THE SURFACE WHERE THE VEIN OR LODE FINDS ITS APEX will not be defeated by the secret, underground workings and possession by parties having no possession of or right to the surface embracing it. The possession of a vein recognized by the mining laws, and to which protection is given, is a possession by one who holds the surface where the vein makes its apex.

AS BETWEEN TWO LOCATORS, AND AS AFFECTING THEIR RIGHTS ONLY, ONE CAN NOT LOCATE a mining claim on ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied.

EXPRESS FINDING, IN AN ACTION TO DETERMINE THE CONFLICTING RIGHTS OF TWO ADVERSE CLAIMANTS of a mining claim, that the defendant was in possession of the same at the time suit was commenced is not necessary where the facts found establish the defendant's right to the possession, and that he had done all that was required by law in order to inaugurate a title to and hold a valid mining claim, and that he was constructively, if not actually, in possession.

APPEAL from a judgment of the third district court, entered in favor of the defendants. The opinion states the facts.

Sutherland & McBride, for the appellant.

Bennett & Harkness, for the respondents.

EMERSON, J. The defendants in this case having made application for the government title to a certain mining claim, called by them the Nabob, the plaintiff filed an adverse claim to a portion of the premises, as a part of the Virginia mining claim which was discovered, located, and owned by him, and in due time he commenced this action to determine the right of possession of the ground in controversy. The case was tried in the court below without a jury, and resulted in a judgment for the defendants. The plaintiff appeals from the judgment, and also from an order denying his motion for a new trial. The findings of fact and conclusions of law are as follows:

1. On or about the fourth day of July, 1877, the defe
Nabob mining claim, situate in Little Cottonwood m
Lake county, Utah, upon a lode of rock, in places t
other metals, the claim consisting of fifteen hundr
to wit: Fifty feet south-easterly from the discovery p
hundred and fifty feet north-westerly from the same po
of location was posted at the discovery point, in wh
date of location, to wit, July 4, 1877, the name of loca
claim, and described the same as situated "on Flags
hundred and fifty feet, more or less, westerly from th
of the Flagstaff mine, and about thirty-six feet, mo
easterly from the northerly side line of the Rough an
ground, and the metes and bounds were therein state
by a stake driven fifty feet south-easterly from the dis
marked No. 1, thence running north-westerly five hun
pine stump blazed on north side, thence to a tree over t
nine hundred feet, thence to a point six hundred fee
Fork. A copy of the same notice was filed for record i
recorder of said mining district on the ninth day of Jul

2. That said locators remained in possession of sa
working the same by an incline run downwards from th
until after the location of the Virginia mining claim, a
the location of the Virginia mining claim the Nabob
by several men on the conflict area, and a shanty was

3. That the locators and claimants of the Nabob mi
year since the location, have done more than one hun
of work thereon.

4. That at the time of the location the locators ma
the ground by setting a stake at the discovery point, by
the middle of the south-easterly end line, marked "No.
ting a stake at each corner of the south-easterly end li
marking a red-pine stump on the center line about
north-westerly from the south-easterly end center sta
and marking a tree on the center line about nine hu
westerly from the south-easterly end of the claim. Th
ground were made either by the locators or the surveyo
claim for a patent on the north-westerly six hundred
the ground being down a steep and inaccessible declivi
survey of that portion being made by triangulation.
the Nabob mining claim, as set forth in the answer,
conformity to the boundaries thereof as located.

6. That on the tenth day of August, 1877, the pl
Virginia mining claim and recorded the same and
ground so as to include the conflict area in dispute,
defendants were at work as aforesaid. The notice pc
was sufficient under mining laws, and the plaintiff ha
than one hundred dollars' worth of work thereon.

As a conclusion of law it was found: 1. That the nc
of the Nabob mining claim contained a sufficient desc
to natural objects and permanent and well-known mo
the same. 2. That said Nabob claim was so marked
its boundaries could be readily traced. 3. That by
location of the said Nabob mining claim, and a co

thereto with mining laws and customs by the defendants, the defendants, at the commencement of the suit, were and still are entitled to the possession of the area in conflict with the Virginia claim, and are now entitled to judgment for said area and costs.

The motion for a new trial was based upon the following grounds, viz.: 1. Insufficiency of the evidence to justify the findings of fact made by the court. 2. That the findings and decisions are against law.

Under the first assignment are the following specifications, viz.: 1. The evidence shows that the boundaries of the Nabob claim were not established on the limits of the claim defined, at the time of the location, or afterwards until the Virginia was located, surveyed, and marked on the ground and recorded; whereas the first and fourth findings of fact find that the defendants located the Nabob by the metes and bounds described therein, and marked the same on the ground. 2. The notice of the location of the said Nabob claim, as posted and recorded, is insufficient, either as a notice or a record, to indicate the existence of any lawful claim.

On the ground that the findings and judgment are against law, the following are the specifications of error, viz.:

1. The notice of location on the Nabob was insufficient. The notice of the claim as recorded was insufficient.

2. The claim was not so marked on the ground that its boundaries could be readily traced, or so that they could be found until after the survey and location of the Virginia claim.

3. The lode upon which the claim called the Nabob was located, including all that part in controversy, was then occupied under ground, and had been since 1872, as a mine of the Flagstaff Silver Mining Company, who then and always had claimed to own the vein; and no adverse claim could be initiated to it by the defendants under such circumstances.

4. The Nabob location having been made on a vein then actually occupied for mining purposes by other parties, the same was void, and could convey no right or title to the possession upon which a claim for a mineral patent could be based; and the judgment that the defendants are the owners of said ground in dispute is erroneous.

The second assignment of error under the first ground of the motion for a new trial, and the first assignment under the second ground, seem to have been abandoned by the appellant, as neither is mentioned in his brief nor referred to on the argument. The record contains no copy of the notice of the Nabob location. According to the findings of the court, which we must presume were supported by evidence, the conclusion of law that the notice contained a sufficient description by reference to natural objects and permanent and well-known monuments to identify the same, was correct. The evidence establishes the fact that the south-easterly nine hundred feet of the Nabob claim was, at the time of its location, plainly marked out on the ground, not alone by posts and stumps distinctly marked along the center line of the claim, but also by stakes at both corners of the south-easterly end, and by trees and stumps on the side lines at points nine hundred feet north-westerly from there. This is established, not only by a strong preponderance of evidence, but by evidence which removes from the mind all reasonable doubt, even of the facts as found by the court. The north-westerly six hundred feet of the claim was not marked on the ground, because it was impossible to do so, owing to the nature of the surface.

The locator testifies that he put no marks on this portion of the claim, "because of the inaccessible and precipitous nature of the ground beyond the divide." The surveyor who surveyed the claim for a patent testified that "the north-westerly six hundred feet of the claim was surveyed by triangulation, and the lines and corners were not established on the ground because of its precipitous surface."

The defendants claimed one thousand five hundred feet in length on the course of the vein, and nine hundred feet of the claim was plainly marked out on the ground, with courses and distances given sufficient to point out to any one honestly endeavoring to ascertain where the lines were for the balance of the one thousand five hundred feet. No one could have been misled by the want of stakes on the inaccessible portion, simply because it was inaccessible, and that such was the nature of the ground is an undisputed fact in the case.

The proofs show that the plaintiff, at the time he made his location of the Virginia, was not, to say the least, a very anxious inquirer as to the boundaries of the Nabob, for at that time he found the owners of the latter claim at work in a shaft at or near their discovery point; and without making inquiry as to the direction or extent of their claim, he completes his location, taking in and including the very ground upon which the defendants were at the time actually working, and which is included in the conflict area. It is sufficient to give a right to the occupants of mining ground on the government domain which the courts will protect, to establish by evidence its appropriation by means which are a substantial compliance with the law upon that subject, and which, in view of the surrounding circumstances, will give notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private claimant. The mining laws do not, any more than any other law, require parties to perform impossibilities.

The same preponderance of testimony shows that the boundaries of the Nabob claim as surveyed for a patent are substantially the same as those described in the location, and marked on the ground at the time the location was made. There was testimony showing a somewhat promiscuous marking of trees with the word "Nabob" in various directions, and entirely off from the ground claimed and located by the defendants. The clear inference to be drawn from all the testimony is, that this marking was done by some party unknown to the defendants, and hostile to their interests, and would indicate an attempt to confuse the boundaries of the Nabob claim.

The finding of the court "that the survey of the Nabob mining claim, as set forth in the answer, is substantially in conformity to the boundaries thereof as located," is abundantly sustained by the evidence. It is neither expected nor required that the locator of a mining claim, in marking his claim on the ground so that its boundaries can be readily traced, shall be exact in running the lines or in fixing the corner or other posts. It is rarely, if ever, that he has either the time or facilities for making an accurate survey, and a difference of three or four feet, or a few points as stated in this case, between the monuments fixed by an actual survey for a patent and those fixed at the time of location is immaterial, and does not affect the validity of the original location.

All the findings of the court relative to the location and making the boundaries of the Nabob claim are abundantly supported by the evidence, and the correct conclusions of law were drawn therefrom. A further

contention on the part of the appellant is that the ground in conflict was not subject to location by respondents at the time this notice of location was posted, because at that date, and for a long time prior thereto, the Flagstaff mining company were in actual possession of the lode and conflict ground and working the same; that the respondent could not make a valid location on a lode in the actual possession of another, whether such possession was lawful or not.

I have had access to and have examined nearly all in the long list of authorities referred to by the appellant in support of the above proposition, and all of those examined refer to the acquisition of agricultural lands, where the acts constituting the possession, or the right to possession, must be upon or done in reference to the surface. There is a distinction recognized by the courts between the acts essential to indicate the possession and occupancy of agricultural lands and those necessary to show occupancy and dominion of a mining claim: English v. Johnson, 17 Cal. 115.

If the above proposition of the appellant is true as applied to the facts in this case, it defeats his own right to recover. He is the plaintiff, and to entitle him to recover he was bound to establish his right as against the respondents to the conflict area. To show this otherwise than by a paper title from some paramount source, it would be incumbent on him to prove his prior possession or appropriation of it in some mode which the law sanctions. If the facts set out in the record constituting the possession of the Flagstaff company rendered the location of the respondents void, that of the appellant would be equally so, as the same facts existed in reference to that.

In reference to the possession of the conflict area by the Flagstaff company, the record discloses "that the Flagstaff mine had been owned by the Flagstaff Silver Mining Company of Utah, since February, in the year 1872," that a claim two thousand feet in length, one thousand feet northerly of discovery, had been patented to the company's grantees and conveyed to it, the surface lines of the patent embracing only about one hundred feet on the length of the lode. That, claiming, notwithstanding the course of the patent lines, that it had a right to follow the lode for the length described by the patent, the company and its grantors had extended its works beyond the lines covered by the patent with and along the course of the vein underground, beyond that portion the apex of which crops out in the ground in dispute between the plaintiff and defendants. That drifts and levels driven from the discovery shaft and main working shaft of the Flagstaff mine had penetrated the hill along the vein on its dip and strike to the northerly, and at the time of the location of both the Nabob and Virginia claims was used, held, and occupied at various depths by those having possession in behalf of said company, and that the workmen and miners in both Virginia and Nabob, before reaching the depth of one hundred feet, distinctly heard the workmen employed in the Flagstaff mine, and the mining works were actually connected at different points underground. That the Virginia tunnel indicated on the map of the underground works was connected with the old Flagstaff works at a point about one hundred and forty feet in depth, and the Nabob at other points not exceeding that. That the vein was occupied on its course and dip by said Flagstaff company to a distance north-west, exceeding the limits of the ground in dispute, said occupation being entirely underground, and not visible on the surface.

In other words and in brief, the patent of the Flagstaff company embraced only about one hundred feet on the length or course of the vein, this claim having been laid and patented across the vein and not along on its course.

According to a decision of this court in a case against this same company, involving its right to extend its workings beyond the side lines of its claim, and which was affirmed by the supreme court of the United States, the side lines of the Flagstaff location are in effect the end lines of this claim on the course of the vein: Flagstaff Silver Mining Co. v. Tarbet, 98 U. S. 463. The Flagstaff company were, according to the facts, secret underground trespassers in exploring and working beyond the side line of this location, and under the surface ground in dispute.

The possession of a vein recognized by the mining laws, and to which protection is given, is by one who holds the surface where the vein makes its apex. The location of a vein or lode made upon the surface where the vein or lode finds its apex will not be defeated by the secret underground workings and possession by parties having no possession of or right to the surface embracing it.

The secret underground trespass of the Flagstaff company does not affect the rights of either the appellant or respondents.

It is conceded by the respondents, and it is doubtless true, that as between two locators, and as affecting their rights only, one can not locate ground of which the other is in actual possession, under claim or color of right, because such ground would not be vacant and unoccupied. This would affect the appellant's right to recover for the conflict area in dispute, it being an undisputed fact that at the very time when the Virginia was located by him, the respondents, the locators of the Nabob, were in actual possession, sinking their incline shaft, and occupying a shanty on the ground. It is further contended on the part of the appellant, that the judgment can not be sustained because there is no finding of fact that the defendants were in possession of the property in controversy at the time of filing the answer, or at the commencement of the action. He claims that this is a jurisdictional question, and may be taken advantage of at any time. It is difficult to conceive how the want of possession by the defendants can be a jurisdictional question as affecting their right to a judgment in their favor, if the plaintiff who had inaugurated the suit against them failed to make out his case.

The judgment settled the right of the defendants to the conflict area only as against the plaintiff. There being no other adverse party to the record, no one else is bound by it. And besides, the facts as found by the court establish the defendant's right to the possession, and that they had done all that is required by law in order to inaugurate a title to and hold a valid mining claim, and that they were constructively at least, if not actually, in possession.

The judgment is affirmed.

HUNTER, C. J., and TWISS, J., concurred.

BOOK REVIEWS.

BROWNE ON DOMESTIC RELATIONS. Elements of the Law of Domestic Relations, and of Employer and Employed. By IRVING BROWNE. Boston: Soule & Bugbee. 1883.

The one hundred and forty-six pages to which the accomplished editor of the Albany Law Journal has limited his treatment of the very important legal topics included within the subject of domestic relations, necessitates, of course, that such treatment should deal with the general principles of the law applicable thereto, rather than with the special matters of detail that make up the greater portion of such exhaustive treatises as those of Mr. Bishop and Mr. Schouler on the same subject, and that of Mr. Wood on Master and Servant. The learned author states in his preface that the object of the present work is to furnish "a sort of primer of the legal principles relating to the law of domestic relations." He disavows any intention of attempting to supersede the excellent treatises above referred to. The most that he claims for his present work is that it may preface, or perhaps accompany, such treatises. Under the head of domestic relations, the learned author has presented, in a most concise and exact manner, the general principles underlying the law applicable to the relations of husband and wife, parent and child, guardian and ward, and master and servant. The aim of the author has been to state such principles as they exist at the present day, and to that end constant reference is made to statutory changes that have been made by the various states in the common law, and the authorities cited have generally been limited to the most recent cases. While the main purpose of the present book is to furnish students with a convenient outline of the law applicable to the subjects discussed, its advantages should not be limited to them. On the contrary, practitioners will find it a very valuable instrumentality in enabling them to refresh their memories or direct their researches, when called upon to make use of that branch of the law included within its scope.

NOTES.

In a recent issue of the Stockton Mail, Judge A. Van R. Paterson, of the superior court for San Joaquin county, called attention to certain faults in the judicial system of California, the natural tendency of which is to produce unnecessary delay in the administration of the law, and not infrequently a complete denial of justice. While the remarks of the learned judge were directed especially to the administration of law in California, they are none the less applicable to every American state where the same effects have been felt. Every unnecessary delay, in his opinion, is due to some or all of the following causes: 1. Defects in the judicial system; 2. Too many unimportant and spiteful appeals; 3. Unnecessary and stupid legislation; 4. Undue adherence to technical precedents; 5. Errors of judicial officers; 6. Laches and professional courtesy of attorneys.

In commenting upon the practical efficacy of the judicial system, as established by the constitution of 1879, the judge said: "This system has failed to meet the expectations of its advocates. The former supreme court left a legacy of about one thousand unheard appeals. The agitation preceding the constitutional convention delayed the calendars of the lower courts so that they were heavily laden when the superior courts were organized. Immediately after the organization of the superior courts a great mass of surplus and accumulating litigation was speedily disposed of. A multitude of appeals was sent to the supreme court. The superior courts being constantly open in every county, litigation has been much more rapidly disposed of than it was under the old system of district courts. This has encouraged and increased litigation. Appeals have been and will continue to be correspondingly greater than under the old system. The working power of the two departments of the supreme court is not much greater than that of a single court, for after a hearing in department many cases are reheard in bank. There is probably no other court in the United States that works harder than the supreme court of this state, and yet our court can not keep up with its calendar. The system works like the subject of a case of warranty recently tried in our superior court, in which it was alleged that the cutting and threshing capacity of a combined header and thresher was so much greater than the separating power that the elevators became clogged, thus delaying the work and wasting the grain. Seventy trial judges are sending up a crop of litigation that no seven judges on earth could do justice to, and write the reasons for their rulings."

In suggesting a remedy for the correction of these defects, the learned judge makes the following pertinent remarks: "There is no doubt that great injustice is done in many cases by the delays in legal procedure, and that the courts are largely to blame for it through adherence to technical precedents. It should not be forgotten, however, that the practice is the growth of ages—not a thing peculiar to this state, but common to all courts of common-law jurisdiction. In those states where the judicial system is such that when appeals can be speedily heard the delays caused by following precedent are not noticed so much as they are with us. The remedy lies chiefly in the direction of legislation. It should be made mandatory that the substance of all the evidence must go up with every appeal, no matter what error is assigned or how the appellant is proceeding to correct it; then if no material evidence has been excluded by the lower court,

the supreme court could finally determine the whole matter on the first appeal. The working power of the supreme court must be increased to correspond to that of the seventy-one departments of the superior court; or there must be an intermediate court such as New York has had for many years; or appeals must be limited to cases involving a greater amount than three hundred dollars (unless involving the construction of some constitutional provision). Meantime, let the war waged against technical precedents go on, but let the weapons be other than personal abuse and the encouragement of personal violence. Let the legislature try again to give us a code that will bring justice nearer to the door of every citizen, and if the commission will concern itself more with evils in matters of precedent, and less with maxims, we may yet have a system in which every judicial officer can take his motto from Horace: 'Bound to swear to the *ipse dixit* of no master; whither my convictions carry me, thither am I borne a welcome guest.'"

WEST COAST REPOI

No. 7. FEBRUARY 14, 1884.

RIPARIAN RIGHTS—THE WEST COAST L

Continued.

IN Hutton v. Frisbie, a case which arose on the s Justice Sawyer, delivering the opinion of the court, sai question the rule adopted in Chotard v. Pope,[1] and Arkansas,[2] to the effect that when a party is authori congress *generally* to enter 'in any land office,' etc., 'a not exceeding,' etc., he must be limited in his selection to selection, and can not take lands already sold, or re or upon which a pre-emption, or some other right, ha a law *which is still in force,* and which covers and prot is obviously sound. It can not for a moment be suppos by *such general acts,* contemplated that the party shou to take land upon which other parties had already e steps to acquire it, and were diligently pursuing th acts *still in force* with reference to that land, or th this *general* way to repeal such acts. The two acts not necessarily inconsistent, and can be so constru adopted by the court as to stand together; and in su viously the duty of the court so to construe them. B case with the act we are now considering." Again the pre-emption laws was undoubtedly beneficent. tended to give those who were pioneers in the unset public domain the first right to purchase the unoccu they have had the courage and hardihood to settle, a *be our pleasure as well as duty to extend to all such t tion justified by the laws of the land.* But this ben no element in harmony with the principle that imp in upon the improved possessions, and avail themselv their neighbors, under the condition of things co

[1] 37 Cal. 475, 485, 486. [2] 12 Wheat. 587.

Suscol rancho [*i. e.*, the grant to A.] The equities which lay at the foundation of the pre-emption policy were, in this particular instance, not with those who entered upon the possessions of such of their neighbors as were honest purchasers; but they were all, and even equities of a much higher obligation, with the purchasers in good faith, who were not merely pioneers, but, also, parties who had paid for their lands, and long occupied and improved them, under the belief that they had a good title; and congress hastened to recognize and give effect to those equities by passing the act in question." Again, the same able judge says: "The difference between this case and those of Chotard v. Pope, and Lytle v. State of Arkansas, where the parties were entitled to select lands from a much larger portion of the public domain, is so obvious that argument can scarcely make it appear more plain. Where an act authorizes a party to enter any thousand acres of land he may select within specified exterior boundaries containing one hundred thousand acres, or in a whole state, and it happens that the government has already sold a given tract within said boundaries, or a pre-emption right in favor of another party has already attached to said particular tract under some prior law, it is not for a moment to be supposed that it was intended to permit an entry of the tract of land so sold, *or upon which such prior right had already attached.* But if he is authorized in express terms to enter the very same specific tract, and no other, before sold or upon which the pre-emption right had attached, there can be no doubt as to the intent to allow the entry of that specific tract, whether it was in the power of congress to give effect to that intent or not. And that is just the difference between the cases cited and the one under consideration." The opinion of Mr. Justice Clifford, in Frisbie v. Whitney,[4] contains explanatory and limiting language to the same general effect.

It would seem that language could not be more plain and pointed than that of the foregoing extracts, to show that the decisions in Hutton v. Frisbie and Frisbie v. Whitney were confined to the operation of special legislation dealing with specified portions of the public domain, and had no reference whatever to the effect of the *general* statutes of congress forming parts of the same general system, nor to the conflicting rights of priority between two parties claiming under the different and *co-existing* provisions of these general statutes. The decision in the case of Western Pacific R. R. v. Tevis[5] was also based upon special legislation of exactly the same character.

Where A. duly locates and settles upon a surveyed tract of the pub-

[4] 9 Wall. 187. [5] 41 Cal. 489.

lic land bordering upon a stream, and files his declaratory statement in (say) 1874, duly completes the requirements of the statute and pays the price in 1877, and receives his patent from the government in 1879; and B. duly posts and serves the notices of his appropriation of the water of the same stream in 1875, and proceeds with reasonable diligence to construct his dams, ditches, and other necessary works, which are not completed, however, so that he can begin the *actual use* of the water until 1880; the appropriation of the water by B., it is held, relates back to the time of his preliminary act of posting and giving notice in 1875, so that he is legally in the same position as though his actual use of the water had begun at that time; while, it is said, that the right of A. as a patentee shall only relate back to the time when he had paid up in 1877. And thus, although A.'s initial step was made before any act whatever done by B., and his legal title was perfected by patent before B.'s works were completed, and the actual use of the water began, yet A.'s rights as a riparian owner on the stream are said to be subsequent to those of B. to appropriate perhaps the entire waters of the stream. In my opinion, there is nothing in the decisions of the United States supreme court, nor in those of the California supreme court, prior to the case of Farley v. Spring Valley M. & I. Co., which necessarily establishes or tends to establish for the pre-emptor, or other grantee of the United States, a rule so different from that which governs the appropriator of water; and there is nothing in the general statutes of congress, nor in the policy which underlies the system, which requires such a discrimination between the two classes of claimants. The notices posted and given by the appropriator of water clearly do not confer on him any higher equity as a *bona fide* purchaser; since the actual and continuous possession required of the pre-emptor is a notice of his prior claim—a notice of the very highest character. I have dwelt upon this particular topic at such length because the subject seemed to be one of practical importance; the discrimination against the pre-emptor or other private grantee of the United States seemed to be inequitable; the decisions bearing upon it are very few; and possibly the court may be called upon to re-examine the question in some subsequent case.

The conclusions from the foregoing discussion may be briefly summed up as follows: While a natural stream or lake is situated on the public lands of the United States, within the limits of a state, a person may, under the customs and laws of a state, and the legislation of congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes,

construct and maintain ditches and reservoirs over and upon the public land; which right, although merely possessory, is good against all other private persons, and is made by statute good as against the United States and its subsequent grantees.

When such a right has been acquired in this manner by prior appropriation, subsequent grantees of tracts of the public domain bordering on the same stream or lake—pre-emptors, homestead settlers, and all other purchasers—take and hold their titles subject thereto, and the patents issued to them by the United States government must expressly except or reserve all such "existing rights" so acquired by other persons in pursuance of the customs and laws of the state. The right thus excepted or reserved in a patent must, of course, be an "existing right" already acquired by some other person. When a grantee of the United States obtains title to a tract of the public land bordering upon a stream, the waters of which have not hitherto been appropriated, his patent is not subject to any possible appropriation which may be subsequently made by another party.

These rules, founded upon local customs and laws, and ratified by congressional legislation, are confined in their operation to the public domain of the United States.[6] If tracts of public land bordering on a stream, and situated within a state, have come into the private ownership of purchasers or grantees from the United States before any appropriation has been made of the water, their rights as riparian proprietors must be determined and regulated wholly by the municipal law of the state concerning that subject-matter—over which congress has no power whatever to legislate.

Whenever a private person, as pre-emptor, homestead settler, or other purchaser or grantee, has acquired title from the United States to a tract of the public land bordering upon a stream or lake within a state, any subsequent appropriation of the waters thereof by another party is subject to his prior rights as a riparian proprietor—whatever those rights may be under the municipal law of the state; and, as against such subsequent appropriator, his rights as a riparian proprietor are complete, at least from the time when he has duly performed all of the statutory requirements, including payment of the purchase price, if necessary, so as to entitle him to a patent, and not merely

[6] See Lobdell v. Simpson, 2 Nev. 274; Lobdell v. Hall, 3 Id. 507; Ophir Silver M. Co. v. Carpenter, 4 Id. 534; Robinson v. Imperial Silver M. Co., 5 Id. 44; Covington v. Becker, Id. 281; Hobart v. Ford, 6 Id. 77; Vansickle v. Haines, 7 Id. 249; Barnes v. Sabron, 10 Id. 217; Shoemaker v. Hatch, 13 Id. 261; Dick v. Caldwell, 14 Id. 167; Strait v. Brown, 16 Id. 317; Cramer v. Randall, 2 Utah, 248; Munro v. Ivie, 2 Id. 535; Fabian v. Collins, 3 Mont. 215; Burkley v. Tieleke, 2 Id. 59; Caruthers v. Pemberton, 1 Id. 111; and other cases previously cited.

from the time of issuing a patent; even if his ri
back to the initiative act of the continuous procee
title is finally perfected.

Having thus described the appropriation of wa
streams and lakes on the public domain of the Uni
proceed to consider the special doctrines which reg
priation, and define the rights of appropriators. I
a general proposition, in this connection, that whe
several successive appropriations of water from the
appropriator stands in the position and has the rig
propriator towards all others whose rights have be
quently to his own. The term "prior appropriator"
always mean the person who is absolutely the first
sive right to the water of a particular stream.

*IV. Doctrines which control the appropriation a
of the appropriators of waters on the public dom
States.*

The most important practical doctrines embrace
may be regarded as having been definitely settled b
ions; and they are substantially the same in all the
territories where this theory of a prior exclusive
water prevails. The various topics to which thes
and which require any discussion, are the following
which an appropriation is effected; the time from
under an appropriation become vested; the propert
in general of the prior appropriator; the amount
in an appropriation—or the extent of the appropr
appropriation, and the relations between successiv
the same stream; abandonment of a prior appropr
to treat of these matters in the order here given.

1. *The Methods by Which an Appropriation is E*
be carefully observed that the water right now un
be, in its essential nature, merely a possessory rig
and maintenance are not essential incidents of, and
depend upon, a legal title to any portion of the publi
appropriator under a patent or other conveyance fro
Nor is it necessary that the appropriator should ha
possession of any tract or parcel of the public dom
the stream or lake from which the appropriation is
or claim which he possesses, and on or at which th
used, may be at a distance from such stream or lak

through a ditch or canal across the intervening *public* lands, unto the tract which he possesses as a mining claim, a farm, or a mill; or even to sell and dispose of the water, thus conducted through the canal, to other parties, who use it for like purposes on their own "claims" or tracts of land. The true "riparian rights" belonging to "riparian proprietors," by virtue of their actual ownership of lands bordering upon a stream, will be considered hereafter; they are foreign to the present discussion.

In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the fundamental doctrine is well settled, that the appropriation must be made with a *bona fide* present design or intention of applying the water to some immediate useful or beneficial purpose, or in present *bona fide* contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming. The purpose may be mining, milling, manufacturing, irrigating, agricultural, horticultural, domestic, or otherwise; but there must be some such actual, *positive*, beneficial purpose, existing at the time, or contemplated in the future, as the object for which the water is to be utilized; otherwise no prior and exclusive right to the water can be acquired, no matter how elaborate and complete may be the physical structures by which the attempted appropriation is effected.[7] Under this rule, an appropriation for mere purposes of speculation is nugatory.[8] And a diversion of water solely for the object of drainage, without any *bona fide* intention of its present or future use for other beneficial purposes, does not constitute a valid appropriation.[9] Thus in the first of the cases cited below, the grantors of the plaintiffs had constructed a ditch for the purpose of drainage alone, with no intention of appropriating the water to any other use, and the defendants had subsequently made a ditch leading from the same stream with the intent of using the water thus diverted for a beneficial object; the court held that the defendants, although later in time, had gained a priority of appropriation over the plaintiffs' grantors, and over all persons holding under them.

J. N. P.

(TO BE CONTINUED.)

[7] Weaver v. Eureka Lake Co., 15 Cal. 271; Maeris v. Bicknell, 7 Id. 261; Davis v. Gale, 32 Id. 26; McKinney v. Smith, 21 Id. 374; Ortman v. Dixon, 13 Id. 33; McDonald v. Bear River etc. Co., Id. 220; McDonald v. Askew, 29 Id. 200; Gibson v. Puchta, 33 Id. 310; Dick v. Caldwell, 14 Nev. 167; Dick v. Bird, Id. 161; Cramer v. Randall, 2 Utah, 248; Munro v. Ivie, Id. 535; Woolman v. Gawinger, 1 Mont. 535.

[8] Weaver v. Eureka Lake Co., 15 Cal. 271.

[9] Maeris v. Bicknell, 7 Cal. 261; McKinney v. Smith, 21 Id. 374.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

In the Matter of Tung Yeong, on Habeas Corpus.

Filed February 1, 1884.

Applications of Chinese Persons for their Discharge from a Restraint claimed to be illegal under the restriction act may be divided into three clauses: 1. Applications for discharge on the ground of previous residence; 2. Applications for discharge founded on the production of Canton certificates; 3. Applications for discharge on the part of children brought to or sent for by their parents or guardians. The nature and effect of the evidence usually produced by the petitioners in each of these classes stated and considered.

Construction to be Given to the Restriction Act.—In construing the Chinese restriction act, if the provisions of the Chinese treaty and such act are irreconcilably conflicting, the court should follow the requirements of the act; but no construction should be given to such act which would violate the provisions of the treaty, if such construction can be avoided.

Chinese Resident of the United States at Date of Treaty—Right of, to Return.—A Chinese laborer who was a resident of the United States on November 17, 1880, the date of the treaty with China, and who left this country before the Chinese restriction act went into operation, has a right to return without producing a custom-house certificate; but the burden of proof is on him to show such facts by clear and satisfactory evidence.

Chinese Who were not in the United States at the Date of Such Treaty are not embraced within the provisions of the second article of such act.

Chinese Laborers Who, although in the United States at the Date of Such Treaty, left the same after such act went into practical operation, and who neglected to procure a custom-house certificate, are not entitled to return.

Chinese Children whose Parents are Lawfully within the United States are not excluded therefrom by any provision of the restriction act.

Chinese Witnesses.—Chinese persons are, under the constitution and laws of the United States guaranteeing to them "the equal protection of the laws," competent witnesses.

The Practical Operations of the Chinese Restriction Act Stated and commented upon.

Application for a writ of *habeas corpus* by a Chinese person, restrained from coming into the United States by the agents of the Pacific Mail Steamship Company, on the ground that he was a Chinese laborer, and not entitled to be or to remain in the United States under the provisions of the Chinese restriction act. The further facts appear in the opinion.

S. G. Hilborn, United States attorney, and *Carroll Cook, assistant United States attorney,* for the government.

Lyman I. Mowry, for the petitioner.

Milton Andros, for Williams, Dimond & Co., agents for the Pacific Mail Steamship Company, who held the petitioner.

Hoffman, D. J. The very great number of cases in which writs of *habeas corpus* have been sued out of this court by Chinese persons claiming to be illegally restrained of their liberty, and which were of necessity summarily investigated and disposed of, has rendered it impossible for the court to deliver a written opinion in each case. The evidence in the various cases and the rulings of the court have been very imperfectly reported by the press, and the latter, though much criticised, have not, it is believed, been thoroughly understood.

It is deemed proper to set forth in an opinion, as succinctly as may be, the general nature of these cases, of the evidence upon which the

decision of the court has been based, and its rulings upon the more important of the questions which have been presented for its determination.

The applications for discharge from a restraint claimed to be illegal may be divided into three classes:

1. Applications on the ground of previous residence. By the second article of the treaty it is provided, that "Chinese laborers *now* in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation:" 22 U. S. Stat. 827. The third section of the Restriction act expressly recognizes the right thus secured to Chinese laborers by the treaty.

It provides that "the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880" (*the date of treaty, and not of the ratification*), "or who shall have come into the United States before the expiration of ninety days next after the passage of this act."

Between the date of the treaty and the date of the passage of the law large numbers of Chinese laborers who were protected by the treaty have left the country, of course unprovided with custom-house certificates, for there was no law then existing which required them to obtain them or authorized the custom-house authorities to furnish them.

The language of the law is ambiguous, and perhaps admits the construction that the laborers who left this country during the interval I have mentioned should be required to produce the custom-house certificate provided for in the act. It was not doubted by the court that if the treaty and the law were irreconcilably conflicting the duty of the court was to obey the requirements of the law, but it was considered that no construction should be given to the law which would violate the provisions of the treaty, if such construction could be avoided. It was therefore held, that a Chinese laborer who was here at the date of the treaty, and who left the country before the law went into operation, might be admitted without producing a custom-house certificate, which it was impossible for him to obtain, and that it was inadmissible, if not indecent, to impute to congress, when legislating to carry into effect our treaty with China, the intention to deprive laborers of the right to come and go of their own free will and accord, which was explicitly recognized and secured by the treaty, by exacting as a condition of its exercise the production of a certificate which it was out of their power to obtain: *In re Chin A. On*, 18 Fed. Rep. No. 8, p. 506. It was also held that Chinese who were not in the country at the date of the treaty were not embraced within the provisions of the second article, and also that a Chinese laborer who, although in the country at the date of the treaty, had left after the law went into practical operation, and who neglected to procure a certificate, was not entitled to return. As to the soundness of this last ruling, doubts may be entertained. It is understood that the question will shortly be submitted to the circuit court.

If there be error in these rulings, it is assuredly not in favor of the Chinese. The right of laborers who can prove they were in the country at the date of the treaty, and had left before the law went into effect, to be allowed to land without the production of a custom-house certificate, being thus recognized, the court held that the burden of proof was on them, and that satisfactory evidence of the facts would be rigorously

exacted. In some cases this evidence was such as to e
beyond all reasonable doubt; as, for instance, the forn
departure of the petitioner were in one case proved by
the reverend gentleman at the head of the Chinese mi
who swore not only to his personal recollection of the f
a record of the proceedings of the sessions of his chu
departure of the petitioner and his resignation of the
which he held, and the appointment of his success
These records, he testified, were in his own handwritin
at the date they bore. In another case a young lad
the mission proved the departure of the petitioner
vert and her pupil), not merely by her own testimo
by the production of a religious book which she gave h
his departure, on the fly-leaf of which were inscribed,
writing, and signed by herself, some expressions of
with some texts of scripture. This book, she testifie
him on board the vessel at the date of the inscriptio
with the injunction to keep it and bring it back on hi
accordingly brought back and produced in court. O
these no rational doubt could be entertained, and the
discharged.

But in the large majority of cases proofs hardly less
exacted and furnished. The Chinese on returning to
most invariably procure permits from the companies
members, and which are furnished them on payment of
departure of the members and the payment of their du
the books of the company. These books the court in
to be produced. It also appears that in most cases th
mulated in this country, are remitted to China for thei
cantile firms in this city, and also that their tickets ar
purchased through the agency of these firms. The
firm books showing these transactions was in like man
they, together with the books of the companies, were
critical scrutiny of Mr. Vrooman, the very intelligent
entirely reliable Chinese interpreter.

In very many cases all these books were produced
some instances the evidence they afforded was corrobor
of white persons in whose employ the petitioner had b
tified to the time of his departure. It is, of course, pos
instances the court has been deceived, but considerin
has a person been allowed to land on the plea of prev
unsupported Chinese oral testimony, the number of s
not be large. The proofs were in all cases sufficient to
and unbiased mind. Of the whole number thus far d
order of the court, it is believed that those discharge
stated constitute nearly one half. In justice to the
should add that their presidents have spontaneously of
to cause copies of their books, with records of departu
bers during the interval I have mentioned, to be m
charges, such copies to be verified by Mr. Vrooman, by
the original records, and then to be deposited with t
this is done, no means will any longer exist of interpo
new names on the books of the companies. It will stil

for a Chinese laborer to assume the name and personate the character of some one whose name appears on the records, but this mode of deception it seems impossible wholly to prevent.

2. Applications founded on the production of Canton certificates. The investigation of this class of cases proved exceedingly embarrassing to the court, and is attended with difficulties almost insuperable. The certificates furnished at Canton by the agent of the Chinese government the law declares shall be *prima facie* evidence of a right to land. This provision of the law, whatever distrust might be felt as to the reliability of these certificates, the court could not disregard. The counsel for the petitioner usually presented a Canton certificate to the court and rested his case. The district attorney was necessarily without the means of disproving the truth of the certificate except by such admissions as he might extract from the petitioner himself when placed on the stand, or had been gathered from him upon his examination by the custom-house officials. The district attorney was therefore allowed to call the petitioner, and cross-examine him in a most searching manner, and contradict, if he could, his statements; in short, to treat him as an adverse witness called by the opposite side. This method, though somewhat irregular, seemed to be the only one to be adopted with any hope of arriving at the truth. Another embarrassment under which the court labored was the inability to attach any distinct and definite signification to the term "merchant," but, inasmuch as the treaty expressly declares that the only class to be excluded are "laborers," and that no other class is within the prohibition of the treaty, it was held by the court that the inquiry was not so much whether the person was a merchant, as whether he was a "laborer," and that that inquiry should relate, not to his occupation or status in China, but to the occupation in which he was to be engaged in this country; as the intention and object of the law was to protect our own laborers from the competition and rivalry of Chinese laborers here.

At first sight it would seem that the production of the books of a respectable mercantile firm, in which the name of the petitioner was inscribed as a partner, would be sufficient to establish his status as a merchant. It was soon found, however, that this mode of proof was, to a great extent, unreliable: for, first, the books might be falsified, and the entry made to meet the exigencies of the case; and secondly, it appeared that the Chinese are in the habit of placing their earnings in stores or mercantile establishments, and in virtue of this investment they are admitted to a share of the profits. It might, therefore, often happen that a Chinese laborer would appear on the books of the company as holding an interest to the amount of a few hundred dollars in the concern, while he himself remained a laborer, and could in no sense of the term be called a merchant or a trader. The books, above spoken of, were in all cases subjected to a rigid scrutiny, with a view of detecting interpolations and falsifications. I am satisfied that in spite of the efforts of the court, which in almost all cases itself subjected the petitioner to a rigorous cross-examination, and in spite of the efforts of the district attorney, some persons have been admitted on Canton certificates who had no right to land—in what numbers it is impossible to say—but this result seemed to be the necessary consequence of the fact that the law made the certificates *prima facie* evidence of the petitioner's right, and of the difficulty of ascertaining the facts. A considerable number of cases was also presented to the court where the petitioner claimed to be about to enter

some mercantile establishment in which his brother, father was interested. The existence of the establi proved beyond a doubt, but the court was at the mer as to the intended adoption of the petitioner as a pa stances letters were produced from his relatives in t to him in Hong-Kong, inviting him to come to this co to the business, but the genuineness of these letters and no obstacle existed to their manufacture in this c of the steamer.

In several cases it appeared by the petitioner's ow was a laborer in China, that he came to this country with money, and that he expected to enter the stor uncle or other relative as a porter. In such cases h the ship, but even in those cases where the petitio other relative declared that he was to be admitted court became aware that it might be the victim of gr such testimony any Chinese person engaged in merc could import as many laborers as he might declare t or nephews, and testify that he proposed to admit th In some instances pretensions of this kind have been In other instances the court has felt compelled to disc on a preponderance of proof, though not without se to the facts of the case.

3. Children brought to or sent for by their paren this city. In almost all these cases the petitions wer the children of from ten to fifteen years of age. Th relatives testified that they had sent for them to United States with a view of placing them at school t language, and later to adopt them into their busi who thus claimed to exercise the natural right to th of their children were in almost every instance sometimes of considerable substance, resident here, the provisions of the treaty to all the rights, privileg of subjects and citizens of the most favored nation. these children in many instances were provided with but though they were in no sense merchants, many o too young to earn their living, they were certainly r was not without satisfaction that I found there was the law which would oblige me to deny to a parent child, and to send the latter back across the ocean t which he came.

The foregoing presents a general, but I think suf the various questions which have arisen in these case of the court upon them. If there be error in those r to discern it. It will be cheerfully corrected when f judgment of a higher court, or even when pointed shall first have taken the pains to ascertain what the have actually been—a natural, and one would think ne which has hitherto been largely dispensed with by th those by whom the action of the court has been as persons have been suffered to land under Canton c in fact within the prohibited class, there is great re this could have been prevented by the action of any

fearlessly discharging its duty under the law and the evidence, has not been pointed out.

By the constitution and laws of the United States, Chinese persons, in common with all others, have the right "to the equal protection of the laws," and this includes the right "to give evidence" in courts.

A Chinese person is therefore a competent witness. To reject his testimony when consistent with itself, and wholly uncontradicted by other proofs, on the sole ground that he is a Chinese person, would be an evasion, or rather violation, of the constitution and law which every one who sets a just value upon the uprightness and independence of the judiciary would deeply deplore. But while according to Chinese witnesses the right to testify secured to them by the constitution and the law, no means of arriving at the truth within the power of the court have been neglected, and the ingenuity of the district attorney and the court has been taxed in the attempt to elicit the truth by minute, rigorous, and protracted cross-examinations. That it has frequently been baffled was naturally to be expected. But notwithstanding these unavoidable evasions, the practical operations of the act have been by no means unsatisfactory.

Returns obtained from the custom-house show that from the fourth of August, 1882, to the fifteenth of January, 1884, a period of nearly sixteen months, there have arrived in this port three thousand four hundred and fifteen Chinese persons. During the same period there have departed no less than seventeen thousand and eighty-eight.

It thus appears that not only has the flood of Chinese immigration, with which we were menaced, been stayed, but a process of depletion has been going on, which could not be considerably increased without serious disturbance to the established industries of the state. It is stated that the wages of Chinese laborers have advanced from one dollar to one dollar and seventy-five cents per diem—a fact of much significance if true.

It is much to be regretted that the notion that the law has through its own defects, or the fault of the courts, proved practically inoperative, has been so widely and persistently disseminated. Such a misapprehension can not have failed to be injurious to the state, by preventing the immigration of white persons from the east to replace the Chinese who are departing.

Another circumstance which, though not contemplated by the law, has incidentally attended its enforcement, may be mentioned. The costs, the attorneys' fees, and the inconvenience and expense of attending upon the courts until their cases can be heard, must in effect have imposed upon the Chinese arriving here charges nearly or quite equal to the capitation tax which in Australia has been found, it is said, sufficient to secure their practical exclusion. On this point I have no accurate information. But the liability to the charges I have mentioned can not fail to exercise a strong deterring influence upon the lower classes of Chinese laborers.

In the case at bar the proofs establish beyond a rational doubt that the petitioner was in the United States at the date of the treaty, and that he left the United States before the passage of the law which enabled or required Chinese laborers to procure custom-house certificates.

He is, therefore, in my judgment, entitled to a discharge.

DISTRICT COURT, DISTRICT OF OREGON.

UNITED STATES *v.* KANE.

Filed January 26, 1884.

OBSTRUCTING THE PASSAGE OF THE MAIL.—The defendant and others, discharged railway laborers, to the number of one hundred and fifty, assembled at Pendleton, Oregon, and by threats of violence prevented the daily train of the Oregon Railway and Navigation Company, including the mail car with the United States mail therein, from proceeding to Portland, because the conductor would not permit them to ride thereon to Portland free of charge, on the ground that they had no money, and the company having "passed them up" ought to "pass them down;" and for the same reason, and by the same means, prevented the conductor from detaching said mail car from said train and sending it to Portland with the United States mail therein. *Held*, that whether the company was under any legal obligation to carry the defendant to Portland free of charge or not, he had no right to prevent the conductor from sending the mail car on to Portland, as he did; and that the conduct of the defendant and his associates being unlawful and necessarily causing the passage of the mail to be obstructed, the law imputes to him an intention, whatever the primary purpose of his conduct was, to cause such obstruction, and therefore he is guilty of obstructing and retarding the passage of the mail, contrary to section 3995 of the revised statutes.

PASSENGER ON TRAIN.—A person who is entitled to travel on a railway car may go upon the same peacefully, and remain therein until he arrives at his destination; and if the conductor undertakes to put him off, on the ground that he is not entitled to travel thereon, he may resist force with force; but if the conductor stops the train on his account, and undertakes to detach the mail car therefrom and send it on with the mail, he has no right to prevent him from so doing, and if he does his act is unlawful.

INFORMATION for violation of section 3995 of the United States revised statutes. The opinion states the facts.

James F. Watson, for the United States.

George Kane, in propria persona, for the defendant.

DEADY, J. This is an information charging the defendant with a violation of section 3995 of the revised statutes, which provides, that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall for every such offense be punishable by a fine of not more than one hundred dollars." The defendant pleads "not guilty," and submits the case to the judgment of the court on the facts stated in the deposition of the witnesses, including his own, examined before the commissioner, who committed him to answer the charge, and which, by the stipulation signed by the district attorney and the defendant, is to have the effect herein of a special verdict.

From this it appears that on January 10, 1884, there were at Pendleton, Oregon, about one hundred and fifty discharged railway laborers, including the defendant, who had lately been employed by contractors in the construction of a railway in that vicinity, and wanted to come to Portland on the regular train of the Oregon Railway and Navigation Company, then running between Pendleton and Portland, and carrying, among other things, the United States mail, without paying their passage, on the ground that they were without money and the company ought to pass them down as it had passed them up, which the conductor of the train refused to permit; that the defendant, acting as spokesman for himself and the crowd, told the conductor that the train should not move without them, and that if he undertook to pull out and leave them behind

there would be trouble and he would be hurt; that thereby the train with the United States mail in the postal car was detained at Pendleton until the next day, January 11th, when the conductor concluded and undertook to cut off the postal car containing the United States mail, then being carried thereon from Pendleton to Portland, and proceed with it to the latter place, as it was his duty to do; but the defendant forbade him to do so, and told him there would be trouble if he attempted to uncouple the car, and when the conductor, notwithstanding the threat, undertook to have the pin removed and the mail car detached from the rest of the train for the purpose of proceeding with it to Portland, the defendant, backed by several of his associates, prevented the brakeman from taking out the pin, by putting his foot upon it and threatening violence if the attempt was persisted in; but also, according to his own statement, saying that the conductor might take "his mail, but if the train goes, we are going with it;" whereby the passage of said mail, mail carriage, and carrier was further obstructed and retarded until the arrival on the ground of a detachment of United States soldiers and the arrest of the defendant by the deputy United States marshal.

In the case of the United States v. Kirby, 7 Wall. 482, the defendant was charged with arresting the carrier of the mail, and detaining the steamboat on which it was being carried, for that purpose. The defendant, in his plea to the indictment, alleged that he made such arrest as sherriff, upon a lawful warrant, charging the carrier with murder, and without any intent or purpose to obstruct the mail or the passage of the steamer. Upon a demurrer to this plea, the judges in the court below were divided in opinion as to whether the conduct of the defendant constituted, under the circumstances, an obstruction of the mail within the meaning of the act of congress, and certified the question to the supreme court. The court answered the question in the negative, saying "that the act of congress which punishes the retarding or obstruction of the mail, or of its carrier, does not apply to a case of a temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

In the course of his opinion, Mr. Justice Field says, substantially, that the statute only applies to persons who do some act with a knowledge that it will retard the passage of the mail, and do it with that intention; but adds: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object."

That the conduct of the defendant and his associates had the effect to obstruct and retard the passage of the mail is self-evident; and that this effect was knowingly caused by them, although it was not the primary object of their action, is also plain enough. They directly and purposely obstructed the passage of the mail, not as an end, it is true, but as a means of coercing the conductor to carry them on his train to Portland. I suppose the passage of the mail is seldom obstructed, except by robbers, otherwise than as a means of attaining some other end. In all such cases the question to be decided is, whether the act causing the obstruction is in itself lawful. If it is, the obstruction necessarily caused thereby is not a crime.

It can hardly be pretended, upon the facts stated, that these men who stopped this train had any legal right to travel thereon without payment

of their fare or the consent of the conductor. No contract, understanding, or usage is alleged or shown under or by virtue of which they could claim such a privilege with a shadow of right. Because, as they allege, the company "passed them up," they claimed it ought to "pass them down." There is an old adage that "one good turn deserves another;" but this application of it would make the doing of good works dangerous to the doer. How long would it be before they would stop an ascending train on the ground that they ought to be "passed up again" because they had been "passed down"? The act of detaining the train, including the mail car, was unlawful, and therefore the intention to retard the passage of the mail by such act is imputed to the defendant and his associates. In other words, the law holds them responsible for the necessary consequences of their unlawful conduct, without reference to the motive or purpose which actually induced it.

But even supposing that they had at the time a legal right to transportation on this train free of charge, or had even paid for their passage to Portland thereon, the act was unlawful. Under such circumstances, it may be admitted that the defendant would have a right peacefully to board the passenger car and to remain there until he reached his destination. If the conductor disputed his right and sought to put him off, he might lawfully resist force with force; and if the conductor chose to detain the train at any point until he got off, and the passage of the mail was thereby retarded, the responsibility therefor would lie at the door of the company, and not the defendant. But in my judgment, the defendant, even under those circumstances, would not be justified in preventing the conductor from detaching the mail car from the train and sending it on to its place of destination; and this is what the defendant and his associates did on January 11th.

The railway company, it should be remembered, was under an obligation to carry the mail without delay, as well as the defendant. And however derelict it may have been in the performance of the latter obligation, the defendant was not thereby authorized to prevent the company from doing what it could to keep its contract to carry the mail, for the purpose of thereby coercing a performance of its supposed obligation to him. In the case of a mail carrier, or a person on board a mail carriage, charged with the commission of a crime, it may be absolutely necessary to temporarily obstruct the passage of the mail, to secure the arrest of such carrier or person. But the arrest of these persons, under the circumstances, is a lawful act, and the temporary inconvenience caused thereby is submitted to rather than that persons guilty of serious crimes should escape punishment. One public convenience yields something to another.

But it is not only unlawful, but riotous, to prevent, as the defendant and his associates did, the passage of a locomotive drawing a mail car with the United States mail therein, for the mere purpose of constraining the person charged with the conduct thereof, to do or refrain from doing some act collateral thereto, and which he may even be under a legal obligation to do or omit. If the railway company was under any legal obligation to carry these men to Portland, and refused or failed to do so, the law gave them the same remedy for this breach of contract that it does other people. But it did not give them any right to coerce the company by preventing it from carrying the mails according to contract, until it should acquiesce in their demand, to the great hinderance, inconvenience, vexation, and possible loss of the public.

The transmission of the mail from place to place throughout the civilized world with certainty and celerity is one of the greatest and most useful labors of modern society. And it can not be admitted for a moment that a great overland link in this endless chain of communication and intelligence can be broken for days to allow a mob of discharged railway laborers to coerce a railway company into giving them a free ride of two hundred or more miles.

In contemplation of law, upon the facts stated, the defendant is guilty as charged in the information. The maximum punishment for this offense is only one hundred dollars fine. Why so serious a matter as this may be is so limited in punishment, as compared with other crimes of no greater moral turpitude or inconvenience to the public, it is impossible to say.

But taking this measure of punishment for my guide, and considering that the defendant has practically declined to make any contest in the premises, he is sentenced to pay a fine of twenty-five dollars, and to stand committed to the jail of this county until the same is paid or he is by law discharged therefrom.

SUPREME COURT OF ARIZONA.

TERRITORY OF ARIZONA *v.* CASIO.

Filed January, 1884.

IN A PROSECUTION FOR THE LARCENY OF PROPERTY THAT DOES NOT EASILY PASS FROM HAND TO HAND THE PRISONER'S EXCLUSIVE AND UNEXPLAINED POSSESSION of the stolen property, recently after the theft, is not only a circumstance to be considered as tending to show the prisoner's guilt, but raises such a presumption that he is the thief that the burden of proof is taken from the prosecution and laid upon him.

APPEAL from a judgment of the district court, convicting the defendant of grand larceny. The opinion states the facts.

No appearance for the appellant.

Churchill, attorney general, for the respondent.

PINNEY, J. The appellant was tried and convicted of grand larceny and sentenced to the penitentiary for the term of two years, from which judgment he appeals to this court, and assigns several grounds of error. Among others, the defendant asked the following instruction: "The mere possession of stolen property is a circumstance to be considered in determining the guilt of the possessor, but this circumstance is not of itself sufficient to authorize a conviction," which was refused by the court, and in the charge to the jury the following was given: "As a point of law, I charge you that possession of property recently stolen is sufficient to put the possessor upon his defense, and calls for satisfactory explanation; and it is for you, gentlemen, to say whether you are satisfied with the explanation of the defendant as to the manner in which he came into the possession of this ass. Its possession may be considered *prima facie* evidence that the possessor came into its possession unlawfully, unless he can show by undoubted proof that it came into his possession in a legitimate and lawful manner. It is for you, gentlemen, to say whether he has shown by that undoubted proof, or whether he has proved at all, that he came

into possession of this ass in a legitimate way. The burden of proof in every instance rests with the prisoner."

The facts in this case in brief are, that the complaining witness was the owner and possessor of an ass; that he had him running near his house; that he was stolen, and in about two months after he was stolen the defendant and appellant was in possession of the ass, claiming him as his own, and sold and delivered him to another party, in whose possession the real owner found him. This was in substance the proof on the part of the prosecution. The defendant was sworn, and testified that he traded a horse for this and another ass, and gave the man's name with whom he traded, but was unable to tell where the man was at the time of the trial.

The charge of the court below on the question of possession of stolen property is couched in rather strong terms; but taking that charge together with the whole charge of the court, and the facts in proof in the case, we can not see that any such injustice has been done the defendant as would entitle him to another trial, provided the instruction given as to possession of property recently stolen is the better law. On this subject, the reported cases are numerous, and some discord seems to exist. The larceny being shown, and the property found in the possession of the defendant soon enough after the theft to make it recent, is that a mere circumstance tending to show guilt, to be considered by the jury? or is it *prima facie* evidence that the possessor is the thief? And is the burden of proof then shifted? and must the defendant satisfactorily explain such possession?

In People v. Chambers, 18 Cal. 383, that court holds that such possession is a circumstance to be considered in determining the guilt of the possessor. In that case the larceny charged was stealing money and watches. And in that class of cases, to say the least, the doctrine that recent possession of stolen property is *prima facie* evidence of guilt, should be greatly modified. Indeed, the authorities all seem to tend in that direction. The same rule should not apply to small articles which readily pass from hand to hand as it does to property which can not be so easily and artfully disposed of. Had the California courts remained content with the doctrine laid down in People v. Chambers, *supra*, and as applied to the facts in that case, we might have been disposed to agree with them. But in the case of People v. Brown, 48 Cal. 253, in which the defendant was charged with stealing a mare, the doctrine that the recent possession is a mere circumstance to be considered, etc., is again approved of by that learned court. And while we are not unmindful that there are cases where great injustice may be done to a defendant by holding a different rule—holding to the old rule, we may say—still the rule of injustice is one which works both ways. And with all due respect, we must differ from the rule as laid down in the case last cited. Indeed, the great weight of authority seems to be against the doctrine there held.

It has been generally understood that the prisoner's exclusive and unexplained possession of stolen property recently after the theft raises the presumption that he is the thief, and that this presumption takes the burden of proof from the prosecution, and lays it upon the prisoner: Rosc. Cr. Ev. 18; 2 Russ. on Crimes, 337. To the same effect see Phillips on Ev., 7th ed., 186; Knickerbocker v. People, 43 N. Y. 177; People v. Walker, 38 Mich. 106; State v. Brady, 27 Iowa, 126; State v. Creson, 38

Mo. 372; State v. Turner, 65 N. C. 592; Walters v. People, 104 Ill. 544; Sablinger v. People, 102 Id. 242. And so far as we have been able to discover, the California courts stand almost alone in the modification of the doctrine.

It is unnecessary to discuss this subject further. Whether a case is sufficiently strong against the accused to warrant his being called on for his defense must necessarily depend upon the facts in each given case. The other errors assigned not being sufficient to warrant a reversal of the judgment,

Judgment affirmed.

FRENCH, C. J., concurred.

TWEED *v.* LOWE ET ALS.

Filed January, 1884.

WHETHER AN APPELLATE COURT SHOULD GRANT A NEW TRIAL FOR AN ERROR in admitting evidence of a parol agreement between the parties when a written agreement was alleged, unless it is plain from the whole case that a different result would be reached on a new trial, *quære.*

PARTNERSHIP AGREEMENT REDUCED TO WRITING, BUT NOT EXECUTED by the partners, is not evidence of the terms and conditions of the partnership.

WHEN THERE IS EVIDENCE TO SUSTAIN THE JUDGMENT, the same will be affirmed.

APPEAL from a judgment of the district court, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

Smith, Oury & Baker, for the appellant.

H. B. Summers, for the respondents.

PINNEY, J. The complaint alleges that Samuel A. Lowe located the El Capitan mine in September, 1877, and that defendant William N. Tweed asserted title to and claims to be the owner of an undivided one-half interest in said mine by virtue of a written agreement, which claim, it is alleged, is without any right whatever, etc. In the prayer it is asked that the defendant may be required to set forth the nature of his claim, and that a decree may be granted declaring and adjudging that plaintiffs are the owners of said mine, and that defendant has no estate or interest whatever in said mine.

The answer admits that Lowe located the mine as alleged in the complaint, and that the plaintiffs are co-owners and in possession of one undivided half of said mining claim, but asserts ownership in and to one half of said claim. And this was the real issue which was tried by the court below without a jury. The issues of facts and conclusions of law were found against the defendant Tweed. A motion for a new trial was made and overruled, to which order the defendants duly excepted, and appealed therefrom to this court.

It is now insisted by appellant that the court below erred in permitting parol proof of the contract between the parties, when they had declared upon a written contract. The complaint alleges that the defendant claims by virtue of a written agreement, not that the plaintiff claims title by virtue of a written agreement, and even if the complainant did claim by virtue of a written agreement with the defendant, it is doubtful if this court would reverse the judgment for that reason, unless we

could see from the whole case as presented th
be reached on a new trial.

It seems from the proof that Lowe and Tweed
an agreement for working and locating mines.
discovered, and Lowe was at work on it, and
half-owner by furnishing provisions, etc., to c
claims his agreement was that he should becon
tan mine as well as the Little Giant, while L
only applied to the Little Giant mine. Lowe
which he signed, and which he afterwards gav
Tweed had in his possession for some time, l
writing was offered in evidence and exclude
having been executed by the parties, it left t
writing had been drawn, and the case then res
made at the time the contract was entered int

And it is urged that the proof largely sustai
to an undivided one half of the El Capitan n
the whole evidence as contained in the transcr
upon the subject, we are satisfied the proofs s
court below, and the same will be affirmed.

Judgment and order affirmed.

FRENCH, C. J., concurred.

SUPREME COURT OF N

RICKARDS *v.* HUTCHINSON E

Filed January 17, 1884.

A MARRIED WOMAN WHO HOLDS THE TITLE TO HER name may mortgage the same in such name.

FORECLOSURE OF MORTGAGE—PARTIES TO ACTION F mortgage after a conveyance of the mortgaged premises when no judgment against the estate of the latter is asl mortgagee to present the note and mortgage to the a allowance. The mortgagee may maintain such action a gaged premises alone, without serving the administrat party to the action.

WHERE A WOMAN WHO HOLDS THE LEGAL TITLE NAME mortgages the same to a *bona fide* mortgagee, w same in secret trust for her son, to whom she afterwa mortgagee to foreclose the mortgage is not barred, as ag than four years have elapsed since the maturity of the right to foreclose is barred as against the mortgagor.

APPEAL from a judgment of the seven Washoe county, entered in favor of the plainti facts.

Thomas E. Haydon, for the appellant.

William Webster and *Roger Johnson*, for the

HAWLEY, C. J. On the twenty-second day L. Wheat made, executed, and delivered to r note for three hundred dollars, payable on May, 1877, and to secure the payment of t upon certain real estate situated in the tc

county. On the twenty-second day of March, 1879, Mrs. Wheat died intestate, and on the thirty-first day of May, 1879, her daughter, Mrs. L. C. Stiger, received letters of administration upon her estate, and ever since has been the administratrix thereof.

This action was commenced on the ninth day of August, 1882, against the administratrix, to foreclose said mortgage. Appellant was made a party defendant, it being alleged in the complaint that he claimed an interest in the property, and that his interest "is subsequent to and subject to the lien of plaintiff's mortgage." Although the administratrix is named as a party defendant, she was not served with any process, and appellant is the only party appearing as a defendant. He interposed a demurrer in the complaint, and upon it being overruled, filed an answer. Upon the argument on the demurrer respondent asked leave of the court, which was granted, to dismiss that part of her action which claimed a personal judgment against the estate of Mrs. Wheat for any deficiency that might remain after the sale of the mortgaged premises, and the application of the proceeds thereof to the payment of the judgment which she might obtain.

Several questions are presented by appellant, but the principal one raised by the demurrer and answer is whether the mortgage is barred by the statute of limitations: 1 Comp. Laws, 1031. Appellant claims that Mrs. Wheat, who was his mother, held the title to the property in her own name in trust for him.

It appears from the evidence that in 1875 Charles Crocker was the owner of the land; that appellant then entered into a written contract with Crocker for the purchase of the property; that under this contract he was let into possession and improved the same; that owing to anticipated troubles with his then wife, and expecting that she would sue him for a divorce and claim the premises as a homestead, he gave up his contract with Crocker for the purchase of the property, and his mother then entered into a contract with Crocker for the purchase thereof in her own name. A portion of the money for which the note and mortgage was given was used by her to pay Crocker for the land, and was so used with the knowledge and consent of appellant. Crocker deeded the land to Mrs. Wheat on the ninth day of June, 1876. On the third day of December, 1878, Mrs. Wheat made and executed a deed, in fee simple, of the land to appellant. This deed, however, was never delivered to appellant until the twenty-seventh of June, 1882, and was on that day filed for record in the office of the county recorder of Washoe county.

The court, upon the trial of this cause, found, among other things, "that the interest of said Hutchinson is subsequent to and subject to plaintiff's lien; that if said Nancy L. Wheat, deceased, did, as plaintiff claims, hold the aforesaid property as his (Hutchinson's) trustee, nevertheless no trust was declared in writing previous to the giving of said note and mortgage; that said trust existed, if at all, by virtue of a secret agreement between said Hutchinson and said N. L. Wheat, deceased, of which plaintiff had no knowledge, either actual or constructive; that defendant Hutchinson was not in the occupancy or possession of said premises when said mortgage was given; that the mortgage was executed to secure a *bona fide* loan for value, after the trust was created by the defendant, Hutchinson, and accepted by N. L. Wheat; that no notice to creditors appears to have been given to the creditors of the estate of said Nancy L. Wheat; that the statute of lim-

itations did not run against the demand of plaintiff after the death of said N. L. Wheat; that the statute of limitations was not put in motion against plaintiff and in favor of G. R. Hutchinson until the deed from N. L. Wheat, made in his favor, and in which the trust was declared, was recorded, and that the demand of plaintiff is not barred by the statute of limitations; that since the appointment and qualification of said L. C. Stiger as administratrix" she "has actually resided and been beyond the limits of the state of Nevada, except for a period of about fifteen months, * * * during which she has been within this state. That at all the times mentioned in the complaint said Nancy L. Wheat, deceased, was a married woman, but that the property mortgaged by her * * * was not the property of the community, but was, as to this plaintiff and to all the world (except, perhaps, as to G. R. Hutchinson), her separate property."

There is enough evidence in the statement on motion for a new trial to support these findings, and the facts found by the court are sufficient to sustain the conclusions of law, "that plaintiff is entitled to a decree against George R. Hutchinson, for a sale of the property described in the mortgage," etc.

Mrs. Wheat, at the time of the mortgage, held the title to the property in her own name, as her separate property; and under the provisions of section 9 of the act defining the rights of husband and wife, 1 Comp. Laws, 159, she had authority to execute the mortgage in her own name.

As the respondent does not ask for any judgment against the estate, and as the estate has no longer any interest whatever in the property, it was unnecessary for her to present the note and mortgage to the administratrix for allowance. She could thereafter maintain this action against Hutchinson alone for the foreclosure of the mortgage against the property, and it was unnecessary to serve the administratrix, as she was not, after such dismissal, a necessary party to the action: Christy v. Dana, 34 Cal. 553; Schadt v. Heppe, 45 Id. 438; Bliss on Code Pl., sec. 102; Corbett v. Rice, 2 Nev. 334.

If the statute of limitations could have been successfully interposed by the administratrix of the estate of Mrs. Wheat at the time appellant filed his deed for record, or at the time of the commencement of this action, there would not, of course, be any question as to his right to invoke the aid of the statute as a defense to this action; but it is apparent, from the facts stated, that the action was not barred by the statute as against the estate: 1 Comp. Laws, 668, 1036; and it is also apparent that appellant has not brought himself within any rule which would entitle him to plead the statute in his own behalf upon any other ground. He was not in possession of the premises at the time the mortgage was given, nor at any time thereafter until 1880. Respondent had no knowledge of the secret trust existing between him and his mother, or of appellant's interest or claim to the property, until he had his deed recorded—which was more than four years after the maturity of the note. The claim, contended for by appellant, that the action as against him should have been brought within four years from the time of the maturity of the note, can not be maintained upon reason or authority.

The allowance of counsel fees for the foreclosure was authorized by the terms of the mortgage. The amount allowed was not, under the facts of this case, unreasonable.

The judgment of the district court is affirmed.

Hammersmith *v.* Avery.

Filed January 23, 1884.

Seizure of Property Exempt from Execution.—In an action against an officer for taking, under execution, the implements of trade of the plaintiff, a barber, exempt from execution, evidence of the customary wages of barbers for the period of time between the seizure and plaintiff's employment is inadmissible to establish the damages resulting by reason of the interruption to plaintiff's business.

Evidence of an Offer Made to the Plaintiff for the Property so Taken is inadmissible to show the value thereof.

The Right to the Exemption of Property from Execution is a Personal Privilege, which, if not claimed, is waived by the debtor; and therefore an officer who seizes property exempt from execution is not a trespasser *ab initio*.

Objection Raised to a Complaint by Demurring for a misjoinder of causes of action is waived by answering.

Appeal from a judgment of the seventh judicial district court for Washoe county, entered in favor of plaintiff. The opinion states the facts.

Clarke & King, for the appellant.

William Cain, for the respondent.

Belknap, J. The defendant, the constable of Reno township, took in execution the implements of trade of the plaintiff, a barber, who claimed them to be exempt from levy and sale. This action was brought to recover damages for the taking, and also for the interruption to plaintiff's business. Plaintiff recovered judgment. Defendant appeals therefrom, and from an order denying a motion for a new trial. In order to establish the damages resulting to the plaintiff, by reason of the interruption to his business, the court allowed him to prove, against defendant's objections, the customary wages of barbers for the period of time between the seizure and plaintiff's employment. The wages of the journeyman are fixed and certain in amount, and must be paid, whether the business of the principal is profitable or unprofitable. There is no necessary relation between the profits of a principal and the wages of a journeyman, and such wages could furnish no criterion upon which the jury could act in determining the damages sustained by loss of business. Furthermore, the testimony was incompetent. The law required the plaintiff to establish his case by the best evidence of which it was susceptible. Such evidence was in his possession, and there was no necessity to resort to comparisons.

The admission of this evidence was error, and the judgment must be reversed. As this case may be tried again, it is proper that the remaining exceptions should be considered. The evidence of the plaintiff as to the "offer" made him for the property should have been rejected, because, among other reasons, the person making the offer may not have known the value of the property. "The value of an offer depends upon too many considerations to allow it to be used as a test of the worth of property:" Fowler v. Commissioners, 46 Allen, 96.

The testimony of the witness Coleman stands upon a different footing. In testifying to his own opinion of the value of the property, he spoke of an offer made by himself. In Perkins v. People, 27 Mich. 389, and Dickinson v. Pittsburgh, 13 Gray, 554, it is intimated that evidence of this nature tends to prove the opinion of the witness, and is admissible. An instruction was given to the effect that if the property was exempt, the defendant was a trespasser *ab initio*. There are cases which hold that

way, but in California and many other states the right of exemption is held to be a personal privilege, which, if not claimed, is waived by the debtor. In this state we have been accustomed to proceed under the latter rule, and we prefer it—certainly in cases where the property is not of a class wholly exempt, because it is equally beneficial to the debtor, and at the same time affords a protection to the officer. The reason of the rule is well expressed in Twinan v. Swart, 4 Lans. 264: "*Prima facie* all property is liable to execution, and it was the duty of the constable in the first instance to make the levy. He can not know instinctively that property is exempt, nor indeed that exemption will be claimed if it is. * * * It would be intolerably oppressive to place the constable in the dilemma of liability to an action if he refuses to levy his execution, and to an action of trespass if he does." The fourth instruction given at the request of the plaintiff was correct, and must be sustained as against the instruction inconsistent therewith given at the request of defendant.

We see no error in the rulings of the court upon the other instructions. The question of misjoinder of causes of action raised by the demurrer was waived by answering: Lonkey v. Wells, 16 Nev. 271.

Judgment reversed and cause remanded for new trial.

MEAGHER ET AL. *v.* VAN ZANDT.

Filed January 23, 1884.

FEES FOR MILEAGE OR ATTENDANCE OF THE SUCCESSFUL PARTY'S WITNESSES CAN NOT BE TAXED, and judgment therefor entered, against the losing party, when such witnesses have not been subpœnaed in the case according to law, or sworn or examined, although present in court at the request of the successful party.

APPEAL from a judgment of the fifth judicial district court for Nye county, entered in favor of the defendant. The opinion states the facts.

D. S. Truman, for the appellants.

Curler & Bowler, for the respondent.

LEONARD, J. As we construe the statute governing the allowance of witness fees in civil actions, it is only necessary, upon the facts presented, to decide whether or not such fees for mileage or attendance of the opposite party's witnesses can be taxed, and judgment therefor entered, against the losing party, when such witnesses have not been subpœnaed in the case according to law, or sworn or examined, although present in court at the request of the successful party. The question whether such witnesses could compel the party requesting their attendance to pay them reasonable compensation therefor, is not in the case. The allowance for witness fees is governed entirely by the statute. No amount beyond what is there stated can be taxed, in any event, for any witness; nor can that be, if only a certain class of witnesses are allowed fees, without showing that such witness belongs to that class. The statute provides as follows: "Witnesses required to attend in any of the courts of this state shall be entitled to the following fees: * * * Witness fees in civil cases shall be taxed as disbursement costs against the defeated party:" Comp. Laws, 2742.

It is plain from the foregoing that witness fees which may be taxed, mentioned in the last part of the section, are the same as those stated in the first part, which witnesses shall be entitled to receive; also, that such fees are limited to witnesses who have been required to attend.

When is a witness required to attend before a court? Is it one who attends under the obligatory requirements of the law, or one whose attendance is secured by a mere request of a party, or both?

The present fee bill was passed in 1865. The prior one, statutes 1861, page 250, section 8, provided that witnesses in civil cases should have two dollars a day for attending before any court, etc., and twenty cents a mile for traveling to the place of trial. At that time, and at the date of the passage of the present fee bill, the statute in relation to the manner of compelling the attendance of witnesses was the same, in substance, as now: Stat. 1861, pp. 374, 375; Stat. 1864, p. 77; Comp. Laws, 1449, 1450. It provided that "a subpœna may require not only the attendance of the person to whom it is directed, but may also require him to bring with him any books," etc. "No person shall be required to attend as a witness before any court * * * out of the county in which he resides, unless the distance be less than —— miles from his place of residence to the county of trial. * * * The subpœna shall be issued as follows: To require attendance before a court. * * * To require attendance out of court, before a judge, referee, * * * before whom the attendance is required. * * * To require attendance before a commissioner appointed to take testimony."

At the date of the passage of the present fee bill, as now, there was no other method of requiring or compelling attendance of witnesses in a statutory sense, than by subpœna. It is plain that the word "require," then and now used in the statute, meant and means the same as "compel." The legislature did not intend to say that no person should be "requested" to appear before any court out of his county, unless the distance was less than a certain number of miles from his place of residence to the county of trial. Webster defines "require" as meaning "to demand; to ask, as of right and by authority. We require a person to do a thing, and we require a thing to be done." He also says it is rarely used in the sense of "asking as a favor."

It is our opinion that when the legislature, in 1865, changed the fee bill of 1861, by limiting witnesses entitled to fees to such as are required to attend, it was intended to use that word in the sense in which it was and is employed in the civil practice act. The then existing statute provided that a witness might be required to attend by a subpœna, and the fee bill was changed so as to allow witness fees only, when witnesses were so required. Saying that witnesses "required to attend before any court" shall be allowed fees, is the same as saying that witnesses who attend "pursuant to law" shall receive them: See Spaulding v. Tucker, 2 Saw. 51; Woodruff v. Barney, 2 Fish. Pat. Cas. 244.

The judgment is reversed, and the cause remanded for trial.

HAWLEY, C. J., dissenting. In my opinion, witnesses who attend court at the request of a party, without the service of a subpœna, are entitled, under the statute, to fees and mileage for attendance. It is claimed that the words "required to attend," 2 Comp. Laws, 2742, confine the allowance of fees to witnesses who are required to attend court by virtue of legal process. In support of this view, the decisions of the federal courts, which hold that "pursuant to law" means upon service of process, are

cited. The statute of this state does not, however, confine the payment of fees to witnesses who are required to attend court pursuant to law, unless this construction necessarily follows from the use of the word "required." It is true that this word is more frequently used as asserting a right, or as a positive demand, "to claim as by right and authority;" but it is also defined as meaning "to ask as a favor, to request:" Webster's Dictionary.

We gain but little light in searching for the definitions of this word. It has been held in one case that the words "request" and "require," although derived from a common source, may and often do have a meaning radically different: Johnson v. Clem, 27 Albany L. J. 444; and in another case it is said that these words have the same origin. "Usage has given to them somewhat different meanings, which, however, are more distinctions in intensity than in effect or substance:" Prentice v. Whitney, 8 Hun, 301; Abb. Law Dic., "Request."

I think it was the intention of the legislature that witnesses should be paid for their attendance at court, without reference to the means employed in procuring their attendance. Witnesses may be required to attend court, by agreement, or by the request of a party, without the service of a subpœna; and if they do so attend they can, in my opinion, collect their fees for mileage and attendance from the party at whose request they were "required to attend." The fees thus paid would, it seems to me, be a necessary disbursement in the action which could, under the provisions of the statute, be taxed as disbursement costs against the defeated party.

It is true, as was said by the supreme court of Oregon, "that the statutory means of compelling the attendance of witnesses is by subpœna duly served; but we are at a loss to see how any party can be injured in having to pay mileage and attendance merely for the witness of an adversary who attends upon request or agreement, when the additional expense of officers' fees and mileage for issuing and serving of a subpœna, swelling largely the claim for disbursements, could do no more than procure the attendance of the witness:" Crawford v. Abraham, 2 Or. 166.

Substantially the same views have been repeatedly expressed by the supreme and superior courts of New York. "Witnesses are entitled to their fees from the party at whose instance they attend, whether they are subpœnaed or not. The non-service of a subpœna would be no defense for the party when sued by a witness, for his fees, who had attended as his witness at his request. Nor is it possible to perceive how the want of a subpœna can relieve the unsuccessful party from the payment of the fees of his adversary's witnesses:" Wheeler v. Lozee, 12 How. Pr. 448; Vence v. Speir, 18 Id. 168.

"The fee bill gives compensation to witnesses for daily attendance upon court; it does not say anything about attendance in obedience to subpœna; if subpœnaed, there is an additional allowance for cost of service; this is necessary to enable a party to compel attendance. The defendant, being liable to these witnesses for their cost, is entitled to the bill as it has been taxed:" Lagrosse v. Curran, 10 Phill. 141; see also Farmer v. Storer, 11 Pick. 241; Gunnison v. Gunnison, 41 N. H. 128.

I also think that witnesses who attend court in two or more cases are entitled to fees for mileage and attendance in each case: Flores v. Thorn, 8 Tex. 382; Robinson v. Banks, 17 Ga. 215; McHugh v. Chicago

& N. R. R. Co., 41 Wis. 81; Willink v. Reckle, 19 Wend. 82; Hicks v. Brennan, 10 Abb. Pr. 305; Vence v. Speir, 18 How. Pr. 168.

I am, therefore, of opinion that the judgment of the district court should be affirmed.

MEAGHER ET AL. *v.* VAN ZANDT.

Filed January 23, 1884.

JUDGMENT REVERSED ON THE AUTHORITY OF MEAGHER v. VAN ZANDT, *ante*, p. 663.

APPEAL from a judgment of the fifth judicial district court for Nye county, entered in favor of the defendant. The opinion states the facts.

D. S. Truman, for the appellants.

Curler & Bowler, for the respondents.

LEONARD, J. The questions presented in this case are precisely the same as in Meagher v. Van Zandt, No. 1140 [*ante*, p. 663], just decided. Upon the authority of that case the judgment herein is reversed, and the cause remanded for trial.

SUPREME COURT OF NEW MEXICO.

TERRITORY OF NEW MEXICO *v.* YEE SHUN.

Filed January, 1884.

A CHINESE PERSON IS NOT INCOMPETENT AS A WITNESS WHO TESTIFIES ON HIS EXAMINATION before being sworn, that he believed in the Chinese religion, and knew that he was to tell the truth, although the record does not show what such religion teaches in regard to the existence of a supreme being, or in regard to future rewards and punishment.

THE PARTY OBJECTING TO THE COMPETENCY OF A WITNESS for a want of religious belief must show such want by evidence *aliunde*.

APPEAL from a judgment of the first district court for San Miguel county, convicting the defendant of murder. The opinion states the facts.

T. A. Green, for the appellant.

William Breeden, attorney general, for the territory.

BELL, A. J. The appellant was convicted at the August term of the district court for the county of San Miguel, of the crime of murder in the second degree, and was sentenced to imprisonment for life. He has taken an appeal to this court. The only error assigned is that on the trial in the court below Joe Chinaman, who testified and gave material evidence in the case, was incompetent for want of religious belief. From the record, it appears that before being sworn, this witness was examined by counsel for defendant as to his competency, as follows:

Q. I will ask you if you believe in the Chinese worship, their joss-houses. Do you believe in the Chinese joss? A. I live in a Chinese house.

Q. I will ask you if you believe in the Chinese joss-house, where they worship—where they have their religious services? Do you go with Chinamen in this country when they worship? Do you understand what

a God is? A. I don't know what it is. Yes, I believe the Chinese religion.

Q. Have you ever changed from Chinese to Christian religion since you came to this country? A. I am a Chinaman, and believe in the Chinese religion.

Q. Was you ever a witness in court before? A. Yes.

Q. Do you know anything about the obligations of an oath under the Christian religion? A. I don't know it.

To the questions put by the attorney general, the witness answered as follows:

Q. Ask him if he knows what he is required to do when he takes an oath here as a witness. A. He come here for a witness to prove that a man got killed.

Q. Ask him what he is to do or what his duty is in telling his story as a witness; if he knows what his duty is as to telling the truth. A. I can tell the truth in this case.

Q. Do you know that you are sworn here so that you are to tell the truth? A. Yes.

The witness was then sworn and permitted to testify over the objection and exception of the prisoner's counsel.

The record shows the objection to have been in form as follows: "Objection by Mr. Green to the form of the oath as administered and the admissibility of the witness. Objection everruled. Exception."

This objection, we think, was properly overruled. There is nothing in the record to show that the witness was not entirely competent. The witness said that he was a Chinaman and believed in the Chinese religion. What that religion teaches in regard to the existence of a supreme being, or in regard to future rewards and punishments, does not appear. The only question here is whether, whatever may be the religious belief of the witness, he took an oath which would bind his conscience to tell the truth. The witness testified that he was sworn in such manner as, that he was to tell the truth. In considering this question, Greenleaf says: "If the witness is not of the Christian religion, the court will inquire as to the form in which the oath is administered in his own country or among those of his own faith, and will impose it in that form. But if the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked whether he thinks the oath binding on his conscience:" 1 Greenl. Ev., sec. 371. Of course he can as well be asked before as after being sworn, as was done in this case. The defect of religious faith is never presumed: Id., sec. 370. It is therefore incumbent on the party objecting to the competency of a witness on this ground to show such want of religious belief as to render him incompetent, and this must be shown by evidence *aliunde:* Id., and note. This the appellant has failed to do.

The judgment must be affirmed.

Bristol, J., concurred.

Territory of New Mexico *v.* Nichols.

Filed January, 1884.

Receiving a Verdict on Sunday.—The act of the trial court in permitting the verdict of the jury in a criminal case to be rendered and received on Sunday is not error.

Separation of the Jury.—The fact that the jury, on the trial of a prisoner charged with murder, after having the case submitted to them, and being sent out to deliberate upon their verdict, separated without the permission of the court and mingled with the people, and afterwards reassembled, came into court, and returned a sealed verdict of guilty, is not a sufficient ground for setting aside such verdict, when it affirmatively appears from the record that the prisoner was not prejudiced by the proceeding.

The Same.—The record showed that the jury agreed upon their verdict at about four o'clock in the morning; that they wrote it out and each juror signed it; in this condition it was placed in an envelope, sealed, and taken in charge by the foreman of the jury; that the jurors then separated and reassembled at the court-house at eight o'clock the same morning and returned their verdict to the court; that the verdict was not in any way changed after the jury separated, but the verdict which they agreed to, signed, sealed up in the envelope, and delivered to their foreman, was the same verdict upon which they were polled. *Held*, that the refusal of the trial court to set aside the verdict upon these facts was not error.

Instruction as to Degrees of Murder.—On the trial of an indictment for murder, it is the duty of the court, even without a request from the prisoner, to properly instruct the jury with respect to each and every of the degrees of that crime, within the definition of which there is any evidence whatever which can possibly bring the case; and the omission of the court so to instruct the jury concerning a particular degree of murder, even though not requested to do so by the prisoner or his counsel, where there was any evidence whatever tending to bring the case within that degree, is error requiring a new trial.

Murder in the Second Degree.—The statutory definition of murder in the second degree—"the killing of a human being without authority of law, when perpetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual"—does not contemplate a homicide committed "upon a sudden impulse and great heat of passion," but a killing perpetrated by an act imminently dangerous to others, without design to effect the death of any particular person, and evincing a reckless disregard of human life—such as recklessly firing a pistol into a crowd, or casting a stone from the top of a house into a crowded street, without thought or regard of the consequences of such acts, or as to who should be injured or killed thereby.

Erroneous Instruction.—The evidence showed that the prisoner was playing cards with the deceased and another person at a table. The prisoner charged the deceased with cheating, and then jumped up and drew a pistol, when the deceased clinched with him, and both fell to the floor, the deceased being uppermost. One of the by-standers took prisoner's pistol away from him. The two then got up, and after getting up the prisoner stepped about four feet to where his overcoat was, drew from it another pistol, and immediately shot at and killed the deceased. Upon these facts the court instructed the jury that "if the prisoner premeditated the death of deceased, it is murder in the first degree. If he killed him upon a sudden impulse and in great heat of passion, but under circumstances which showed an abandoned mind, regardless of human life, he is guilty of murder in the second degree." *Held*, that the instruction concerning murder in the second degree was error; that the evidence pointed either to murder in the first degree, or to murder in the fourth degree, which is defined by the statute to be "the killing of another in the heat of passion without design to effect death, by a dangerous weapon."

Appeal from a judgment of the district court for the county of Colfax, convicting the defendant of murder. The opinion states the facts.

W. D. Lee, for the appellant.

William Breeden, attorney general, for the appellee.

Bell, A. J. The prisoner was indicted for murder in the first degree at the September term of the district court for the county of Colfax. Thereafter, at the same term of the said court, he was tried upon this

indictment, and convicted of the offense of murder in the second degree, and sentenced to imprisonment for life. From this judgment, thus pronounced against him, he has appealed to this court. Various errors are assigned upon the record before us, which we will consider in their order. The first is, that the verdict in this case was returned on Sunday, and is therefore a nullity. Authorities are cited to sustain this view, and some of them do so, but a careful review of the modern decisions leads us to the conclusion that the common-law rule has been so modified in most of the states as to make it proper to receive a verdict on Sunday, though perhaps not to pronounce a judgment thereon. The distinction is made by many of the decisions between acts judicial and ministerial, and it is held that the receiving a verdict is ministerial, or at most only *quasi* judicial; it may be done when no strictly judicial act can be; as, "though Sunday is *dies non juridicus*, wherein no judicial act is valid, but ministerial acts are, a verdict received on Sunday is good, yet not a judgment on the verdict." Bish. Cr. Proc., sec. 1001, and numerous cases cited; Houghtaling v. Osborne, 15 Johns. 119; Baxter v. People, 3 Gilm. 385.

The reason assigned by some of the judges against the propriety of receiving a verdict on Sunday is, in substance, that it is a desecration of the Sabbath day; that, in the language of the supreme court of Iowa, "courts of justice should, at least by their practice and decisions, maintain the sanctity of that time-honored and heaven-appointed institution."

We can not see the force or good sense of such reasoning. Is it to be said that the sanctity of the day is violated by discharging from unnecessary confinement twelve citizens who have completed important and honorable service for the state? Is it desecration to permit them to return to their homes and join with their families in such observance of the day as may seem good to their consciences? We think not, and are therefore clearly of the opinion that the return of the verdict in this case on Sunday was proper.

The common-sense view of this subject is so well presented in a New Jersey case, that we quote from it: "Although it is the solemn duty both of courts and juries to so arrange their business, and so to discharge their duties, as never to encroach in the smallest degree on the Sabbath, if it be possible to avoid it, yet when the jury have been compelled to reach the morning of that day before the verdict was prepared, I see no mode of proceeding so proper as to receive the verdict, dismiss the jury and parties, and at such future day as may be convenient and proper take the subsequent proceedings. This must be done *ex necessitate rei:*" Van Ripen v. Van Ripen, 1 South. 156.

The second alleged error is upon the refusal of the court below to set aside the verdict of the jury for the reason, that after being sent out to deliberate upon their verdict, the jury, without the permission of the court, separated, and mingled with the people, and afterwards returned a sealed verdict. This was a grave irregularity and merited severe reprehension from the court. It is quite probable that the jurors themselves may not have been aware of the serious consequences which might flow from the act of separation, but it would seem almost impossible that the officers having them in charge could have furnished any good excuse for their neglect of duty. They were sworn to keep the jurors together, and should have been held to strict responsibility for their failure to do so. We do not think, however, that the court below erred in refusing to set the verdict aside in the case at bar for the reason

verdict at about four o'clock in the morning; that they wrote it out, an
each juror signed it, and that the written verdict, thus signed, was place
in an envelope, sealed, and taken in charge by the foreman of the jur
that the jurors then separated and reassembled at the court-house
about eight o'clock of the same morning, and then returned their ve
dict to the court convened for that purpose. The following also appea
in the bill of exceptions as returned: "It is not claimed that the verdi
was in any way changed after the jury separated, but it is agreed th
the verdict which they agreed to, signed, sealed up in an envelope, an
delivered to their foreman, is the same verdict upon which they we
polled."

However reprehensible the unauthorized separation of the jury ma
have been, we think the record shows clearly that no prejudice to th
prisoner came from it. The best authorities on the subject now hol
that when the separation was under such circumstances as that ther
was no reasonable ground to believe that any abuse followed, a verdic
will not be disturbed. In regard to irregularities on the part of a jur
or the panel, Bishop says: "The doctrine is, that if the defendant ha
been deprived of a substantial right or if he has suffered injury or bee
put in danger of suffering it from an irregularity, and has been convicte
the verdict will be set aside, otherwise not:" 1 Bish. Cr. Proc., sec. 99
and cases cited.

The supreme court of New York, in an elaborate discussion of thi
question, says: "Anciently, the utmost rigor and strictness was observe
in keeping the jury together, and when once charged with a cause, the
never could be discharged till they had agreed upon their verdict, bu
the practice has been much relaxed in modern times in both these pa
ticulars. On looking into the books, we do not find that a mere separa
tion of the jury has ever been held a sufficient cause for setting aside
verdict, either in a civil or criminal cause, if we except, perhaps, th
case of the Commonwealth v. McCaul, 1 Va. Cas. 271. We think tha
the mere fact of separation, unaccompanied with abuse, should not avoi
the verdict, even in a capital case. We do mean to be understood a
saying, that the mere separation of the jury without any further abus
is not sufficient ground for setting aside a verdict, though it may deserv
severe reprehension from the court:" People v. Douglass, 4 Conn. 2
People v. Ransom, 7 Wend. 423.

In another case in the same state Judge Selden says: "In New York
mere separation [of the jurors] without permission appears formerly t
have been *prima facie* evidence of misbehavior, but the better opinio
now is that to vitiate a verdict, reasonable suspicion of abuse mus
exist:" People v. Eastwood, 3 Park. Cr. 44. The reasoning in the case
cited seems to us to express the correct view of the law. In the case a
bar, the record, as we have said, shows clearly that no abuse followed th
unauthorized separation of the jury, and there is not left even a suspicio
that the defendant was thereby prejudiced. We are therefore of th
opinion that the court below correctly refused to set the verdict aside o
account of this irregularity.

The next point made by counsel for the appellant is that "the evidence
in this case is of such a nature that the jury might have found the de-
fendant guilty of murder in the fourth degree, and it was error in the
court in not instructing as to murder in the fourth degree." By the bill

of exceptions certified to this court, it appears that "said judge who presided at said trial instructed the jury impaneled to try said case only in relation to murder in the first degree and murder in the second degree; and the said defendant did not, either personally or by his counsel, ask for instructions in any other degree or degrees of murder."

It is, we think, so well settled as to become almost elementary law, that the court in its instructions to the jury in a criminal case must give to them all the law applicable to the evidence elicited at the trial. This, indeed, is the very purpose of instructions from the court, and it is only properly fulfilled when the jury retire to their room fully informed of the principles of law which are to govern them in considering the testimony. The law makes this the duty of the presiding judge, and he must perform it whether requested to do so or not. Suppose the evidence in a capital case clearly pointed to a particular degree of the crime as defined by the statute, and the presiding judge failed, through inadvertence or otherwise, to charge as to that degree, and the defendant was thereby prejudiced, can it be said that because his counsel did not ask for instructions as to that particular degree, that he can not avail himself of the error in the appellate court? We think not, and as we have said already, we think the law on this subject is well settled. Bishop, in his work on Criminal Procedure, says: "The charge should state the law in its application to the facts as already explained correctly and fully. If, for example, there are different degrees of an offense, the law of each degree which the evidence tends to prove should be given, but not of any degree which it does not tend to prove:" 1 Bish. Cr. Proc., sec. 980, and numerous other cases.

Another writer says: "As to the grade or character of the offense, it is the duty of the court to define in all its elements the offense charged, to point out what constitute the different grades of the offense charged in an indictment, as in the case of homicide:" Proffatt on Jury Trial, sec. 328.

Wharton, on this subject, says: "The law is to come from the court, and the court is bound to give the law. And it has been repeatedly declared that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal:" Wharton's Cr. Pl. & Pr., sec. 709. "It is error for the judge, unless there be an entire absence of evidence to prove a particular grade of murder, to exclude such grade from the consideration of the jury:" Id., sec. 713; McNevins v. The People, 61 Barb. 307; Adams v. The State, 29 Ohio, 81, 412.

We have quoted thus far from the text-writers, but the law is made clear in this territory, not only by the statute, but by several adjudications. The practice act of 1880, section 23, provides, amongst other things, that "the court shall instruct the jury as to the law of the case, but shall not comment on the weight of evidence:" Prince's Comp. 126. This statute, of course, can only mean that the court shall instruct the jury as to all the law applicable to the evidence in the case, and this being so, a failure to do so would be error. The court is not permitted to wait until it is asked to charge as to a particular degree of crime to which the evidence is applicable, but it must do so as a part of its duty in the case. The question has, however, been passed upon in this court. In The Territory v. Young, this court said: "Of course, the judge who

thus excludes certain degrees from the consideration of the jury does so at his peril; that is to say, he should be absolutely certain that there is no testimony whatever which would make a verdict of one of these degrees possible, for if there is the least evidence, it is for the jury to determine its weight and effect; and the slightest mistake of that kind would be error, for which the appellate court would have to grant a new trial: 2 N. M. 93. In another case at the same term, this court said, in considering the same question in a capital case: "If there is any evidence whatever which could bring the case within the definition of any degree not given, the limitation of the degree in the charge to the jury would be error which would be good cause for reversal:" The Territory v. Remine, 2 Id. 114; see also The Territory v. Romaro, Id. 474.

Did the court below err in its instructions to the jury in this case? The evidence on both sides was to the effect that the prisoner, the deceased, and two other persons were seated at a table playing cards together; that the prisoner charged the deceased with cheating, and then jumped up and either drew a pistol or tried to do so, when the deceased clinched with him and both fell to the floor, the deceased being on the top; one of the other players took prisoner's pistol away from him; that then he and the deceased got up, and that after getting up, the prisoner stepped about four feet to where his overcoat was, drew from it another pistol, and immediately fired at deceased. One witness says that three or four minutes elapsed between the scuffle on the floor and the firing, but it is apparent from all the evidence that the events of the strife followed in rapid succession until it culminated in the death of one of the parties. The testimony of the several witnesses to the occurrence, called by both the prosecution and the defense, varies but little from the above statement of the evidence.

The court, upon this state of proof, charged as to the degrees of murder as follows: "If he [prisoner] premeditated the death of deceased, it is murder in the first degree and the punishment is death. If he killed him upon a sudden impulse and in great heat of passion, but under circumstances which showed an abandoned mind, regardless of human life, he is guilty of murder in the second degree."

No other degree of the crime of murder was given to the jury. Passing over the first degree of the crime as given by the court, and which it is unnecessary to consider, as the prisoner was not convicted of it, we think the court below erred in its definition of the second degree of murder, and to the prejudice of the prisoner. Correctly defined, under our law, murder in the second degree consists of "the killing of a human being without authority of law; when perpetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." The killing in the case at bar was not such a killing as is contemplated by this defined degree of murder. This statute does not contemplate a homicide committed "upon a sudden impulse and great heat of passion," as stated by the presiding judge in his charge in the court below, but a killing perpetrated by an act imminently dangerous to others, and without design to effect the death of any particular person, and evincing a reckless disregard of human life; such as recklessly firing a pistol into a crowd, or casting a stone from the top of a house into a crowded street, without thought or regard of the consequences of such acts, or as to who should be injured or killed thereby.

The prisoner in this case, upon all the evidence, either unlawfully killed the deceased from a premeditated design to effect his death, in which case he should have been convicted of murder in the first degree, or he killed the deceased under circumstances which would have warranted his conviction of the crime of murder in the fourth degree as defined in our law. One of those definitions is: "The killing of another in the heat of passion without design to effect death, by a dangerous weapon."

We are of the opinion that, upon the evidence, the court below erred in not defining to the jury this degree of murder. The prisoner and deceased had a fight, and the jury might very well have found, on the evidence, that in the heat of passion consequent on it, and immediately following it, the prisoner fired the shots which caused his death, but without design to effect it. All the evidence shows that the prisoner fired the shots, and fired them at deceased, either with design to effect his death or without that design. There can be no question that the shots were intended for the deceased, and him alone, and so the case could not be one of murder in the second degree. The prisoner was, upon the evidence, improperly convicted of that degree of crime, and we think that this resulted from the erroneous definition of that offense given by the presiding judge in the court below, and from his failure to submit to the jury the definition of murder in the fourth degree as being applicable to the evidence in the cause.

The judgment must be reversed, and a new trial ordered.

BRISTOL, J., concurred.

LUNA ET AL. *v.* MOHR.

Filed January, 1884.

PARTY TO A BILL OF EXCHANGE.—In a suit upon the following bill of exchange, duly protested for non-acceptance: "$10,000. Santa Fé, N. M., Nov. 25, 1876. Three days after sight, pay to the order of J. M. Luna & Bro. ten thousand dollars, and charge the same to the account of (signed) Max Lichtenthal, Ag't. To Messrs. Mohr & Mohr, Cincinnati, Ohio"—*held*, that the action can not be maintained on this bill against the defendant, Paul Mohr, as a drawer thereof, by means of parol evidence tending to show that in drawing said bill Max Lichtenthal acted as agent for the firm of Mohr & Mohr, the drawees thereof, that the bill was thus in reality drawn by said firm as drawers upon themselves, and that defendant was a member of said firm.

PARTIES TO NEGOTIABLE INSTRUMENTS.—In general, a person can not be held liable as a party to a negotiable instrument where his name does not in any way appear on the instrument as such party.

LIABILITY FOR THE ORIGINAL CONSIDERATION.—A person not liable on a negotiable instrument, because he is not a party thereto, may still be held liable in a suit brought, or upon a separate count, upon the original consideration for which the note or bill was given.

PLEADING.—When a special count of the declaration has been demurred to, and the demurrer sustained, and the plaintiff has thereupon filed other amended counts, upon which issue has been joined, it is error for the trial court, against an objection by the defendant, to submit to the jury any issues as arising on such original count, to which a demurrer had been sustained.

PLEAS IN THE ACTION OF ASSUMPSIT.—The plea of *non est factum* is only proper in actions on written instruments under seal, and can not properly be interposed as a defense to an action of *assumpsit* on any simple contract in writing, such as a promissory note or bill of exchange.

THE GENERAL ISSUE.—The defense that the defendant is not liable on the bill of exchange in suit, because not a party thereto, is admissible under the general issue, which was pleaded; and his unverified special plea, in substance "that the said supposed bill

of exchange is not his deed, and that he never executed the said instrument, nor authorized any person to execute it, and that the signature thereto is not his signature," is mere surplusage and immaterial, and may be rejected.

APPEAL from a judgment of the district court, entered in favor of the plaintiffs. The facts appear in the opinion.

Fiske & Warren, for the appellant.

Catron & Thornton, and *Gildersleeve & Knaebel*, for the appellees.

BRISTOL, A. J. The plaintiffs in the court below, J. M. Luna & Brother, as copartners, brought suit and obtained judgment against the defendant, Paul Mohr, in the sum of twelve thousand five hundred and twenty-five dollars damages, and one hundred and seven dollars and fifty-five cents costs. The case is here on appeal by the defendant below, Paul Mohr, and was argued and submitted at the last term.

The original declaration contained the common counts, and in addition thereto a special count as follows, viz.: "For that whereas the defendant by his duly authorized agent, Max Lichtenthal, heretofore, to wit, on the twenty-fifth day of November, A. D. 1876, at, to wit, the county of Valencia aforesaid, according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to the said defendant, by the name of Mohr & Mohr; by which said bill of exchange the said defendant, by his agent, Max Lichtenthal, then and there requested the said defendant, by the name of Mohr & Mohr, three days after sight, to pay to the order of said plaintiffs, by the name, style, and firm of J. M. Luna & Bro., ten thousand dollars, for value received," and averring presentation and protest for non-acceptance.

To this declaration the defendant pleaded *non assumpsit*, and to the special count on the bill of exchange, the defendant also pleaded what is called in the record "*non est factum.*" Afterwards, by leave of the court, the plaintiffs amended the said special count on the bill of exchange by averring that defendant, with some other person or persons to them unknown, trading and doing business under the firm name and style of Mohr & Mohr, by their agent, Max Lichtenthal, written "Max Lichtenthal, Ag't" (meaning agent for said Mohr & Mohr), made the draft or bill of exchange in question, and averring demand and protest for non-acceptance and non-payment.

To this special count as amended, the defendant interposed a demurrer, which was sustained by the court below, with leave to the plaintiffs to file two additional special counts by way of amendment of the declaration, which was accordingly done.

One of these additional special counts is upon said bill of exchange, and alleges, among other things, that the defendant and some other person or persons to the plaintiffs unknown, "trading and doing business under the firm name and style of Max Lichtenthal, Ag't, at Santa Fe, N. M., that is to say, at the county of Valencia, aforesaid, to wit, on the twenty-fifth day of November, A. D. 1876, made their certain bill of exchange in writing, under and by the said firm name and style of Max Lichtenthal, Ag't," and avers demand and protest for non acceptance and non-payment, etc.

The other of said additional special counts is also upon said bill of exchange, and alleges, among other things, that the defendant, Paul Mohr, together with some other person or persons whose names are to

the plaintiffs unknown, trading and doing business under the firm name and style of Mohr & Mohr, at Santa Fé, New Mexico, that is to say, at the county of Valencia aforesaid, heretofore to wit, on the twenty-fifth day of November, 1876, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to themselves, the said Messrs. Mohr & Mohr, at Cincinnati, etc., and avers demand and protest for non-payment and non-acceptance, etc.

On motion of defendant, and order of the court, the plaintiffs filed a bill of particulars as follows, viz.:

"1. The bill of exchange is the same one on file in the cause declared on in the first count of plaintiffs' original petition.

"2. The second (common) count is for ten thousand head of sheep or more, which plaintiffs sold to defendant and some one else whose name is to plaintiffs unknown, and offered and tendered at La Junta, Colorado, as per contract made by defendant, by his agent, with plaintiffs, some time in the month of December, 1876, or January, 1877, or thereabouts, plaintiffs not being able to remember now the exact date, sixteen thousand dollars.

"3. For money about that time last mentioned, the exact date the plaintiffs do not now remember, lent and advanced to said defendant through his agent, ten thousand two hundred dollars.

"4. For money paid, laid out, and expended by plaintiffs to the said defendant, and to the agent of the said defendant for the use of said defendant and some other person whose name is unknown at the time last aforesaid, the exact date of which the plaintiffs can not now state, ten thousand two hundred dollars.

"5. For money received by said defendant and some other person at present unknown to plaintiffs, through the agent of said defendant for the use and benefit of said defendant, at about the time last aforesaid, the exact date of which plaintiffs can not now remember, ten thousand two hundred dollars.

"6. For an account stated by and between plaintiffs and defendant's agent, acting for and on behalf of defendant, found due, the exact date of which the plaintiffs can not now remember, but about February or March, 1877, ten thousand two hundred dollars."

The plaintiffs' cause of action, therefore, is presented by the two special counts last aforesaid—the common counts and bill of particulars covering the entire declaration. The bill of exchange which was filed with the declaration is as follows:

"$10,000. SANTA FÉ, N. M., Nov. 25, 1876.

"Three days after sight, pay to the order of J. M. Luna & Bro. ten thousand dollars, value received, and charge the same to the account of

"MAX LICHTENTHAL, Ag't.

"To MESSRS. MOHR & MOHR, Cincinnati, O."

To the cause of action thus presented, the defendant pleaded the general issue, and also interposed a special plea to the two special counts of the bill of exchange, such special plea being as follows: "And for a further plea in this behalf as to the last and additional counts of the said second amended petition or declaration, the said defendant says that the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says that the said supposed bills of exchange in the said two counts mentioned are not his deeds, and that he

never executed the said instruments nor either of them, nor authorized any person to execute them or either of them for him, and that the signatures thereto are not his signatures, and of this he puts himself upon the country," etc.

This special plea (designated in the record and by the parties as a plea of *non est factum*) purports to have been verified by the oath of the defendant before a notary public in the state of Ohio; but the record discloses no evidence of the notary's official character, or of his authority under the laws of Ohio to administer oaths other than what purports to be his signature, certificate, and notarial seal. Plaintiffs demurred to this special plea, on the ground that it did not appear that the plea had been verified before an officer authorized to administer oaths. The demurrer was overruled and the ruling was excepted to. Issues having been joined upon this condition of the pleadings, the parties went to trial, resulting in a verdict and judgment for the plaintiffs for damages and costs as aforesaid.

A large amount of evidence, with numerous rulings thereon, with exceptions, is presented by appellant's bill of exceptions; the court below, on its own motion, gave an elaborate charge to the jury, much of which was excepted to by the appellant, as well as to refusals to charge as requested by him. Every step taken by either party during the progress of the trial seems to have been objected to by the opposite party. An interminable number of questions are thus presented by the record; it would be unseemly to attempt to pass upon all of them.

The first question naturally presenting itself relates to defendant's special plea to plaintiffs' special counts on the bill of exchange, designated in the record as a plea of *non est factum*. The plea of *non est factum* is only applicable in actions on written instruments under seal. In common-law pleading, this plea was never interposed as a defense to an action of *assumpsit* on any simple contract in writing as a promissory note or bill of exchange. Our statute, in express terms, makes this distinction. Section 30, Prince's General Laws, 119, is as follows: "When any party to a suit, either as principal or security or indorser, founded on any written contract, covenant, or agreement whatsoever, shall deny his signature, he shall do the same under oath."

The next succeeding section, 31, is as follows: "In all cases where a suit has been instituted upon any writing obligatory, or may be so instituted, the execution of the instrument shall be regarded as proven, and the plea of *non est factum* shall be regarded as unavailing until the person filing such plea shall have made oath that he never executed the said instrument, nor authorized any person to execute it for him."

A writing obligatory is a bond or some written obligation under seal. It is a term that is never applied to simple contracts, though they may be in writing. These two sections of our statutes are quite distinct and independent, and refer to two separate classes of written instruments. Section 30 can only apply to simple written contracts, such as bills of exchange and promissory notes, and other written instruments not under seal. It specifically relates to the signature to any such simple contract of the party sought to be charged thereby, and the denial thereof by him, and to nothing else. The proper special plea under this provision of the statute would be that such signature is not the signature of the defendant. The plea that it is not his deed does not apply. The bill of exchange in question has upon its face the signature of Max Lichtenthal,

Agent, as drawer, and the name of the firm of Mohr & Mohr, as drawees. The plaintiffs seem to have experienced great difficulty and doubt as to the capacity in which the defendant should be sued, and it is extremely doubtful that the two special counts of the declaration on the bill of exchange can be reconciled as consistent and proper in the same declaration. In one of these counts it is sought to charge defendant as a member of the firm of Max Lichtenthal, Agent, composed of the defendant and other persons unknown to plaintiffs, while in the other of said counts it is sought to charge the defendant as a member of the firm of Mohr & Mohr, composed of the defendant and other persons unknown to the plaintiffs. It is nowhere alleged that these firms are identical in membership. For aught we know they may be distinct partnerships, with separate and distinct liabilities, though the defendant may be a member of each. The plaintiffs in their bill of particulars seem to have concluded themselves on this point at the outset, by admitting that there was but one bill of exchange sued on. It is evident that the defendant could not be sued in both capacities in the same action on the same bill of exchange. Appellees' counsel claim that in consequence of the defective verification of appellant's special plea to the two special counts in the declaration, it should be considered as an admission on his part that the signature to the bill of exchange is his. This construction would be by far too broad, even under the peculiar allegations of the declaration in the two special counts on the bill of exchange. A person's signature is his name in his own proper handwriting, or, if he can not write, then some mark or symbol or sign adopted by him as his signature, and made or impressed on an instrument in writing, by his own hand. If he is sued on an instrument in writing purporting to have been executed by him over his signature, but as a matter of fact was not, then his liability must be established, if at all, not upon the ground that it is his signature, but by proofs that he expressly authorized some agent or procurator to bind him by writing what purports to be his signature. So in this case, even if the appellant could be held liable on the bill of exchange in the manner claimed in the declaration, such liability must be established by competent proof showing his connection therewith, instead of relying on the ground that the signature to the bill of exchange is his, as it is evident from the face of the bill that it does not bear his signature within the meaning of section 30 of the statute aforesaid.

The action is not brought against the partnership firm of Max Lichtenthal, Agent, nor that of Mohr & Mohr, but against Paul Mohr in his individual capacity as a member of each. The necessary proofs to establish appellant's liability on the bill of exchange, if such liability exists, could be given under the general issue. Appellant's special plea, therefore, may be treated as surplusage and immaterial. In this connection it may be well to consider the fact that Tranquilino Luna, one of the appellees, who, it seems, negotiated for and took the bill of exchange on behalf of appellees, in his testimony on the trial, in answer to the question, "For what consideration was this draft in question given?" said, "The consideration was some sheep I sold him;" and to the next succeeding question, "Sold whom?" he replied, "Max Lichtenthal, as agent for Mohr & Mohr." This evidence of one of the appellees should be conclusive as showing that the signature "Max Lichtenthal, Ag't," can not be considered as the signature of the defendant within the meaning of the statute. And all the evidence introduced under objection, tend-

ing to show a liability on the part of appellant as a member of the firm of "Max Lichtenthal, Ag't," was improper evidence to be considered by the jury, and constituted error.

The lower court, in charging the jury, among others, gave the following instructions: "The plaintiffs sue the defendant on a certain draft or bill of exchange, dated November 25, 1876, for the sum of ten thousand dollars, said instrument being signed "Max Lichtenthal, Ag't." Their declaration or complaint contains three separate counts, besides others that do not seem to be insisted on in the trial. If they have proved their case to your satisfaction under either of these counts, they are entitled to a verdict. The first one of these counts alleges that said draft was made by the defendant doing business under the firm name of Mohr & Mohr, by Max Lichtenthal, his agent. The second alleges that the defendant and one or more others unknown were doing business under the firm name of Max Lichtenthal, Agent, and as such made said draft. The third alleges that the defendant and one or more others unknown were doing business under the firm name of Mohr & Mohr, and that they made the draft." To these instructions, the defendant duly excepted. The first special count on the bill of exchange was permitted to be read to the jury, though objected to by defendant's counsel, and during the progress of the trial evidence bearing upon the said account was permitted to be given to the jury, though objected to by defendant's counsel. This certainly was error under the state of the pleadings, as a demurrer had been sustained to such first count, and it no longer formed a part of the declaration.

The lower court, at the request of plaintiffs, though objected to on behalf of the defendant, gave also the following instructions to the jury:

"If the jury believes from the evidence that the defendant and Max Lichtenthal, either alone or with any one else, were partners in the year 1876, under the name and style of 'Max Lichtenthal, Ag't,' and that while they were so partners, Max Lichtenthal, as a member of said firm, drew the draft in question by the said firm name on the defendant, either individually or as the firm of Mohr & Mohr, they shall find a verdict for the plaintiffs," etc.

This instruction is so adroitly worded as to be well calculated to mislead the jury. The jury even might have apprehended from its phraseology that if Max Lichtenthal executed the draft on his own individual and private account, the defendant would be liable under the circumstances, though a strict grammatical construction would not sustain that view. The instruction is otherwise erroneous, inasmuch as the declaration contains no count covering the defendant's liability as the member of any firm of which Max Lichtenthal was also a member. Max Lichtenthal was necessarily known to plaintiffs, and as we have seen from the evidence of one of such plaintiffs, the transaction was entered into upon the representations of Lichtenthal that he was acting as the agent of Mohr & Mohr, and that the draft was taken with the understanding that the firm of Mohr & Mohr was to be looked to as the responsible party. In other words, that Mohr & Mohr drew the draft on themselves through their agent, Lichtenthal, in favor of appellees. The representations of Lichtenthal as to the capacity in which he was acting may have been false and fraudulent, but unless it be shown that appellant was in some way connected with the fraud, he could not be held responsible. There were several other instructions that were given and excepted to on behalf

of appellant, and several that were asked to be g
and the refusal excepted to on his behalf. It m
would be discovered upon a further examinatic
ence to such instructions, but enough has bee
justify a reversal.

There is another question presented by the
all the others in importance, since upon its det
termination of the further question whether the
granted, or a final judgment rendered by thi
appellant.

This relates to the peculiar character of this l
the name of the appellant, nor of the firm of Mc
is a member, appearing on the face thereof as dr

The question presented is, whether any pa
mony *aliunde* can be made liable as principal u
ment, under the circumstances presented in this
disclosed thereon. This question has been argu
side with signal ability, indicating careful and e
one of those questions about which there is a go
flict in judicial opinions. Upon this point, in su
that a party may be charged as principal though
on the negotiable instrument, we are referred
authority to the case of Mechanics' Bank of Al
lumbia, 5 Wheat. 326, and to the case of Baldv
1 Wall. 234.

Any decision unreversed of the supreme cou
covering the case before a territorial court woul
sive on such court irrespective of the weight of a
state courts.

In the first of these cases, 5 Wheat. 326, an
brought upon a bank check made and issued in
business as a bank transaction; but the check wa
taken from the printed check-book in common u

"No. 18. MECHANICS' BANK OF ALEX.

"Cashier of the Bank of Columbia: Pay to th
Esq., ten thousand dollars ($10,000).

William Patton, jun., who signed this check,
Mechanics' Bank of Alexandria, and Minor, t
check, was the teller. The check was offered in
to on the ground that it could not be used in
Mechanics' Bank, because it did not appear th
check of said bank, and because no parol or ot
received to explain its character; but the objec
other evidence showing it to be a bank transacti
the parties, was received, together with the check
United States supreme court affirmed the judg
ground mainly that the corporate name of the ba
of the check, leading to the belief that it was
individual transaction, to which consideration v
stances that the cashier was the drawer and the
the evidence on the face of the bill predominate
bank transaction. Under these circumstances it
this class of cases whatever there was of patent

the check might be explained by parol testimony. On this point the court said: "Had the draft signed by Patton borne no marks of an official character, the case would have presented more difficulty, but if marks of official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable."

In the other of said cases, 1 Wall. 234, is a somewhat stronger case in support of appellees' position. It was an action of *assumpsit* brought upon a promissory note, a copy of which is as follows:

"$3500. BOSTON, Dec. 9, 1853.

"Five months after date, I promise to pay to the order of O. C. Hale, Esq., cashier, thirty-five hundred dollars, payable at either bank in Boston, value received. J. W. BALDWIN."

The suit was brought by the Bank of Newbury, a corporation of Vermont, against Baldwin, the signer of the note. The action was brought in Massachusetts, where Baldwin resided, and where the note was made and payable. In the mean time, Baldwin had obtained a discharge from his debts under the then bankrupt laws of his state. He pleaded this discharge in bar of the action on the note. He also pleaded the general issue, and under this plea the objection was raised on his behalf that the note declared on was not competent evidence to support the declaration, in that it appeared on the face of the note that Hale, in his individual capacity, was the payee, and not the Bank of Newbury, the plaintiff corporation.

And upon this point there was the following agreed statement of facts by the parties, viz.: "It is agreed that O. C. Hale was *in fact the cashier of the Bank of Newbury* at the time of the making said note, and in case the court would admit such evidence, after objection by the defendant, and not otherwise, and not waiving his objection to the same as incompetent, the defendant admits that said Hale, mentioned in said note, in taking said note was acting as the cashier of and agent for the plaintiff corporation. If upon the foregoing facts the plaintiff has made out a legal cause of action in his favor, and the defendant's discharge is ineffectual as a bar of said action, the defendant is to be defaulted, otherwise the plaintiff is to become nonsuit."

One of the points raised and decided in this case was practically the same as that raised in the first of the foregoing cases, 5 Wheat. 326, and was decided in the same way. On this point the court said: "Promise, as appears by the terms of the note, was to O. C. Hale, *cashier*, and the question is, whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note he acted as the cashier and agent of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general, he is the officer who superintends the books and transactions of the bank, under the orders of the directors. His acts, within the sphere of his duty, are in behalf the bank, and to that extent he is the agent of the corporation. *Viewed in the light of these well-known facts*, it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument."

There is some general language used in each of these decisions that has been construed by appellees' counsel as deciding that in all cases of negotiable instruments between private parties, any person whose name does not appear thereon may be made liable, as maker or drawer, by parol testimony. But they are not so comprehensive as that. They rest upon grounds peculiar to banking institutions and their officers, their purport being that if a bill of exchange, check, or promissory note is made by or to a *cashier*, in contemplation of law the strong presumption arises that it is a bank transaction, and if that is the fact, whatever uncertainty there may be can be cleared up by parol testimony. This is as far as they go.

It is within the knowledge of every business man, that in the multitude of daily transactions of banking institutions they have fallen into the habit of a very summary mode of executing checks, bills, and notes, and when the word "cashier" is attached to a name, without anything else to indicate the official character of the instrument, it is commonly understood to relate to a bank transaction. In this class of cases the rule of law on the point now under consideration seems to be quite well settled.

In a very late case, decided in May, 1882, the supreme court of Illinois, in the case of Scanlan v. Keith, 102 Ill. 634, very clearly makes this distinction. The language of the court is as follows: "Whatever may be the decisions elsewhere, the authorities of this state are full to the point that a party will not be permitted to show by oral testimony that his written agreement, understandingly entered into, was not in fact to be binding upon him. Accordingly it was held, in Hypes v. Griffin, 89 Ill. 134, mainly on the authority of Powers v. Briggs, 79 Ill. 493, that where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties it was to be the note of the church corporation, and not the note of the trustees executing it. The principle running through that and other cases in this court is, that such instruments will be construed as the parties made them, without the aid of extrinsic evidence. That rule would seem to be as well settled in this state as any rule can be. But there is another principle declared in Hypes v. Griffin, *supra*, that has more immediate application to the case in hand. It is, that where a party signs his name as cashier or agent of a banking, railroad, or other corporation, in drawing drafts and bills or in accepting drafts or other evidences of indebtedness in its ordinary business, if it appears or is made to appear it is the obligation of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence. Most generally there is that on the face of the instrument itself, and especially when the execution is witnessed by the seal of the corporation attached thereto, that indicates unmistakably it is the obligation of the corporation. It is seldom any one takes such paper under the belief it is the obligation of the officers executing it on behalf of the corporation. But parol testimony is admissible to establish the facts, collateral though they sometimes may be, that will make it appear past all doubt whose obligation it is."

This decision, with the distinctions therein made, is in perfect accord with the decisions of the United States supreme court above referred to. In the case of Bank of New York v. State Bank of Ohio, 29 N. Y.

619, it was expressly decided that a bill drawn to D. C. Converse, *cashier*, is, in judgment of law, payable to the bank of which he is the officer. There is another class of adjudications, notably the modern decisions of the court of appeals of the state of New York, on the subject, which put it upon much broader grounds apparently, by applying the same principles to bills and notes between private individuals as are applied to the same kind of negotiable instruments made by or to cashiers of banks in the ordinary business of such institutions. The case of Moore v. McClure, 8 Hun, 559, decided October, 1876, by that court, is to that effect, and is much relied on by the appellees.

This was an appeal from the order of the lower court, sustaining a demurrer to a count of the complaint. The count demurred to was as follows: "And for a second and further cause of action the plaintiff alleges that on the seventh day of January, 1875, the said defendant, by J. S. McClure, her said agent, made and delivered to this plaintiff her promissory note in writing, of which the following is a copy:

"'CANANDAIGUA, January 7, 1874.

"'Twenty days after date, I promise to pay to the order of C. T. Moore sixty-one and sixty-two one-hundredths dollars, at Williams & Remington's Bank, value received, with use and exchange on New York.

"'JOHN S. MCCLURE, Agent.'

"That said note was given by said McClure to plaintiff for and as the agent of said defendant; and that said note was given by said defendant by her said agent for and on account of goods, wares, and merchandise theretofore sold and delivered by said plaintiff to said defendant."

In rendering the decision the appellate court used the following language: "The demurrer was sustained on the ground that the note does not refer to the defendant by name, and the count does not show that J. S. McClure had authority as the agent of the defendant to make the note, or that it was made in the business of his agency. We think the count is sufficient; it avers that the defendant, by her agent, in consideration of goods, etc., sold and delivered to her, made her note. * * * The fact that the name of the principal does not appear on the face of the note, under the modern decisions of this state, is not at all conclusive. * * * The order sustaining the demurrer is reversed." The case of Colman v. First National Bank of Elmira, 53 N. Y. (Court of Appeals, 8 Sickels) 388, is to the same effect, though the action was upon a bank deposit. These New York decisions are in conflict with the great preponderance in the weight of authority on the subject. And when we consider the code practice of that state, wherein the original transaction constituting the consideration of the note is set out in the same count in the complaint in which is also set out the note, it is not at all surprising that upon the whole statement of facts taken together it should be held that the count contained a cause of action, since all the authorities agree that although a party may not be held liable on a bill or note unless his name appears thereon, yet if it be true that his connection with the original transaction and consideration out of which the negotiable bill or note arose was such as to render him liable, he may be sued on such original consideration: 1 Parsons on Notes and Bills, 92, 93; 1 Daniel on Neg. Inst., 2d ed., sec. 305, p. 251.

In case an action is brought on such original consideration, parol testimony may, of course, be received showing such liability. The distinction being, that according to the "law merchant" bills and notes must

be in writing and can not be varied by parol; such a thing as a parol bill of exchange is unknown to the law. This distinction is by no means an idle thing, since there can be no doubt that it is of the greatest advantage in commercial transactions to have all the terms, conditions, and parties to such paper expressed with certainty in writing. No case could be invented that would better illustrate the soundness and reasonableness of this principle than the difficulties and uncertainties attending the very case we are now considering. Surely the liability as principal on any negotiable instrument in writing should rest on some more certain foundation than the weak, conflicting, and unsatisfactory parol testimony disclosed in the record in this case. This view is not not only supported by the preponderance of judicial authority, but is sustained in the text of every law-writer on the subject.

In the very late and valuable work of Daniel on Negotiable Instruments, in vol. 1, 2d ed., sec. 300, that author says: "It is a general principle of commercial law, that a negotiable instrument must wear no mask, but must reveal its character on its face; and it extends to the liability of parties thereto, who must appear as distinctly as the terms of the instrument itself, in order to be bound by those terms." Again, in section 301, he says: "If a bill be payable to A. B., describing him as agent, it is generally considered mere *descriptio personæ*, and if he should indorse it in like manner, we should say he was personally liable; and we can see no difference between such a case and those in which it is held that where the maker of a negotiable note adds the word "agent," he and he alone is bound; the terms being regarded as descriptive only." Again, in section 303, he says: "No party can be charged as principal upon a negotiable instrument unless his name is therein disclosed. The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'a courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto unless his name is in some way disclosed upon the instrument." In section 305, he further says: "If the agent sign a note with his own name and discloses no principal, he is personally bound. The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself thereon appearing, it must be construed as his note or as a nullity, and though he term himself agent, such suffix to his name will be regarded as mere *descriptio personæ*, or as an ear-mark of the transaction, and may be rejected as surplusage. And this principle applies although it could be proven that the payee knew of the agency when the note was made, and it was understood that the principal and not the agent should be bound, for such evidence would vary the terms of the note."

The very latest decision on the subject that has come to our knowledge is that of the Ohio National Bank v. Cook, decided by the supreme court of Ohio in January, 1883, and reported in the Review, January 11, 1883, under the head of "commercial law." The action was upon three drafts signed by Cook as treasurer, and made to his own order as treasurer, the corporation of which Cook was treasurer being the defendant. The plaintiff in the lower court obtained judgment, but the supreme court reversed it. Judge White, in the opinion, said: "The name of the corporation of which Cook is the treasurer, and which he declares is his

principal, nowhere appears on the face of the bill as a party to it, and parol evidence is not admissible to add a party to the instrument when there is no notice on its face. Whoever takes negotiable paper enters into a contract with the parties who appear on the face of the instrument, and no other person can be looked to for payment. The addition of "treasurer" to Cook's name does not relieve him of personal responsibility; that is merely *descriptio personæ.*"

There can be no doubt that this view is in accord with the general current and weight of authority on the subject. In our opinion, no valid reason can be assigned for doing violence to this long-established and wholesome rule of law, since, as we have seen, there need be no failure of justice in rejecting a bill as that of an undisclosed principal, so long as an action may be maintained against him on the original transaction and consideration, unattended with any of the difficulties as to parol testimony that surround negotiable paper.

In each of the New York cases referred to, the real issue practically was upon the original consideration on which parol testimony was admitted. In one of these cases, Coleman v. First National Bank of Elmira, Judge Andrews, in delivering the opinion, said: "The real issue on the trial was whether the bank or Van Campen was the depositary." This issue related exclusively to the original consideration for which the certificate of deposit sued on in connection therewith was given. These cases apparently were disposed of without much thought or deliberation. In either case, the complaint under the code no doubt contained a cause of action, setting out, as it did, in the same count, the original consideration in connection with the note. There was therefore no occasion for considering the terms of the note as having been varied by parol, as judgment might have been rendered on the allegation and proof of defendant's connection with and liability on the original transaction and consideration for which the note was given. With us such a complaint would not be considered good pleading, but under our common-law pleadings and practice, the same result may be attained in another way, by setting out the original consideration under the common counts. This was done in this very case, and testimony was received on the trial that might have been properly applied to the common count covering the original transaction in regard to the sale and delivery of sheep. But the court below at the outset, in charging the jury, took from their consideration the common counts, and submitted to them only the special counts on the bill of exchange, and no objection was raised by either party. In proceeding upon the common counts covering the original consideration, the bill of exchange, no doubt, in some way should be brought into the case and not be left outstanding; and while it could not be received in evidence for the purpose of charging an undisclosed principal thereon, it might, for some purposes, be received as explanatory of the original transaction, and that the judgment might become a bar to any future action thereon. We hold that the appellant can not be held liable on the bill of exchange as drawer, his name not appearing thereon as such, and that the only remedy of the plaintiffs is to proceed on the original consideration.

A new trial is ordered.

All concur.

SUPREME COURT OF OREGON.

BUCHANAN *v.* SCHULDERMAN ET ALS.

Filed January, 1884.

A DEVISE OF CERTAIN REAL ESTATE IS NOT VOID FOR RESTRAINING THE POWER OF ALIENATION beyond the time authorized by statute, where a testatrix gives the same to her two daughters, "in common, for the term of their natural lives, and after their death, or the death of either of them, the share of the one dying to her children in fee simple, the children of each daughter to take one half thereof; or in case of the death of either of said daughters without issue, then the children of the other daughter to take all of the same;" provided, that neither of such daughters could sell the same; and provided, that no one of their children should have the power to sell his interest until after all of the children taking shall attain majority; "and if any of said children shall die during minority, then the brothers or sisters, by my said daughters, of the child or children so dying, shall take all of the said property in the same manner as though the child or children dying had never been born; and upon the death of all the children, of either of my daughters, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee; and that all of the children of both my daughters who shall attain the age of majority, and none other, shall be and become, at such time as all living children of my said daughters shall attain to the age of majority, sole and absolute owners in fee simple of said property."

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the defendants. The opinion states the facts.

George H. Williams, for the appellant.

E. D. Shattuck and *Robert L. McKee*, for the respondents.

WALDO, J. The controversy in this case arises on the will of Delia Delschneider, who died in the city of Portland, in January, 1881, leaving a last will, dated January 13, 1881, by which she made the following disposition of a large portion of her real estate: "I give and bequeath unto my said daughters Hannah Schulderman and Luzetta Buchanan, in common, for the term of their natural lives, and after their death or the death of either of them the share of the one dying to her children in fee simple, the children of each daughter to take one half thereof; or in case of the death of either of said daughters, without issue, then the children of the other daughter to take all of the same, each an equal portion of the same, all of my real estate and lands of every description, of which I shall die seised or possessed, excepting the two lots in Watson's addition hereinbefore bequeathed to my said daughter, Hannah Schulderman; provided always, that neither of said daughters shall have the power to sell or convey her or their interest in or to any of the property above enumerated, but only to lease the same for the period of time not extending beyond the life of the daughter leasing; and provided also, that no one or any of the children who shall take any of said property by virtue of this my will shall have the power to sell or convey his or their interest in or to said real estate until after all of the children taking hereunto shall attain and arrive at the lawful age of majority; and if any of said children shall die during minority, then the brothers or sisters, by my said daughters, of the child or children so dying shall take all of the said property in the same manner as though the child or children dying had never been born, and upon the death of all the children of either of my said daughters, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee, in equal portions to said children. * * * And that all of the chil-

dren of both my said daughters who shall attain to the age of majority, and none other of said children, shall be and become at such time as all living children of my said daughters shall attain to the age of majority, sole and absolute owners in fee simple of said enumerated property. * * * And to provide against the alienation of any and all of my said property by either and both of my said daughters, or by any of their children until all of said living children shall attain to the full age of legal majority; and that all of my said lands may and shall be preserved intact for my grandchildren at the time when they shall all become of the age of majority."

The plaintiff contends that the will is void for perpetuity. The testatrix devises life estates to her two daughters, H. and L.: Gen. Laws Or., sec. 28, p. 790. "After their death, or the death of either of them," she devises "the share of the one dying to the children in fee simple, the children of each daughter to take one half thereof; or in the case of the death of either of said daughters without issue, then the children of the other daughter to take all of the same." This part of the will, without going further, would give a vested remainder in fee to all the children of each of the daughters who should be living at the death of the testatrix, or who should thereafter be born: 2 Jarm. on Wills, Bigelow's ed., 157. But the testatrix goes on to provide that if either of her daughters should die without issue, the estate so devised should go over to the children of the other. This language, uncontrolled, Sheel's Estate, 52 Pa. St. 263, must be construed to import a definite failure of issue—that is, dying without lineal descendants surviving after the death of the tenant for life: Abbott v. Essex County, 15 How. 202; Groves v. Cox, 40 N. J. Eq. 44; 2 Jarm. on Wills, 497, note 1.

Thus far we would have a devise running to the daughter for life, with a contingent remainder in fee to her children, dependent on the contingency that they or their issue should survive their parent, with an executory limitation over. But such contingent remainder, while it vests absolutely in such of the children as should be living and of full age when the life estate falls in, vests only a qualified fee in such as are under age at that period—to become enlarged into a fee simple, or finally defeated on the contingency of dying before they reach majority. This qualification is annexed to the estate, irrespective of the possibility of leaving issue surviving. No provision is made for issue in this contingency. Hence, in order to take absolutely, under the will, the children must, in any event, attain majority. If this age is reached during the continuance of the life estate, they must also survive the determination of that estate, or leave issue surviving its determination.

The clause in the will relied upon by counsel for appellant to establish a perpetuity that "upon the death of all the children of either of my said daughters, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee," is intended to relate to death during minority. The testatrix had just provided that if "any" of said children should die during minority, the share of the child dying should go to the children surviving, and the clause just cited, which immediately follows, is designed, evidently, to provide for the contingency should "all" die during minority. The testatrix certainly did not intend that the children of that one of her daughters happening first in the course of nature all to die, should take a fee simple absolute. On the contrary, subsequent clauses of the will show,

unequivocally, that she intended that each child should take a fee simple on reaching majority. These provisions for the children are somewhat restricted in their general terms by previous clauses in the will, as we have seen, and by the temporary restriction or alienation at the end of the will. It follows that the whole of the estate must vest absolutely within lives in being, and twenty-one years afterwards, as counsel for respondent have shown, and hence the executory devise over is not too remote.

Decree affirmed.

WILSON *v.* ALLEN ET AL.

Filed January, 1884.

A DENIAL IN AN ANSWER OF ANY KNOWLEDGE OR INFORMATION SUFFICIENT to form a belief as to an allegation in the complaint is a sufficient denial under section 713 of the civil code.

A SURETY ON ONE OF SEVERAL NOTES SECURED BY THE SAME MORTGAGE on real estate, after a foreclosure of the same, can not compel the judgment creditor or his assignee to apply the proceeds arising from the sale of the mortgaged premises *pro rata* towards the payment of such notes.

APPEAL from a decree of the circuit court for Linn county, rendered on the pleadings in favor of plaintiff. The complaint alleges: 1. The execution of a promissory note for two thousand four hundred and eighty-six dollars and six cents, January 1, 1877, by T. T. Wilson, with respondent as surety, in favor of Smith, Brassfield & Co., due one day after date; the execution of a second note for seven hundred and twenty-four dollars and seventy-six cents, by John S. Wilson, with T. T. Wilson as surety, to the same firm, January 1, 1878, due one day after date; the execution of a third note for sixty-six dollars and twenty-five cents, February 3, 1879, due one day after date, to the same firm, by T. T. Wilson; and the execution of a mortgage on the last-mentioned date, by T. T. Wilson to said firm, on certain real estate, to secure the payment of all of said notes. 2. The transfer of the property in said notes and mortgage to Hiram Smith and J. W. Brassfield, individually, the foreclosure of the mortgage by them, and judgments on said notes, with award of execution for any deficiency, after exhausting the proceeds of sale of the mortgaged property. 3. The assignment of the decree and judgment to the appellants, the issuance of execution and sale of mortgaged property for eight hundred dollars, and the application of the entire net proceeds of the sale to the payment of the amounts which had been adjudged due on the second and third notes. 4. The payment by the respondent, upon the judgment on the note executed by him and T. T. Wilson of a sum sufficient to satisfy the amount due thereon, after applying the net proceeds of the sale of mortgaged property upon the judgments on all three of said notes, *pro rata*, and the commencement of a suit in equity by him to compel the appellants to make such an application of such net proceeds of sale; the subsequent vacation of the sale by order of the court, and the resale of the premises for a much larger amount, to wit, one thousand eight hundred dollars, the net proceeds of which amounted to one thousand six hundred and forty-three dollars and eighty-eight cents, and final confirmation of such sale by the court; the dismissal of the first suit to compel a *pro rata* application of the proceeds of sale, and the refusal of the appellants to make such application of the proceeds arising from the last

sale. The present suit was brought to compel such application, and to recover the sum of two hundred and sixty dollars, claimed to be due respondent as an overpayment. The answer denies that appellants "have any knowledge or information sufficient to form a belief," as to whether the respondent, or T. T. Wilson, were only sureties on the first and second notes respectively, as alleged in the complaint; and alleges that after the resale, but not until after the complaint in this suit was filed, the appellants did apply the net proceeds thereof *pro rata* upon the amounts then due thereon and unpaid—which, in the case of the judgment against the respondent and T. T. Wilson, appears from the pleadings to have been the balance, after deducting the payment made by the respondent after the return of the first sale.

Flinn & Chamberlain, for the appellants.

Weatherford & Blackburn, for the respondent.

WATSON, C. J. The denial of any knowledge or information sufficient to form a belief was a good denial under the statute, and has been so held by this court: C. C., sec. 713; Robbins v. Baker, 2 Or. 52; Sherman v. Osborn, 8 Id. 66. But the issue thus joined is immaterial. If the respondent was surety only on the first note secured by the mortgage executed by the principal debtor to Smith, Brassfield & Co., that fact would not of itself entitle him to control the application of the proceeds of the sale of the property covered by the mortgage. It is true that considerable diversity and perhaps some conflict exist among the authorities upon this point. But those which hold that a surety in the situation of the respondent has no such right are not only more direct adjudications upon the precise question involved here than the others which seem to countenance the opposite view, but the doctrine they announce appears more consonant with sound legal principles: Belcher v. Hartford Bank, 15 Conn. 381; Stamford Bank v. Benedict, Id. 437; Wilcox v. Fairhaven Bank, 7 Allen, 270; Mathews v. Switzler, 46 Mo. 301. The appellants in this case held all three of the notes, as well as the mortgage. There is no such question here as is usually presented where there is litigation over the application of payment between creditors holding distinct debts secured by the same mortgage. Between them the rule as to the application of the proceeds of sale of the mortgaged property contended for by respondent applies. But it is not based upon the debtor's contract, under which the mortgage security has been furnished. His engagement is that the security shall be for all the debts in full, and he gives his creditors the power over it for that purpose. He can not in ordinary cases, like the present at least, compel an application of the proceeds of such security according to the rule which obtains between distinct creditors.

After the execution of the notes and mortgage in this case, Smith, Brassfield & Co. could have assigned the first note only to the appellants with a distinct stipulation in the contract of assignment that the proceeds of the mortgage security should first be applied in payment of the second and third notes, and to the exclusion of the first in the event of the insufficiency of such proceeds to satisfy all three of the notes, and such stipulation would have been valid: Dixon v. Clayville, Adm'x, 44 Md. 573. There is no conflict among the authorities on this point. And if the debtor can not insist on the observance of the rule, against such an arrangement, made exclusively between his creditors, how can his

surety? If a creditor, holding all the debts thus secured, can, by means of an assignment, confer a right upon his assignee to apply the proceeds of the mortgage security in contravention of the rule, without the debtor's assent, why should he be held by it if he prefers to retain all the debts and obtain payment of them himself? If he can give the power to make the application in a different manner by assignment of one of the debts secured, he certainly may make such application himself. In such case the debtor's surety would plainly stand in his shoes and not in the creditor's. And as the debtor could not complain, the surety could not. This conclusion virtually disposes of the whole case. For, if the appellants had the right which they exercised, of applying the proceeds of the sale of the mortgaged property to the payment of any of the debts held by them and secured by the mortgage, as they might see proper, as we hold they had, in view of the facts appearing in the record of this case, then respondent has only paid what he could have been compelled to pay, and can not recover it back.

Decree reversed, with directions to dismiss the bill.

HUGHES *v.* OREGONIAN RAILWAY COMPANY, LIMITED.

Filed January, 1884.

MONEY IN THE HANDS OF ONE CORPORATION, A STOCKHOLDER IN ANOTHER corporation, the legal title to which is in the latter, is liable to garnishment at the instance of a creditor of the latter.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the plaintiff. The opinion states the facts.

W. H. Effinger, for the appellant.

Bellinger & Gearin, for the respondent.

WATSON, C. J. The respondent, Hughes, having recovered judgment against the Oregonian Navigation Company, limited, for three thousand eight hundred dollars and costs, in an action at law, instituted this proceeding against the appellant to obtain satisfaction thereof, alleging that it held in its possession a large sum of money belonging to the judgment debtor. The issues were tried by the court, and the findings of fact, upon which the judgment appealed from was rendered, are as follows:

That on the seventeenth day of May, 1880, the Oregonian Navigation Company, Limited, purchased and became the owners of these two certain steamboats mentioned in the allegations, interrogatories, answer, and reply herein, called the City of Salem and Ohio; that thereafter said company rebuilt the said steamer Ohio, and gave to it the name of The Salem; the price paid for said boats being thirty-six thousand dollars. That about the second day of April, 1881, the Oregonian Railway Company, Limited, garnishee herein, purchased four hundred and ninety-nine shares, of the par value of one hundred dollars each, in the capital stock of the Oregonian Navigation Company, Limited, paying therefor thirty-six thousand dollars, being a controlling interest in the stock of said navigation company; that said stock was purchased by the said railway company as a convenient and lawful method of owning and controlling said steamers by the railway company; that said shares of stock

were transferred as fully paid up and non-assessable, as shown by the certificate therefor, of which the following is a copy:

"Incorporated May 14, 1880; 1,000 shares of $100 each; No. 6, for 499.

"PORTLAND, OREGON, April 3, 1881.

"OREGONIAN NAVIGATION COMPANY (LIMITED).

"This is to certify that the Oregonian Railway Company, Limited, is the owner and holder of four hundred and ninety-nine fully paid shares of the capital stock of the Oregonian Navigation Company, Limited, transferable only on the books of the company, at its office in the city of Portland, Oregon, by indorsement hereon and surrender of this certificate.

WILLIAM REID, President.

ELLIS G. HUGHES, Secretary."

That during all the time mentioned herein William Reid was manager and Ellis G. Hughes was the attorney of both of said corporations. That Ellis G. Hughes, as attorney for the railway company, advised William Reid, the manager thereof, that the railway company could not own the steamboats herein mentioned, as it was a foreign corporation; that said steamers remained the property of said navigation company until November, 1881, when they were sold by it to William Reid for twenty-three thousand dollars; that the proceeds of said sale were taken and received by the Oregonian Railway Company, Limited, garnishee, defendant herein; that said sum of twenty-three thousand dollars, so received by the railway company, is still in the possession of said company, garnishee herein; that Ellis G. Hughes has a judgment for three thousand eight hundred dollars and costs, which remains unpaid and unsatisfied in any part, against the said Oregonian Navigation Company, Limited.

Judgment was given for the respondent for the full amount of his judgment against the Oregonian Navigation Company, Limited, with costs.

We find no ground for interfering with the judgment of the circuit court. After all, the appellant was only a stockholder; and the legal title to the boats, and funds realized from their sale, was in the corporation—the Oregonian Navigation Company, Limited. Nor is the objection to the proceeding at law well taken. It can not be inferred from the findings that the appellant received this money as a dividend on its shares of stock, and if it did not, it had no greater right to retain it against the judgment creditor than an entire stranger would have. It had no legal title, and simply had possession of funds belonging to the judgment debtor: Hyatt v. Allen, 56 N. Y. 553; Minot v. Paine, 99 Mass. 101.

The judgment affirmed, with costs.

SUPREME COURT OF UTAH.

PEOPLE ETC. *v.* BIDDLECOME.

Filed November 27, 1882.

MOTIVE OF WITNESS—EVIDENCE OF.—Where, on a prosecution for murder, a witness for the people has testified that he saw the deceased and the prisoner together, and on cross-examination stated that he had a motive for watching them, it is error for the court to allow the witness to testify, in answer to a question by the prosecution, and against the defendant's objection, as to what his motive was. And after testifying that his motive was the expectation of seeing a fight, because the deceased had told him that he had a difficulty with the prisoner, it is error for the court to refuse to strike out such evidence of a difficulty, or to caution the jury that the statement of the witness was not evidence of such difficulty.

THE EXCLUSION FROM EVIDENCE OF AN UNAUTHENTICATED COPY OF AN ACCOUNT OFFERED BY THE DEFENSE for the sole purpose of fixing a date, and thus corroborating the testimony of a witness, is not error.

REFUSAL OF THE COURT TO CHARGE THE JURY THAT THERE IS NO EVIDENCE that the prisoner ever shot the deceased, or ever molested or premeditated shooting or killing him, or ever had any malice or ill-feeling against him, is not error, unless the evidence entirely failed to support such facts.

WHEN AN INSTRUCTION ASKED FOR CONTAINS SEVERAL PROPOSITIONS, one or more of which are erroneous, and the balance unobjectionable, it is not error for the court to refuse the whole request.

REFUSAL TO GIVE AN INSTRUCTION WHICH HAS ALREADY BEEN GIVEN in substance is not error.

INSTRUCTION AS TO WHAT CONSTITUTES A MURDER, GIVEN IN THE LANGUAGE OF THE STATUTE, is not error.

EVIDENCE IN THIS CASE HELD SUFFICIENT TO SUSTAIN the judgment of conviction.

APPEAL from a judgment of the third district court, convicting the defendant of murder. The opinion states the facts.

Sutherland & McBride, for the appellant.

P. T. Van Zile, for the respondent.

EMERSON, A. J. The defendant was indicted for the murder of one Charles Jensen, alleged to have been committed on the twenty-sixth of November, 1879. He was convicted of murder in the first degree, and upon the recommendation of the jury, as provided in the statute, was sentenced to be imprisoned at hard labor in the penitentiary for life. He appeals to this court, upon various assignments of error, from the judgment and order denying his motion for a new trial. The deceased was last seen alive by several witnesses on the twenty-sixth day of November, 1879, in company with the defendant. From this time on he was missed from the neighborhood. There seems to have been some talk of and perhaps some search made for him. His body was not found until February, 1881, buried under not over fourteen inches of soil, and not far from where both the defendant and deceased had lived. One of the witnesses who assisted in exhuming the body from where it was found testified as follows: "We found the body but slightly buried, not even six inches of soil over the body, and part of the clothing was exposed at the surface; the body had been buried face downwards. There was only the skeleton left, but the frame was intact, but separated some by handling when dug up. I did not particularly examine the clothing. The coat was yellow ducking, lined with light-colored blanket; overalls of the same material. The body was taken to Stockton, and there the coroner held an inquest. There was a patch on the

knee of the overalls. We found a belt on the body and a knife in the pocket; these have been in my possession ever since. [Produces them before the jury.] I found a bullet-hole on the back part of the skull, on the left side; the skull being removed from the trunk, a bullet considerably battered dropped out, which I kept, and here produce. [Produces it and shows it to the jury.] The body was found in Tooele county, in Utah territory. I was present at the trial of the defendant before a justice of the peace."

Witness was asked if he knew of any difficulty between defendant and Jensen about a gun and saddle. He replied, "I heard defendant say he had bought a gun of a person whom I did not know." The body was identified by the clothing and articles found with it. There was testimony on the part of the prosecution of admission of the defendant that he had "fixed" or "killed" the deceased. The prosecution attempted to prove by several witnesses that there had been a difficulty between the defendant and the deceased.

The first point urged on behalf of the defendant on this appeal refers to the rulings of the court in connection with the testimony of one William Bracken, a witness on the part of the prosecution. The testimony and rulings were as follows: "I am postmaster at Rush lake. I know the defendant, and knew Charles Jensen. I saw him on the twenty-sixth day of November, 1879. He had been gone for some time, and he returned to Rush lake, I think, on the seventeenth day of November, 1879, or that was the first time I saw him. He went to Frisco between the first and tenth of May of that year. I don't know as I saw him again after the seventeenth of November until the twenty-sixth. On that day I saw him and the defendant together." On cross-examination, said witness said: "I am not on friendly terms with the defendant. I saw Jensen and defendant together in front of my store about ten A. M., talking together, and saw them together again about the same place about three P. M. I watched them closely." Counsel for the defendant asked witness if he had any motive for watching or that led him to notice particularly. Witness said he had, and was about to explain his reason when he was stopped by the defense. Counsel for the people insisted that the witness having stated that there was a reason why he watched, he had a right to explain why he watched; he had a right to explain what it was, also; as it then stood, the jury might infer that he had some sinister motive.

The question was then asked by the people's counsel: "What induced you to notice particularly the circumstance of seeing Jensen and the defendant together on the twenty-sixth of November, 1879?" The defendant's counsel objected to said question, because: 1. The people have no right to ask the question to test the witness's recollection, for that is the privilege solely of the party cross-examining; 2. The question is general, and would leave the witness to state hearsay or other incompetent matter. The court directed that the witness state any fact or circumstance which existed to impress the circumstance on his mind.

The witness answered: "I knew there was a difficulty between the accused and Jensen, and I expected to see a fight." Defendant's counsel then asked witness if he ever saw the parties together having difficulty. Answer. No.

Q. How do you know they had difficulty except by hearsay? A. Jensen told me so.

Defendant's counsel moves to strike out this answer, and also that to the last question on the part of the people, because he states a fact not competent, namely, a statement of Jensen. The attorney for the people objected to the striking out, and the motion was denied. Defendant's counsel then and there excepted. Whereupon defendant's counsel asked the court to caution the jury that the witness's statement that Jensen told him there was a difficulty was only evidence that witness had that circumstance to induce him to watch them, and was not evidence that there was a difficulty between them; which caution the court refused to give, and to which the defendant's counsel excepted.

The objection to the question asked by the prosecution should have been sustained. He was their witness. The fact they sought to establish by him, and for which he was ostensibly called, had been squarely and unequivocally testified to. On the cross-examination he had stated that he had a motive for watching the parties. What his motive was, beyond the fact that it served to fasten the circumstance he had testified about upon his mind, was immaterial. The counsel for the defendant seemed content to leave the matter there, and the prosecution should have been equally so. The answer of the witness to the former question did not give the prosecution the right to put and have answered the question objected to. It in no sense related to new matter drawn out on the cross-examination. The question itself, had it been otherwise competent, was too general, and left the witness to state, as he did state, hearsay and incompetent matter. It follows, of course, that after the answers on the re-cross-examination, the defendant's motion to strike out should have been granted; and failing in this, beyond all question the limitation as to the effect of the testimony, and the caution counsel for the defendant asked to have given to the jury, should have been granted. The answer was clearly inadmissible as evidence of any difficulty between the defendant and the deceased. That there had been a difficulty between them on or about that date, the prosecution seemed anxious to prove, probably to furnish a motive for the alleged crime.

The course pursued at the trial with this witness, and especially the refusal of the court to withdraw from the attention of the jury the statement about the difficulty as any proof that there ever was one, gave to this testimony an undue prominence, and there being nothing in the record showing the contrary, we must presume that injury resulted from its admission. This error furnishes sufficient ground for the reversal of the judgment. It was not error to exclude the "butcher account," offered for the purpose of fixing a date, and thus corroborating the testimony of Mrs. Biddlecome, the mother of the defendant, and a witness for him.

She testified that he was at home on the twenty-fourth, twenty-fifth, and twenty-sixth of the month, and that on the twenty-fourth he had killed an animal, and on the twenty-fifth had taken the carcass to one Mitchell, a butcher, who gave them credit for it on account. The witness produced a paper writing, and said: "I received this from Mr. Mitchell, the butcher." Offered in evidence. Objected to by the people's attorney and ruled out by the court. The objection stated by the people's attorney was, the paper was not signed by Mitchell, and it does not appear that he wrote it. Objection being sustained by the court, the defendant's counsel then and there excepted to the ruling. The paper writing purported to be an account between the witness and Mitchell, commencing on November 25, 1879, and ending on the thirtieth of the

same month. Among other items, and the only item of credit, is one under date of November 25th, of one hundred and twenty-five pounds of beef. That the paper offered was a copy, there can be no doubt, for the witness swears that she procured it of Mitchell, and it bears date at another place than that where the parties lived at the time the transaction occurred, and on September 6, 1881. It needs no argument or citation of authorities to demonstrate that this unauthenticated copy of an account is inadmissible for any purpose.

The refusal of the court to give the following requests, on the part of the defendant, is relied upon as error:

"4. There is no evidence in this case that the defendant shot Jensen.

"5. There is no evidence that the defendant ever molested or premeditated the shooting or killing of Charles Jensen.

"6. There is no evidence that the defendant ever had any malice or ill-feeling against Jensen. The jury have no right to find that there was ill-feeling, or that there was a dispute between them, from any evidence of a rumor to that effect, or from proofs of any declaration made by Jensen; nor is it proper for the jury to take into consideration as evidence any such rumor or declaration. * * *

"8. The jury have no right to convict, unless the testimony convinces them of the defendant's guilt beyond a reasonable doubt. They should not convict unless the proof is so full and convincing that it excludes or disproves every reasonable hypothesis, except that the defendant is guilty. The proof must be then sufficient and convincing that Jensen is dead, and came to his death on the twenty-sixth day of November, 1879; and that the remains found in February, 1881, were his; that the defendant shot and killed him, and that the defendant committed the act maliciously and premeditated it."

And the following: "Rumor is not evidence, nor are the declarations of the deceased, not known to have been made to or in the hearing of the defendant, and the jury are instructed that they can not find any fact upon such testimony."

All the foregoing requests were refused, except as they were otherwise given in the charge. The fourth and fifth requests were properly refused, because the effect of giving them would have been to take the entire case from the jury. There was some evidence relative to the point covered by each request. By the statute the jurors are made the sole judges of the facts and the weight of the evidence. These requests, however, sought to have the court itself pass upon the weight of this evidence, and, in effect, direct a verdict of acquittal. Requests so framed are never proper, unless upon points entirely unsupported by proof. This applies equally to the first sentence of the sixth request. The balance, however, was unobjectionable, and might very properly have been given. But when a request to charge contains several propositions, one or more of which are erroneous and the balance unobjectionable, it is not error for the court to refuse the whole request. The better practice, however, is to call the attention of counsel to the objectionable matter, that he may rewrite it if he so desires, or the court may modify it so as to make it conform to his ideas as applicable to the case, but he is not bound to do this, and it is not error if he does not.

The substance of the eighth request had already been given by the court in as full and complete terms as those embodied in the request. It was, therefore, not error to refuse to give it. The last request, which is

not numbered, should have been given. This was the final and closing effort on the part of the defendant to get rid of the effect of the testimony of the witness Bracken, which had been improperly admitted. It was a correct statement of the law as applied to the declarations in evidence in this case. Upon the argument it was claimed for the defendant, that the definition of murder, as given in the instructions by the court, was incomplete, the element of unlawfulness being entirely omitted. This criticism was not warranted by the facts. In the charge, the court used this language: "By our statute, 'murder' is the unlawful killing of a human being with malice aforethought, and is divided into degrees, the first and second degrees," and then proceeded to define the different degrees. It is claimed for the defendant that the verdict is not sustained by the evidence. In the case of the People v. Clawson, Utah, 502, this court held, that "before this court will set aside a verdict on appeal, on the ground that the verdict is contrary to the evidence, it should appear, either that there is an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor. So much depends upon the demeanor of a witness on the stand, the manner in which his testimony is given, and which can not be brought in or made a part of any record, that the statute has very properly made the jurors the sole judges of the weight to be given to it. The record in this case does not show such an absence of evidence against the defendant or such a preponderance in his favor that we can say that the jury was influenced by passion or prejudice. The evidence was conflicting. It is evident that the jury, who are made by the statute the sole judges of this credibility, did not believe some of the defendant's witnesses." This language is applicable to the case at bar. There was no error in refusing to grant a new trial on this ground. The alleged misconduct of one of the jurors is not sustained by the evidence in relation to that matter, and hence furnished no sufficient ground for a new trial. But for the errors above mentioned the judgment of the third district court is reversed, and a new trial ordered.

Twiss, A. J., concurring. I concur in the reversal of this case, but not upon the grounds given in the opinion of the majority of the court. The first part of the eighth instruction was in substance, by the court in its charge, properly submitted to the jury. The clause, "they should not convict unless the proof is so full and convincing that it excludes or disproves every reasonable hypothesis, except that the defendant is guilty," was not, either in form or substance, given to the jury. Refusing to give this in substance, as requested, was, in my opinion, error. The authorities on this point, it seems to me, are conclusive, and for this reason I am of the opinion that the case is properly reversed: Commonwealth v. Webster, 5 Cush. 295, 317; Roscoe's Crim. Ev., 7th ed., p. 16, and note.

The last request of defendant, which is not numbered, was properly refused. Had it been given, the jury would have been instructed that "rumor is not evidence," but not told what "rumor" is, or what particular evidence or testimony was thereby referred to; they would have been left to guess or determine as best they could what, if any, rumor there was in evidence. Such an instruction, instead of giving light and guidance as to the particular evidence sought thereby to be brought into question, would have tended to mystify, confuse, and involve all the evidence in perplexity and confusion, and therefore was properly refused. What is rumor, might have been, under the circumstances of the case, a

question in the mind of the jury of great difficulty; and the words, "nor are the declarations of the deceased not known to have been made to or in the hearing of the defendant," do not necessarily make clear to the jury what particular testimony or words are struck at by the proposed instructions. When instructions are asked, they should be precise and certain to a particular intent, that the point intended to be raised may be distinctly seen by the court, and that error, if one be made, be distinctly assigned: United States v. Bank of Metropolis, 15 Pet. 377–406; McKinney v. Snyder, 78 Pa. St. 497; Talbert v. Mearns, 21 Mo. 427–431; Rollins v. Cate, 1 Heisk. 97. It is the province and duty of the court to decide upon the admissibility of evidence, and if improper evidence is admitted, it is error for which the party thereby aggrieved has a remedy; but when once admitted, it is for the consideration of the jury until withdrawn by the court, and when the court undertakes to withdraw such evidence, it should be so clearly and distinctly described as to leave no room for doubt or conjecture. The question whether the court below erred in refusing to caution the jury, as requested by counsel for the defendants, as to the testimony of Bracken, is one upon which I express no opinion, except that the testimony is near the boundary line between what is included as the *res gestæ* upon one side and hearsay upon the other.

Ralfson *v.* Cannon et al., Adm'rs, etc.

Filed February 16, 1883.

An Administrator is not Authorized to Erect a Dwelling-house with the assets of the estate, to be occupied by him, or for any other use or purpose; nor is money borrowed for such purpose a charge against the estate, although it may be against the administrator individually.

Appeal from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

S. H. Lewis, for the appellant.

J. H. Boreman, for the respondents.

Twiss, A. J. Upon the death of the intestate, the lot of land upon which the house was built descended to his heirs, subject to the payment of the debts of the deceased—to the control of the probate court, and possession of the administrator for the purpose of administration: Comp. Laws, sec. 701. It is the duty of the administrator to administer the estate, to take care of and to preserve it, to collect all the moneys due it, to pay all of its indebtedness, and to render his accounts, and to dispose of the balance in his hands as required by law. Having done this, the estate is administered, and he is entitled to his discharge; and the heirs are entitled, in due form of law, to their respective portions of the estate. The administrators were not authorized to erect a dwelling-house with the funds or assets of the estate, to be occupied by one of them, or for any other use or purpose; neither could they involve the estate by borrowing money with which to pay for material and for labor performed in the construction of such house.

They did not have authority to charge the estate with the repayment of money by them borrowed for this purpose. The borrowing of this money was not a contract between Thomas F. Heath *as administrator*

and the appellant, although it may have been a contract between him individually and the appellant: Tompkins, Adm'r etc., v. Weeks et al., 26 Cal. 51; Estate of Millinovich, 5 Nev. 189; Austin et al. v. Munro et al., Ex'r etc., 47 N. Y. 360. The facts that the estate of the deceased was improved and the value of it enhanced by the erection of the house, and that the money was borrowed for the purpose of in part paying for material and labor necessary for the construction of the same, do not make the estate liable for the debt thus contracted. An administrator is not permitted to use the funds of his estate, or to borrow money upon its credit or liability, for such speculative purpose: Merchants' National Bank v. Weeks, Adm'r, 53 Vt. 115; Tompkins v. Weeks, 26 Cal. 51, 60.

The judgment of the district court is affirmed.

HUNTER, C. J., and EMERSON, A. J., concurred.

CRISMON, Collector etc., *v.* BINGHAM CANYON & CAMP FLOYD R. R. CO.

Filed February 24, 1883.

AN UNDERTAKING ON APPEAL CAN NOT BE DISPENSED WITH IN AN APPEAL by a collector of taxes from a judgment against him, in an action to recover delinquent taxes. If such undertaking be not filed as required by statute, the appeal will be dismissed.

MOTION to dismiss an appeal from a judgment of the third district court. The opinion states the facts.

Zerubbabel Snow, Rosborough & Merritt, Marshall & Royle, and *R. N. Baskin*, for the appellant.

Sutherland & McBride, for the respondent.

EMERSON, J. The respondent moves to dismiss this appeal, on the ground that no undertaking has been filed or deposit made with the clerk as required by the statute. The appellant is collector of taxes for the county of Salt Lake, and brought this suit to recover certain taxes assessed against the respondent which were delinquent. Judgment was against him in the court below, and he appealed to this court, but filed no undertaking on appeal, for the reason stated below.

By section 329 of the practice act, to render an appeal effectual for any purpose, in any case, it is required that a written undertaking be filed, or a deposit of money made with the clerk, within five days after the notice of appeal is filed. Section 344 provides that the court below may, in its discretion, dispense with this, "when the appellant is an executor, administrator, trustee, or other person acting in another's right." The appellant, conceiving himself within the provisions of the latter section, obtained from the court below an order dispensing with the undertaking required by section 339.

The authority by which the collector sues for these delinquent taxes is found in the session laws of 1880, page 44, and is as follows: "On or before the first Monday in May in each year the collector of each county shall settle with the clerk of the county court, and make full payment into the county treasury of *all* taxes due. If any tax shall remain unpaid to the collector on the said thirty-first day of May, the collector shall have in his own individual right a right of action, the same as on an express contract for the direct payment of money, against each delinquent, and no taxable property of such delinquent shall be exempt from execution on a judgment in such case."

By the express provisions of the act he must bring suit in his own name and in his individual right. So far as the money due from the delinquent tax-payer is concerned, he is a trustee for no one, and in bringing the suit, he is acting in his own and not in another's right. The court could not legally dispense with the filing of the undertaking on this appeal. The appeal is therefore ineffectual for any purpose.

The motion is granted and the appeal is dismissed.

HUNTER, C. J., and TWISS, J., concurred.

SNOW *v.* CROW.

Filed February 28, 1883.

ERRORS ALLEGED TO HAVE OCCURRED ON THE TRIAL WILL NOT BE CONSIDERED by the appellate court, when the statement used on the motion for a new trial was not signed, when filed, either by the appellant or his attorney, or other person for him, in the manner required by statute.

APPEAL from a judgment of the third district court, entered in favor of the plaintiff. The opinion states the facts.

James McKnight, for the appellant.

R. B. Tripp, for the respondent.

TWISS, A. J. This is an appeal from the third district court. Several errors are alleged to have been committed by the court during the trial, which was by jury; but we pass upon none of them, for the reason that this case is not properly here. Under the direction of the court there was a verdict for the plaintiff. The record shows that the appellant filed with the clerk of the district court a paper which, in terms, was a statement on a motion for a new trial, but it was not signed, when filed, either by him or by any attorney, or other person for him. After the time allowed by statute to file such statement had expired, and after motion was made by plaintiff to strike the same from the files because of such defect, the defendant's attorney, McKnight, without leave of court or consent of the plaintiff, took the papers of the case, including the statement, from the clerk's office and signed the statement, and then returned them all to the place from whence he took them. Neither the pages nor the lines of the statement were numbered. A copy of such paper before it was signed, left with plaintiff's attorney, was the only attempt to make service of it upon the respondent.

In these respects there was a failure on the part of the appellant to comply with the clear and express requirements of the statute. And as he elected to stand upon the record thus made rather than to move for leave to make at the proper time the necessary amendments, the court below committed no error in disregarding such statement and in overruling the motion for a new trial.

By the acts of the defendant's attorney in subtly taking the papers of the case from the clerk's office, and signing the statement, and thus returning it to the place he took it from, he merited and became entitled to the rebuke and censure of the court, rather than his client thereby to new or enlarged rights in the case.

The judgment of the district court is affirmed.

HUNTER, C. J., and EMERSON, A. J., concurred.

VOGEL *v.* WALKER ET AL.

Filed March 2, 1883.

A COMPLAINT IN AN ACTION TO RECOVER THE AMOUNT OF A DEFICIENCY after a sale of mortgaged premises under a judgment of foreclosure must allege that such deficiency has not been paid. An allegation of the insolvency of the judgment debtor is not enough.

APPEAL from a judgment of the district court, entered in favor of the defendant. The opinion states the facts.

R. B. Tripp, for the appellant.

C. K. Gilchrist, for the respondents.

TWISS, A. J. The plaintiff certainly had no claim against the defendants, unless there was something due to and owing her by reason of and under the deficiency judgment obtained by her against James Crossley. If that was paid, the mortgage debt was no longer in existence, and she not only had no claim against either of the Crossleys, but no pretense of claim against the defendants. Without expressing any opinion as to the sufficiency of the allegations of the issuance and return of the execution issued upon that judgment, but considering as admitted that the execution was in due form of law, that it was placed in the hands of a proper officer for service, that he made diligent search for property of James Crossley and found none, that the officer in due form made return thereon of such facts, and returned the execution to the clerk in December, 1880, and that James Crossley at the time this action was commenced, March 14, 1881, was insolvent, it by no means follows as a legal sequence that on the last-named date the judgment was in force, or that by virtue thereof, or otherwise, the judgment debtor was indebted to or owing the plaintiff any sum whatever. The complaint contains no allegation of any existing indebtedness to the plaintiff from either of the Crossleys at the time the action was commenced.

In Frisch v. Caler, 21 Cal. 71, the court say: "It is necessary in an action on a promissory note to allege that the note has not been paid." Hershfield et al. v. Aiken et al., 3 Mont. 442, was an action to foreclose a mortgage given to secure the payment of two promissory notes. One of the questions involved in the case was, "Does the complaint state facts sufficient to constitute a cause of action?" Upon this point the court, after citing Frisch v. Caler, *supra;* Davanay v. Eggenhoff, 43 Cal. 395; Doyle v. Phœnix Ins. Co., 44 Id. 264; and Roberts v. Treadwell, 50 Id. 520, says: "Under these authorities we must hold that the complaint is defective in not alleging that the notes sued on still remain unpaid, and that no breach of the contract is alleged." The principle of law and rule of pleading stated in these cases is undoubtedly correct, and I can conceive of no reason for an exception to the rule, excepting the plaintiff from the necessity of alleging that the deficiency judgment is still in force and unpaid. The charge that Crossley was insolvent at the time of the commencement of this action does not enable the plaintiff to ignore well-established rules of pleading, nor does it raise any legal presumption attaching to the allegations of the complaint that the judgment was not paid. That it was paid should have been so clearly and concisely stated that reference to extraneous allegations in aid of such statements would be unnecessary and redundant.

There being no allegation of existing indebtedness on the part of

James Crossley to the plaintiff by reason of or upon the deficiency judgment, the complaint contains no cause of action against the defendants, and therefore it is unnecessary to consider any of the other questions presented by the briefs and arguments of counsel.

The demurrer to the complaint was rightfully sustained, and the judgment of the district court is affirmed.

HUNTER, C. J., concurred.

EMERSON, A. J., dissented.

SUPREME COURT OF WYOMING.

KENT *v.* UPTON, Assignee, etc.

Filed April, 1883.

MOTION FOR NEW TRIAL, WHEN MUST BE MADE.—The provisions of the compiled laws of Wyoming, sections 308 and 309, regulating the time within which motions for new trials may be filed, are mandatory, and the lower court can not extend such time upon the oral *ex parte* application of the party desiring to move. Unless such motion is made within the required time, an appeal therefrom will not be considered by the appellate court.

THE COURT WILL NOT HESITATE TO REVERSE A PRIOR RULING made in the same case, on a mere matter of practice, when satisfied that such ruling is erroneous.

ERROR to the district court for the first judicial district for Laramie county. The opinion states the facts.

W. W. Corlett, for the plaintiff in error.

C. N. Potter, for the defendant in error.

SENER, C. J. This was a civil action, brought in the district court for the first judicial district in and for Laramie county, by Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, against Thomas A. Kent as a stockholder in said company, to recover the balance alleged to be due on a subscription to the stock of the said company, and unpaid. The petition alleged that said Kent was the owner of ten shares of the stock originally subscribed for by himself, and of ten other shares purchased by him from Joslin & Park, and for which a new certificate was given, upon which twenty shares forty per cent. had been paid prior to bankruptcy, leaving a balance of sixty per cent. on each share unpaid, and failing to pay the said balance in accordance with the order, this suit was commenced in said court. Kent filed an answer, admitting the corporate existence of said company, and the fact of his subscription for ten shares of its capital stock, and the subsequent purchase by him of the ten shares from Joslin & Park, and denied each and every other allegation of the petition; and for a second defense alleged that the subscription was made by him on account of false and fraudulent representations of the agent of the company; and thirdly, alleged a set-off. The second and third defenses were originally demurred to by the plaintiff, and the demurrer overruled, and the court admitted evidence under said defenses; but in its charge to the jury stated that said admission was error, and instructed the jury to disregard the same.

The case was tried by a jury, and a verdict rendered against Kent for twelve hundred dollars. Upon the case coming to this court at the March term, 1879, the judgment of the court below was reversed, upon the ground that the action was barred by the statute of limitations, which

claim was first made in this court, and the case was thereafter heard in the United States supreme court upon that question only: *Vide* 15 Otto, 646; this court being reversed upon the question of statute of limitations; and the case was then remanded to this court to take such further proceedings as may be in conformity with law, and not inconsistent with the opinion of the supreme court of the United States.

The petition in error puts in issue in this court several questions respecting the admission of testimony and the instructions of the court to the jury. But before we can or ought to consider these questions, we must first consider and dispose of the one last raised by the defendant in error in his brief, and which is thus stated by him: "The question of the time when the motion for a new trial was filed is submitted for consideration. The time was extended, for what reason the record fails to inform us, and some considerable time from verdict elapsed before its filing."

In brief, it is submitted to us whether the plaintiff in error has so perfected his case in the court below as to bring into this court any question which this court can or ought to determine.

The statute of Wyoming governing the question as to the time and manner of presenting applications upon motions for new trial are very simple and clear, are found in chapter 13, sections 308 and 309 of the compiled laws of Wyoming, page 72, and read as follows:

"Sec. 308. The application for a new trial must be made at the term the verdict, report, or decision is rendered, and except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.

"Sec. 309. The application must be by motion, upon written grounds, filed at the time of making the motion. The causes enumerated in subdivisions 2, 3, and 7 of section 306 must be sustained by affidavits showing their truth, and may be controverted by affidavits."

These statutes are mandatory in their character, as their reading will show. The highest courts of several states have construed them in this light, as will be seen by reference to Harris and Ray, 15 B. Mon. 628; Odell v. Sargent, 3 Kan. 80; Killip v. Empire, 2 Nev. 34; Richmond v. Wardlaw, 36 Mo. 313; Ellsasser v. Hunter, 26 Cal. 279. In this case we can not do better than to adopt the language of Judge Wagner in Richmond v. Wardlaw, 36 Missouri, 313, in delivering the opinion of the court, wherein he says: "The sum of the whole matter seems to be this, a party sleeps on his rights until the time allowed him by law to make a motion for a new trial expires; he can no longer claim to make his motion as a matter of right." Continuing, the learned judge says: "If the court refuses to grant the party a new trial, no error will lie, because no law authorized him to make the motion after the four days expired, and this is a proper punishment for neglecting to assert his rights in due time."

The record in this case shows that the verdict of the jury was rendered on the fourteenth of December, 1876. *Vide* page 116 of the printed record before us.

The motion for a new trial was not filed until the sixteenth of February, 1877, more than sixty days after the verdict was rendered. And there is nothing in the motion, or accompanying the motion, to show

that the party filing said motion had been theretofore "unavoidably prevented." But it will be urged that the court extended the time for filing said motion for a new trial until the end of the *then present* term of the district court. The extract of the record giving this permission, or rather undertaking to do it absolutely, in the face of the mandatory words of the statute, are as follows (*vide* page 116 of the printed record), nothing being omitted of the entry:

"November term, 1876. Saturday, December 16, 1876. Clark W. Upton, assignee of the Great Western Insurance Company, v. Thomas A. Kent.

"On application of W. W. Corlett, Esq., of counsel for defendant, it is ordered by the court, that the time for filing a motion for a new trial herein be extended to the end of the present term of this court."

In the first place, it would be a sufficient objection to this entry to say that, taking the entry for all that it is worth or purports to be worth, it was purely *ex parte*. The journal entry utterly fails to show the presence of both parties at the time, and no party could be bound by any such proceeding, if not present either in person or by counsel. As is justly said by Powell on Appellate Proceedings: "When a motion is to be made in any manner affecting a judgment or the rights of the opposite party, or to amend or to avoid or to reform the judgment or pleadings, or otherwise affecting the rights of the party, where they are not already in court to hear the motion and to meet it, it is necessary that the party making the motion should give the opposite party, or his attorney, due notice of the time when and the grounds upon which the motion is to be made, or such proceedings themselves would be erroneous; for it is a general rule in all cases affecting the rights or interests of others that the opposite party should have due notice thereof, or such proceedings would be erroneous or void, except in such proceedings as are strictly *ex parte*."

But it is utterly invalid, for the reason that no such motion is known to the law. As the supreme court of Kansas say, in the case of Odell v. Sargent, 3 Kan. 80, a motion for leave to make a motion for a new trial (practically, that was the order before recited of December 16, 1876, extending the time for filing the motion for a new trial) is one unknown to the law, and is a nullity. It was an anomalous motion, and utterly unavailing as an expedient and as a substitute for the law which requires such a motion to be upon written grounds. And where the motion is filed in writing after the three days during which the motion for a new trial is a matter of right, it is equally clear that there must be affirmative matter in writing in the motion or accompanying it, showing that the party has been unavoidably prevented from earlier making such motion. And even then such affirmative showing, that a party has been unavoidably prevented from making the motion within the statutory period, is not to be taken as of course true, but may be traversed. And failing thus to bring himself under the mandatory provisions of the law, as in this case, the party standing upon such a motion must fail. To do otherwise would be to alter the law by judicial authority, in spite of the legislative will.

We are aware that in thus holding we are setting aside a ruling and decision on this question passed upon by this court in 1879 in this case, on a motion then made to dismiss.

In thus reversing our own court in this matter, we can not do better

than to quote the words of Judge White when pronouncing the opinion of the full court in Mead et al. v. McGraw, 19 Ohio St. 63: "Upon full consideration of the subject," says the learned judge, "both in the light of principle and authority, we are led to the conclusion that the rule of law was incorrectly stated." This is not a case in which we should forbear to correct the error on the principle of *stare decisis*. It is not a rule of property involved, but a rule affecting the practical administration of justice, and which, if wrong, ought at the earliest opportunity to be corrected.

In Little v. Smith, 4 Scam. 402, the supreme court of Illinois has decided in the same way, not hesitating to correct any error affecting practice. In these states the courts held differently at different times, and reversed themselves in different cases. Here, we are correcting, on full reflection, an error made in the same case; we do so now because we believe the former decision in this case was clearly erroneous. It was then passed upon, doubtless, hurriedly; but in any event, as we have said, it is to our minds clear that the statutes regulating the time within which motions for new trials may be filed are mandatory; that being mandatory, a mere oral *ex parte* application in a lower court can not extend the power of that court in the matter in the face of the explicit words of the statute; that unless such a motion has been made in the court below as required by our law, and rule No. 6 of this court—then rule No. 5—there is no jurisdiction here to review a record brought up without these essential elements, as in this case.

A decision that a statute regulating new trials is directory, or that it lies within the power of the court below to extend the time for filing such a motion beyond the time allowed by statute, unless accompanied by a showing that the party applying was unavoidably prevented, is without light or landmark in English or American jurisprudence, as we believe.

As the supreme court of Nevada say in a similar case, so we repeat here: "We have made no examination of the merits of the case. For such purpose the case is not before us." As no error lies in this case, the judgment of the court below must be affirmed.

PARKS, J., concurred.

BLAIR, J., dissented.

IVINSON v. HUTTON ET AL.

Filed May 7, 1883.

PAROL EVIDENCE TO VARY THE DISCHARGE OF A MORTGAGE.—In an action to foreclose a mortgage which had been fully and completely discharged and canceled on the record by the mortgagee, parol evidence is inadmissible to show that such discharge was merely conditional.

THE SAME.—Even if such evidence were admissible, it would have to be as full, clear, positive, and satisfactory as if it were offered for the purpose of reforming the discharge as entered on the record for fraud, accident, or mistake. The facts of the case reviewed, and held not to comply with such requirements.

A DEBT SECURED BY MORTGAGE IS NOT NECESSARILY RELEASED by a discharge of the mortgage on the record.

APPEAL from a decree of the district court for Albany county, entered in favor of the defendants. The opinion states the facts.

M. C. Brown, for the appellant.

W. W. Corlett, for the appellees.

PARKE, J. This is a bill to foreclose a mortgage which has been discharged on the record according to the statute. It is not claimed that there was any error, accidental or intentional, in the discharge as it was entered on the record, nor is it sought to cancel, modify, or alter, in any way, said entry. As made, it is as follows:

"I hereby acknowledge satisfaction in full of the debt for which this mortgage was given to secure, and hereby discharge and cancel the same this sixth day of October, 1877. E. IVINSON.

"Attest: J. W. MELDRUM, Register of Deeds."

The rule that while the discharge remains on the margin of the record it is a bar to a foreclosure, is ignored as not being applicable to this case. The theory of the complaint is, that the mortgage was discharged in accordance with a written agreement, made between the parties on the thirty-first day of May, 1877, by which the complainant, Ivinson, agreed, for certain considerations, stated in said agreement, to execute a partial and conditional discharge on the first of August following. This view of the case is clearly stated and ably argued. In fact, the case is so well presented on both sides that if the court is not able to come to a correct conclusion it will not be the fault of the solicitors.

No discharge was executed till the sixth day of October following the agreement, and the important question in this case is, not what the parties on the thirty-first day of May agreed they would do on the first day of August, but what did they really do on the sixth day of October. The agreement, marked "Exhibit D," is made part of the record, and expressly and repeatedly excepts the rights of the parties, depending on the result of a suit between them, then undecided, in the supreme court of the United States.

The proper way to determine whether the discharge was made in accordance with the agreement is to compare the two writings. It is manifest on inspection, that in the vital point in this suit they do not accord. The agreement provides for a partial, limited, and conditional discharge, in order to save the mortgage as security for any sum that Ivinson might gain by a decision of the supreme court of the United States reforming the mortgage in his favor.

But the discharge actually entered on the record is full, complete, and without any saving or conditional clause in it, and it does not only discharge, but it *cancels*, *i. e.*, annuls, blots out, destroys the mortgage. To prove that, notwithstanding this disagreement, the rights of the complainant Ivinson which might be established by said decision were excepted and saved in the discharge, parol evidence was introduced and several witnesses were examined.

This testimony was not competent, and should not have been admitted. The authorities upon this point are so numerous and familiar that I shall cite but one. In the fifty-third volume of the Illinois reports, page 522, the law is briefly and clearly stated as follows: "The conversations and declarations of the parties made before or simultaneously with the writing are not admissible in evidence. The rule that written agreements, unambiguous in their terms, are not to be varied or explained by parol, is so old and so well established and so consonant with reason and justice, as to render any argument upon this point unnecessary. The rule may be regarded as inflexible. It has often been said by the court, that a contract can not exist partly in writing and partly in parol."

But whether this evidence was properly admitted or not, it fails to make out the case of the complainant. The evidence to sustain the

case made by the bill should be as full, clear, positive, and satisfactory as if the bill were to reform the discharge, as entered on the record for fraud, accident, or mistake. The effect of the proof upon the case and the rights of the parties would be the same. There is quite as much evidence against the theory of the complainant as for it. It is quite as likely that the discharge was made in accordance with the determination of J. M. Carey, that his security for the ten thousand dollars he proposed to loan Hutton should be free from all incumbrances, as that it was made in accordance with the agreement marked "D."

No witness was better situated to know or more likely to remember what was said and done before and at the time of the discharge than Carey. A part of his testimony is as follows, reaffirming, in substance, what he had said before: Q. Now state the facts in reference to those matters so testified to by Mr. Brown. A. At the time mentioned I did not examine the contract in question, viz., the contract of May 31, 1877, nor at any other time previous to the commencement of this suit; that at the time named I paid the amount of money to H. B. Rumsey, as a full and complete settlement of all the liabilities of the said Hutton to the said Ivinson, including the satisfaction of the mortgage and all controversies arising out of the transaction for which the mortgage and notes were given; that we would not have agreed to pay the amount of money, or any other amount, if Mr. Ivinson, both previous to the time we purchased this property and at the time we purchased it, had not agreed that such amount would settle all of his claims and demands, of whatever kind, he had against the said Hutton; that we took every precaution to secure all the title that had ever existed in the said Hutton; that after the satisfaction of the mortgage on the record, and the satisfaction made on the record of the debt for which the mortgage was given, Mr. Brown called my attention to a suit pending in the United States supreme court. I examined the records of the district court of Albany county, so far as it related to a certain decree in the case of Ivinson v. Hutton, from which the case in the supreme court was an appeal. I was satisfied that such decree was not a cloud upon the title which we had obtained by the said deeds of conveyance, and I so expressed myself. I was entirely satisfied with the satisfaction of the mortgage by Mr. Ivinson, and the assurance that he gave me, at the time of the settlement, that he intended to release the said Hutton of all claims and demands, of whatever kind.

Q. Are you positive that when your attention was first called to the suit in the supreme court of the United States by Mr. Brown, and to the fact that Mr. Ivinson did not intend to include that in the settlement of the sixth of October, 1877, that you had already agreed in behalf of yourself and R. Davis Carey for the benefit of Mr. Hutton, and that you had already advanced the amount paid to Mr. Rumsey; and that Mr. Ivinson had already canceled and discharged on record the note and mortgage which he held against the real estate of Mr. Hutton? A. I am positive, for the simple reason that I would make a settlement on no other basis.

Carey gives the same testimony more in detail, on pages 50 and 51 of the transcript, and he repeats it in some form three or four times during his examination. The testimony of Downey and Hutton is substantially the same. Downey's, on pages 69, 70, and 71 of the transcript, is clear and positive. A part of it is as follows:

Q. Have you any knowledge in reference to any settlement made between the complainant, Edward Ivinson, and the defendant, Charles H. Hutton, at Laramie city, on the sixth day of October, 1877? A. I was present at a settlement which was made in the clerk's office at the time, made by the complainant, Mr. Ivinson, Mr. H. B. Rumsey, Mr. Hutton, the defendant, and J. M. Carey, also one of the defendants.

Q. Now state all the facts within your knowledge in reference to that settlement. A. Mr. Carey was making the settlement for Mr. Hutton. He had agreed to advance to Mr. Hutton a sufficient amount of money to settle the claim against his ranches. Don't know the amount of money he paid in that settlement. I know that he was very anxious to have a full understanding as to what claims, if any, Mr. Ivinson or any one else had against certain real estate of Mr. Hutton, which he subsequently bought of Mr. Hutton. I heard Mr. Carey ask Mr. Meldrum, the then register of deeds of Albany county, to examine the record and let him know just what liens of any kind existed against Mr. Hutton and his land. Mr. Meldrum referred him to a mortgage of Charles H. Hutton to Ed. Ivinson, dated twelfth of April, 1873, given to secure a note of thirteen thousand five hundred and eighty-two dollars and fifty-four cents. He also referred him to a number of judgments against Mr. Hutton in favor of other parties. Judge Carey sat down at the clerk's office and commenced figuring. I heard him ask Mr. Meldrum, after this showing that I have referred to, if these were all the claims against Mr. Hutton, and Mr. Meldrum answered that they were. Judge Carey also turned to Mr. Ivinson and asked him if he had any further claims against Mr. Hutton. Mr. Ivinson answered that he had not. Mr. Ivinson then released the mortgage referred to by me, signing the record, which was attested by J. W. Meldrum, register of deeds. Judge Carey then wrote the checks to pay off the judgment and liens against Mr. Hutton, first asking, however, whether his checks would be taken instead of money.

Counsel for complainant objects to all that part of the answer before the word "Hutton," in the twelfth line, and moved to strike the same out, because it is not responsive to the question asked, and because it is incompetent, irrelevant, and immaterial.

Q. State who were present during the time of the settlement mentioned in your last answer. A. J. W. Meldrum, register of deeds, Edward Ivinson, J. M. Carey, H. B. Rumsey, Charles H. Hutton, S. W. Downey. These were all I remember.

Q. State whether or not in that settlement, or shortly thereafter, any reference was made to a claim made by Ivinson against Hutton, which was then in litigation in the supreme court of the United States, and based upon a reformation of the note for thirteen thousand five hundred and eighty-two dollars and fifty-four cents, which is referred to in pleadings in this case. If so, state what was said, and by whom, in reference to that matter. A. After Mr. Ivinson had entered the satisfaction of the mortgage referred to, Mr. M. C. Brown, attorney for the complainant, opened the door leading into the office where this settlement had taken place, and called Judge Carey's attention to the suit referred to by you, and that in event of the suit being decided in favor of Mr. Ivinson he would endeavor to make his claim. Judge Carey answered in substance: "We don't care for that now."

Q. Was any allusion made to the matter referred to in the last question, before the complainant had satisfied the mortgage in question, by any of the parties to the settlement? A. None that I heard.

But Carey's statement is not only supported by these witnesses, but it is highly probable in itself. He was about to loan Hutton a large sum of money to pay his debts, on real estate security, on part of which Ivinson had a mortgage. It was perfectly natural that he should want the security to be ample and be freed from all prior incumbrances. It would be rather strange if he had not insisted that the discharge of Ivinson's mortgage should be full and complete, and according to the statute; and it would be still more strange that Ivinson should make an entry on the margin of the record of his mortgage, such as the law provided shall be a discharge, if he did not mean it. It is certainly reasonable to suppose that if he intended only a special release, saving his rights in the supreme court of the United States, he would have so entered it; or if he considered agreement "D" still in force, that he would have referred to it in some way in the entry of the discharge. Besides, he was interested in Hutton getting the money to the amount of nearly six thousand dollars—five thousand five hundred and forty-nine dollars and eighty-eight cents, the sum of the Creighton judgment; and four hundred and thirty-four dollars and forty-six cents costs, for which he was responsible. He had abandoned his demand for five hundred dollars rather than prevent a settlement. He knew that he must make that discharge absolute, according to the statute, to satisfy Carey, or defeat a settlement of Hutton's affairs in which he was more deeply interested than any other party except Hutton himself. And he made the discharge according to law. It is true, he did this reluctantly, but he did it deliberately and intelligently.

On page 77 of the transcript Downey testifies that "Ivinson refused to go up to the court-house and satisfy the mortgage referred to in the contract of May 31, 1877, insisting that if he did it would kill his mortgage, and his suit in the supreme court of the United States against defendant Charles H. Hutton would amount to nothing." He afterwards changed his mind, for reasons satisfactory to himself, and did knowingly kill his mortgage, and no mysterious virtue in agreement "D" can restore it to life. Ivinson's right thus to extinguish this mortgage at any time he chose, either before or after the first of August, of course can not be questioned. Neither he nor Hutton, nor anybody else, has a right to complain that he did more than he had promised.

But it does not follow from the cancellation of the mortgage that the reformed note was all paid. Mortgages are not unfrequently released for other reasons than the full payment of the debts they are given to secure. In 13 Minn. 305, the court says: "It is clearly competent for the parties to release either the personal liability or the real security; and the release of the one can not affect the validity of the other." Hutton, indeed, says in his sworn answer, "that the said note is fully paid and discharged;" and he denies in said answer "that there is owing on said note as reformed any sum whatever." But this case depends upon the mortgage and not upon the note, and it is not necessary to decide or even to discuss any further the question whether the note was paid or otherwise settled or not.

The district court found that the complainant had no mortgage to secure the payment of the amount claimed to be due on the reformed note, and consequently no equity to sustain his petition.

I think the decree was correct and should be affirmed.

BLAIR, J., concurred.

SAXER, C. J., dissented.

SUPREME COURT OF CALIFORNIA.

EMERIC ET ALS. *v.* ALVARADO ET ALS.

In Bank. Filed January 31, 1884.

A PARTY INTENDING TO MOVE FOR A NEW TRIAL HAS TEN DAYS ALLOWED HIM BY STATUTE, AFTER THE SERVICE ON HIM of the notice of the filing of the findings and the entry of judgment, to give notice of such intention and serve his bill of exceptions; and an order of the court, made before such ten days have elapsed, extending the time within which such notice and service may be made for thirty days, will be construed as extending such time from the end of the period of ten days allowed him by statute.

NO JUDGMENT ROLL IS PROVIDED FOR BY THE PROCEDURE IN CALIFORNIA UNTIL FINAL JUDGMENT has been entered, and consequently, an appeal from an interlocutory judgment in partition will not be dismissed because the entire judgment roll has not been brought up.

AN APPEAL FROM AN ORDER DENYING A MOTION FOR A NEW TRIAL, when an interlocutory judgment has been rendered and entered in an action for partition, must be brought up by a statement, or bill of exceptions, or affidavits, as in other cases where a motion for a new trial is made and denied.

THE WORDS "TESTAMENTARY EXECUTOR" ARE A CORRECT TRANSLATION of the Spanish word *albacea*.

GRANT BY THE MEXICAN GOVERNMENT TO THE "HEREDEROS" OF A DECEASED TESTATOR.—Under the Spanish and Mexican law an heir (*heredero*) could be instituted by will, if designated therein by apt words, so that it can be perceived who is meant. And where, in the proceedings to obtain a grant of land, the Mexican governor declares that a certain deceased testator was the lawful owner of the land, and by his death his successors (*herederos*) are lawful owners of the same, and directs that a title in conformity with this view be delivered and handed over to the testamentary executor of said deceased, for the ends required, the grant issued to such successors (*herederos*) will be held to have issued to the successors as established by the will of the testator. The governor had power to make such grant under the decree of 1824 and the regulations of 1828.

THE ERRONEOUS ADMISSION IN EVIDENCE OF A DOCUMENT which did not tend to injure any party, furnishes no ground for a reversal.

UNDER THE MEXICAN LAW, WHERE A FATHER DIES, HAVING DEVISED HIS ESTATE to his wife and children in certain proportions, and after his death, but before the death of their mother, certain of such children die intestate, the interests so devised to such deceased children vest in their mother, and not in their surviving brothers and sisters.

WHERE THE EVIDENCE IN SUPPORT OF A FINDING AS TO THE MENTAL CAPACITY of a grantor to make a deed is conflicting, such finding will not be disturbed by the appellate court.

AN ATTEMPTED PARTITION OF A MEXICAN GRANT, THE BOUNDARIES OF WHICH HAD NEVER BEEN DETERMINED by the United States, in pursuance of a written agreement for partition, in which all the tenants in common of such grant are named as parties, is null and void when it appears that some of such parties never executed such agreement, or where a much larger tract of land was included in such attempted partition than was included within the boundaries of such grant as the same were finally determined by the survey approved by the United States courts. And the same is true of all other deeds and transactions between such parties, the object and purpose of which are to facilitate and perfect such partition, when the same is the only consideration on which they are founded.

AN AGREEMENT BY THE TERMS OF WHICH ONE PARTY PROMISES TO CONVEY certain land to the other, in consideration of the latter's performing certain services, conveys no interest, legal or equitable, to such latter unless the services stipulated for are performed.

A GRANTEE IN A DEED WHICH RECITES THAT THE SAME IS GIVEN IN LIEU of a previous deed for different premises, who accepts the same in lieu thereof, is estopped from claiming under such previous deed. Whether such grantee is divested of the title conveyed to him by the previous deed, without a reconveyance, *quære*. Equity might compel such reconveyance, unless the rights of innocent purchasers had intervened.

A JUDGMENT FOR COSTS WAS VOID, UNDER THE PRACTICE ACT OF 1851, SECTION 511, and may be collaterally attacked, when the costs were not inserted by the clerk at the time of the entry of the judgment, but were inserted by him afterwards, without any

order of the court; and a sale of land under an execution issued on such judgment confers no title on the purchaser.

EVIDENCE OF THE PETITION OF A TESTAMENTARY EXECUTOR TO THE BOARD OF LAND COMMISSIONERS, for the confirmation of a Mexican grant to his testator, is admissible in an action for the partition of such grant, when offered along with a copy of the will attached to the petition, the opinion of the board confirming the claim and the decree of confirmation.

A DEED BY A TRUSTEE, PURPORTING TO CONVEY TO THE GRANTEES THE LEGAL TITLE to their shares in the land, may be admitted in evidence, notwithstanding an objection thereto which goes merely to the effect of such conveyance. The operation of such conveyance was a matter for the consideration of the court when it rendered judgment.

DECLARATIONS OF PARTIES WHICH FORM NO PART OF THE RES GESTÆ are hearsay and not admissible.

NEITHER AN ORDER APPOINTING A GUARDIAN AD LITEM FOR AN INFANT NOR THE PETITION FOR SUCH APPOINTMENT NEED APPEAR in the judgment roll. Such appointment may be made on an application *ore tenus* in open court, as well as in writing.

THE INFANT SUCCESSORS IN INTEREST OF DECEASED DEFENDANTS IN AN ACTION FOR PARTITION may be substituted for such defendants on motion, without the issuance of a summons to bring them in. Such infants may appear by their general guardians, or by guardians *ad litem* appointed for them, and where the record is silent as to their manner of appointment the regularity of such appointment will be presumed.

TO SUSTAIN A SERVICE OF SUMMONS BY PUBLICATION AGAINST MINOR DEFENDANTS, the court will presume, unless the contrary appears, that such minors were over the age of fourteen years, in which case no service of summons on their mother, or other person having them in charge, is required.

THE FINDINGS OF THE LOWER COURT ON THE ISSUES RAISED BY THE PLEADINGS MUST STATE separately the facts found and the conclusions of law, in such a manner that the appellate court may see that the conclusions of law follow as a deduction from the facts found. Tested by such rule, certain findings of the lower court, to the effect that no assessments for taxes during certain years were made on a portion of the property in controversy, and certain judgments rendered for such taxes were void, held insufficient.

SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A FINDING that the possession of the defendants was not adverse will not be considered by the appellate court, when such adverse possession could not have continued for a sufficient length of time prior to the commencement of the action to furnish a defense.

THE DIFFERENT SECTIONS OF A CHAPTER IN ANY ONE OF THE CODES MUST BE SO CONSTRUED as to reconcile all apparent conflicts, and if there are conflicting provisions in the different sections of a chapter, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter.

IN ALL ACTIONS FOR PARTITION, INCLUDING THOSE PROVIDED FOR IN SECTION 760 OF THE CODE OF CIVIL PROCEDURE, BEFORE ANY PARTITION IS ORDERED OR CAN BE MADE, the interests and shares of all the parties must be determined and adjudged by the court, and also the moieties in which the land is to be divided. Such moieties must be specified in the interlocutory judgment, so that the referees appointed to make the partition may have no question of title to determine, and may intelligently discharge the duties as to making the allotments devolved on them by the decree. An interlocutory decree which fails to observe such requirements is erroneous.

WHERE A MAP OR OTHER PAPER IS REFERRED TO IN A JUDGMENT as a material part of it, it should be identified by the judgment and made a part of it. It should not be referred to as a paper recorded elsewhere.

NO APPEAL LIES FROM AN ORDER OF THE LOWER COURT APPOINTING A RECEIVER in an action for partition, notwithstanding the fact that such order may operate as an injunction in restraining the rights of the parties to the action to hold and manage their lands.

APPEAL from a judgment of the fifteenth district court for the city and county of San Francisco. The opinion states the facts.

B. S. Brooks, and others, for the appellants.

A. M. Crane, and others, for the respondents.

THORNTON, J. In this cause, which is an action for the partition of the San Pablo ranch, situated in the county of Contra Costa, and containing

seventeen thousand nine hundred and thirty-eight and fifty-nine one-hundredths acres of land, there are five appeals, prosecuted each by some of the defendants. Of these five appeals, two are from the interlocutory judgment or decree, one from an order denying a motion for a new trial made by several defendants, and the other two are from an order appointing a receiver. We are asked to strike out the bill of exceptions, on the ground that the notice of motion for a new trial and the bill of exceptions were not filed or served within the time allowed by law or by the court.

The interlocutory judgment was filed on the fifteenth of July, 1878, and notice of the filing of the findings and entry of judgment was served on the parties and attorneys on the next day. Seven days afterwards, viz., on the twenty-third of July, the parties intending to move for a new trial obtained from the Hon. Samuel H. Dwinelle, the judge of the court below, the following order:

"Good cause appearing therefor, it is ordered that the time for the defendants, or any or each of them, to give notice of their intention to move for a new trial, and to serve a bill of exceptions, is hereby extended thirty days."

No stipulation of attorneys, extending time, was asked or given, and no other order was asked or granted than the foregoing. The foregoing order was a valid one: C. C. P., sec. 1054.

On the twenty-fourth of August, 1878, the notice of motion for a new trial was served, and on the same day the proposed bill of exceptions was served.

It is argued that the time was only extended by the order of the judge thirty days from the twenty-third of July—the date of the order—which would extend the time to the twenty-second of August, and therefore the notice of motion and bill of exceptions which were served on the twenty-fourth of August was too late by two days.

We do not so construe the order. We think it extended the time thirty days from the end of the period of ten days allowed by the code of civil procedure, and that such was the intention of the learned judge who made the order. The parties intending to move had ten days from the sixteenth of July to give notice, and serve their bill of exceptions: C. C. P., sec. 650. This would bring the ten days' period to a close on the twenty-sixth of July. The extension of thirty days would bring the end of the extended period to the twenty-fifth of August, and notice and bill were filed the day preceding, viz., on the twenty-fourth of August. The extension of time by the order referred to the ten days' period as the point from which the extension was to run and be computed. The order must have been made within the ten days, for the judge had *no* power to make it afterwards. No reference is made in the order to its date as the point from which the extension was to be computed, and we would be violating the rule made by the order of the learned judge of the court below were we thus to hold. We think the notice and bill were filed in time: See Green v. Fawcett, No. 5074, March 21, 1876; Clark v. Crane, 7 Pac. C. L. J. 412.

We will remark here, that the cause had been a long time on trial, that the transcript consists of more than seventeen hundred pages, and certainly the judge would be disposed to allow all the time in his power to prepare and serve a bill of exceptions. Remarkable diligence was used in preparing and serving it within the time allowed.

It is further urged that the appeal should be dismissed because the entire judgment roll is not brought up. Conceding that on an appeal from an interlocutory judgment in partition, the entire judgment roll, so far as it exists, is to be and can be brought up in the transcript on appeal, we remark that it is not the practice of this court to dismiss an appeal under such circumstances, when the defect can be readily cured on a suggestion of diminution. It is clear, however, that on such an appeal no judgment roll has been made up. No final judgment has been rendered, and until final judgment has been made and entered, the judgment roll is not and can not be required to be made: C. C. P., sec. 670. Before the *postea* and entry of judgment, according to what is known as the common-law procedure, the roll was known as the issue roll, or *nisi prius* roll; after the entry of judgment it was called the judgment roll: Bootes Suit at Law, 136, 142, 143; Stephen's Pl. 81; Abbott's Law Dict. *verb.* Judgment Record or Roll, citing Smith's Act. at Law, 184. This, however, applied only to cases at law. No judgment roll was known in courts of equity. The pleadings, process, depositions, orders of all kinds, upon being filed, and final decree when enrolled, in cases in chancery, went into and constituted the record.

The case before us, although courts of law had at an early period jurisdiction in cases of partition, 1 Story's Eq. Jur. 646–648, partakes more of a case in equity. However, it is sufficient to say, that no judgment roll is provided for by the procedure in this state, until final judgment has been entered, and we do not see why the requirement contended for here should obtain. The appeal should not be dismissed on the ground referred to, and the motion is denied. If any party had desired any paper to be brought up, which would constitute a part of the record in the case when the roll is made up, and would be material on the examination and decision of the cause, on a suggestion or motion to that effect, leave would have been granted.

In holding that we will not dismiss the appeal because all the documents which constitute the judgment roll when made up after the final judgment is made and entered are not in the transcript, we do not intend to hold that the procedure by which questions are brought to the court for examination and review on appeal is otherwise changed. The same mode might be adopted to bring questions for review before this court on appeal from an interlocutory judgment in partition, as on an appeal from a final judgment. The same is true on appeal from a motion denying a new trial in the case of an interlocutory judgment. The questions to be considered and decided on the denial of such a motion, when an interlocutory judgment has been rendered and entered, must be brought before us by a statement or bill of exceptions or affidavit, as in other cases when a motion for a new trial is moved for and denied. Such, in our judgment, is the fair construction of the code of civil procedure. We think the other appeals should not be dismissed, except the appeal from the order appointing a receiver, which will be discussed elsewhere in this opinion.

It appears from the bill of exceptions that on the first day of January, 1827, the citizen, Francisco Castro, presented "to the commander in chief of the Californias" a petition, in which he speaks of himself as a former member of the deputation of the territory of Alta California, and stated that since the fifteenth of April, 1823, he presented to the territo-

rial assembly (deputation) a memorial, a true and faithful copy of which he appended to this memorial, as follows:

"HON'BLE DEPUTATION: Don Francisco Castro, member of the provincial assembly of Upper California, citizen of and resident in the town of San José, in the said province, with due respect presents himself to you and exposes:

"That being the owner of large herds of horned cattle and horses, he finds himself under the necessity, in order to preserve the cattle which he now possesses, and in order to provide for the maintenance of his numerous family, to solicit of you that a piece or tract of land may be given to him for the purpose of fixing his establishment.

"Wherefore, I address myself to your high sense of justice, and ask of you that in the exercise of the ample powers with which you are invested, you would be pleased to grant to me the possession of three square leagues (sitios) in the place called 'Los Cuchigunes' or 'San Pablo,' formerly occupied by the mission of San Francisco, which lies opposite the said mission and the port of said name, and upon its shores; which piece of land has been abandoned by the said mission, and which, with the previous knowledge of its holy fathers and father ministers, I had already solicited from the present government, who will *testify* to the fact if necessary.

"Feeling thus confident, as I do, that you will have the kindness to consider myself entitled to this favor, I request and pray of you to give me the rights of property, possession, and ownership to the land in due form of law, so that it may be secured to me and my successors. Wherefore, I humbly solicit that you will look favorably at my demand, and do that which you will deem pertinent and necessary.

"MONTEREY, April 15, 1823.

"Honorable Deputation.

"FRANCISCO CASTRO."

That on the same day, fifteenth of April, 1823, the honorable assembly made the following decree or order:

"MONTEREY, April 15, 1823.

"The Hon'ble Assembly [Deputation] grants to the claimant the piece of land which he solicits, measuring three square leagues, considering the said claimant entitled to said favor, for his services, his known probity, and the abundance of stock which he possesses, for which purpose the government appoints the commander of the Presidio of San Francisco for the measurement, and giving him possession of the lands for which he petitions. ARGUELLO.

"JOSÉ JOAQUIN DE LA TERRE, Secretary."

The above is made part of the petition.

The petition concludes as follows: "Considering that to the present time the foregoing decree has not been complied with, the reason thereof being unknown to me, I present myself to you in order that, making use of the powers with which you are invested, you will be pleased to give the orders necessary for the purpose of having the foregoing decree enforced. The highly discriminating powers which distinguish you make me confident that you will grant me this favor, for then only will I consider myself safely and permanently settled, and having nothing to fear either for my live-stock or for the sundry branches of industry, and to the maintenance of my family. This last point being the first which occupies my attention.

"Wherefore, I respectfully pray, that taking my petition into consideration, you will be pleased to order all that which you will deem pertinent and reasonable, which favor will, I hope, be granted to me.

"In the presidio of San Francisco, first of January, 1827.

"FRANCISCO CASTRO."

On the margin of this petition to the commander in chief, the following order was made:

"PORT OF SAN DIEGO, January 29, 1827.

"The commander of San Francisco will be pleased to report why the right of possession within referred to was not given. ECHEANDIA."

On the twenty-seventh of July, 1827, the above named Castro presented a petition "to the commander in chief and political chief of the Californias." The petition begins as follows:

"Francisco Castro, owner of the rancho San Pablo, in the district of San Francisco, respectfully presents himself to you, and in due form of law, and according to his rights, exposes." The petition proceeds to set forth that four years have elapsed since he became and continued in the possession of the said tract of land, as will appear by the document accompanying these presents, which document, granted by the honorable deputation, confirms the donation, and orders that due title to the possession of the land be given to him (Castro), and requires the commander of San Francisco to do so; that though the gentleman notified for the purpose of giving him said possession, as he (Castro) was at that time a member of the said deputation, and was then called to Monterey on public service, he could not obey said summons, and as from that day he had not been able to settle this matter, he now had recourse to the well-known justice of his excellency, requesting that he would be pleased to order that due possession of the tract of land be given to him. He asks his excellency to take also into consideration that he has already built upon the land a house, having stone foundations, measuring forty varas, two other wooden houses, planted a garden with many fruit trees therein, and a vineyard containing upwards of one thousand stalks of vines, built a mill, and sowed thirty fanegas of wheat, and one half a fanega of corn and beans each; and that he has six hundred head of cattle, and five hundred horses, more or less; that the tract of land runs along the bank of the creek (estero) and that of the bay (mar) of San Francisco, from north to north-west, where it meets the boundary line of Sergeant Luis Peralta; its distance from the mission of San José is about thirteen leagues, and from that of San Rafael a little over two; that in order to go to the latter, one has to cross an arm of the sea, in consequence of which a boat has been built "so that one's family be not in want of spiritual food."

He concludes by asking that his excellency would be pleased to take his demand into consideration, and grant it if just. This petition is signed by Castro, and bears date at Monterey. He appends to it his petition to the territorial deputation and the decree of the same, above given. On this petition the following order was made:

"Let the possession prayed for by the claimant be given to him, it being understood that the three sitios prayed for and granted are to measure three square leagues, and said possession being given to him on the place where he has erected his house, or wherever it may be most convenient, on the said sitios, bearing in mind that the measurement and putting in possession must begin from the place where his house is built,

or from any other place pointed out by him; and that there must be measured therefrom seven thousand five hundred varas in each direction; and to that effect I appoint, as an intelligent and honest man, the citizen, Francisco de Haro, a resident of the presidio of San Francisco, so that he may, for and in behalf of the citizen Francisco, having previously called to his assistance two witnesses, and also the owners of the adjoining estates, and in their presence he may pass upon and operate in due form of law, and fulfill all the formalities prescribed and in furtherance of this decree.

"This done, that these two documents be sent back to me through the commander of the presidio of San Francisco, by whose channel I now forward them, in order that they may be complied with, and in order also that they may be registered in the book of records and possessions, which are kept in this office. ESTRADA."

It further appears that Castro presented the following petition, dated the thirtieth of January, 1828, to the commander in chief:

"To THE COMMANDER IN CHIEF: Now comes the citizen, Francisco Castro, who says: That four years ago he petitioned his excellency, Don Luis Antonio Arguello, for the place called 'San Pablo,' claiming three square leagues out of it, which were granted to me by a decree in which he orders that due possession be given to me, as the person appointed for that purpose. Don Ignacio Martinez has not as yet to this day done it, on account of you having kept in your hands the documents upon which, and in consideration thereof, the usual legal proceedings are to be had, which shall confirm the grant and possession of the said piece of land. I now come and pray you to deliver to me the said document in your possession, so that the formalities prescribed may be complied with in furtherance of the request of the commissioners appointed.

"San Francisco, 30th January, 1828. FRANCISCO CASTRO."

It does not appear that any order or decree was made on this petition. On the first of May, 1830, he presented a further memorial, addressed to the political chief:

"To THE HON'BLE THE POLITICAL CHIEF: Francisco Castro, of the town of San José, Guadalupe, residing on the rancho of San Pablo, respectfully comes to you and says, that he is the owner of the place called San Pablo; that it was granted to him five years ago by the hon'ble the territorial deputation. That taking in consideration the laws concerning the colonies and the supreme decree of your excellency, renews his claim to the possession of the said tract of land, which measures three sitios, and is such as described in the first claim presented by him, and now in the hands of your excellency, requesting you to remark, that although he has frequently requested that possession be given to him of said tract of land, that the same has not as yet been done. He therefore renews his claim, that due possession be given to me of the said tract, and that the amount expended, and the improvements made by his family on the said land, should be taken into united action—the same consisting of a house, measuring ten varas, and having good foundations, one thousand stalks of vine, and sundry other plants.

"And in order that this claim be attended with a full knowledge of the facts, and justice rendered to him in the present instance, he will add that he is fifty-five years of age; that he is married and has ten children; was born in the town of Cinaloa, in the district of Sonora, which was founded by his father; that he was for thirteen years a soldier and cor-

poral in the Mexican company of artillery, and that he has belonging to him on the tract which he occupies, one thousand four hundred head of cattle, six hundred sheep, and five hundred horses. He would therefore respectfully request that in consideration of the services rendered by him, the possession of the said tract of land be granted to him, in order that he may in peace and quietness, and with confidence, go on with the improvements necessary for the maintenance of his numerous family, which favor from your well-known sense of justice will, he trusts, be granted to him.

"RANCHO OF SAN PABLO, 1st of May, 1830. FRANCISCO CASTRO."

The following marginal decree was made on the foregoing:

"MONTEREY, 26th May, 1830.

"Let the plaintiff add to his petition a plan (diseño), showing the conformation, extent, and all other important particulars relating to the tract of land claimed by him. ECHEANDIA."

No doubt the plan or diseño above spoken of related to the requirement of the rules and regulations of 1828, in relation to the granting of lands for colonization of the territories of the republic of Mexico, and that the law of 1824 and the regulations of 1828 had then been promulgated in California, and that the laws concerning the colonies referred to in the petition were the law and regulations above mentioned. On the fifth day of November, 1831, Francisco Castro died, having first made his will, which appears in the bill of exceptions. The bill opened with the following recital:

"On the twenty-first day of October, 1831, I, Francisco Mario Castro, finding myself, by divine mercy, of sound mind, but severely sick, and desirous of disposing of my effects before I die, in the best possible form, in the absence of a notary public, having called all the witnesses who would willingly come, and asked and supplicated Diego Forbes y Rodriguez to write, in the presence of said witnesses, the following testament, which I will dictate in the form following."

The will appears to have been very formally drawn up. Among other dispositions, the following are made:

"I order, and it is my will, that my wife, Gabriella Berreyessa, shall have absolute title to one half of all my property, rights, and credits, with all the movables of my house, for her aliment and maintenance, in the same manner that she has had during my life, and I charge my children to comply with the direction or obligation, in the same manner as though it were with my person."

The following clause is inserted in a subsequent part of the will:

"I order, and it is my will, to leave, as in fact I do leave and give, all my property, rights, and actions, together with all the land of my rancho San Pablo, to my wife one half, and the remaining half equally between my legitimate sons and daughters, each being owner of his equal part or share of the effects." The language of this clause without the other is sufficient to devise one half of the ranch to the wife.

The will contains these further clauses, among others:

"I pray and declare that it is my will to nominate, and I nominate and appoint for my executors of this my voluntary last testament, the following-named persons: In the first place I appoint my son, Joaquin Isidro Castro, my first executor and holder of the property of my wife, my daughters and sons—Ramon, Victor, Jesus Maria, and Alvino Antonio, enjoining them to strict compliance with my ultimate wish, at the

same time giving him all right and power to superintend and take care of the rights and effects corresponding to each one of those persons, that is to say: my wife, my legitimate daughters, and my sons aforementioned, and also to cause the rest of my children to comply with this my last wish.

"I nominate and appoint my son, Juan José Castro, as my second executor, and my son Gabriel Vicente Castro my third executor, to carry out my last wish, and conferring upon them all the rights which the laws direct in these cases.

"I declare and direct all my executors that if any of my children attempt to introduce discord or difficulty of any kind in order to disturb the peace and quiet of my family, he or she be ejected the ranch immediately, without exception of person.

"I declare as my last wish, and direct that all my tame horses be for the use of my wife, my legitimate daughters, and my sons Ramon, Victor, Jesus Maria, and Alvino Antonio. My horses number thirty, with two mules, which are for the use of my house.

"I direct, * * * and it is my desire, that my youngest son shall be master or owner of my branding iron and cattle mark."

This will was signed by Castro on the third day of November, 1831, and was attested by three witnesses who sign: "Carlos Castro, first witness to this testament; José Berreyessa, second witness to this testament; Diego Forbes y Rodriguez, third witness to this testament."

It will be observed that the testator appoints his son, Joaquin Isidro Castro, first executor of his will.

On the twenty-sixth of May, 1834, this son and first executor of the will presented to the political chief the following petition:

"To his Excellency the Political Chief: The citizen Joaquin Isidro Castro presents himself before your excellency, and in due form of law exposes:

"That in consequence of the death of my father, who has instituted me the heir of a portion of his property, and guardian of that of my brothers (as will appear by his testament, a copy of which is registered in this capital), and in fulfillment of the obligations resulting from the trust which I have accepted, and for the due execution of the same, I solicit of your excellency the lawful ownership of a certain piece or tract of land named San Pablo, a plan of which is hereto annexed, together with a copy of the first petition for the said tract, presented by my father, and dated the fifteenth of April, 1823, and also of a copy of gubernatorial decree of the same date, and the same having remained without effect, I hereby renew a demand for the said piece of land, together with the documents necessary for the security of the rural property therein situated, consisting of three thousand head of cattle, nine hundred horses, and six hundred sheep. I hereby solicit your excellency to do that which you will deem just and necessary in the premises, protesting my entire good faith, and taking the oath prescribed, etc.

"Rancho de San Pablo, May 26, 1834. Joaquin Isidro Castro."

On this petition the following marginal decree was made by José Figueroa, the political chief to whom it was addressed:

"Monterey, June 1, 1834.

"Let the petitioner be notified to produce the original documents, in virtue of which the lands which he claims were granted, and a report be made of the same. I, Don José Figueroa, a general of brigade of the

Mexican republic, commander general, inspector, and political chief of the territory of Upper California, so order and decree, and in faith thereof, thereunto affix my name. JOSÉ FIGUEROA.

"AGUSTIN V. ZAMORANO, Secretary."

To this decree Joaquin I. Castro made answer on the eleventh of June, 1834. The answer is as follows:

"This day, the eleventh of June, 1834, the petitioner, Don Isidro Castro, being present, and the foregoing notification from the political chief having been duly served on him, and having been made acquainted with it and heard it read to him, declared and answered: That the original documents referred to in said notification are on file in the office of the secretary of the government, together with a petition of his deceased father, praying for a grant of said rancho; and having so answered in good faith thereof, he affixed thereto his signature, and so did also the secretary of the government. JOAQUIN ISIDRO CASTRO.

"AGUSTIN V. ZAMORANO."

On the same day, Governor Figueroa ordered that the secretary of the government report on this answer, annexing the documents referred to, and of the whole let an account be rendered in order to determine thereupon. The secretary, Zamorano, in conformity with the foregoing order, produced the documents referred to for such further orders as his excellency might be pleased to make. The documents referred to are those above given, consisting of the various petitions made by Francisco Castro in his life-time and the orders and decrees made thereon. On the petition of Joaquin above given, Governor Figueroa made this decree:

"MONTEREY, June 12, 1834.

"Taking into consideration the petition at the head of this expediente, the commission granted by the hon'ble the territorial deputation, on the fifteenth of April, 1823, and all steps taken and other things done in conformity with the requirements of the law on such matters,

"We declare Don Francisco Maria Castro the lawful owner, and by his death his successors, of all that tract of land known under the name of Los Cuchigunes, or San Pablo, bounded by the ranchos of San Antonio, and El Pinole, and by a portion of the port of San Francisco. Let, therefore, a title be delivered in conformity with the above, have it registered in the proper book, and handed over to the testamentary executor, Don Joaquin Isidro Castro, for the ends required, and have the expediente recorded.

"I, José Figueroa, general of brigade, commander in chief, general inspector, and superior political chief of the territory of Upper California, do so order and decree, and in faith hereunto sign my name.

"AG. V. ZAMORANO. JOSÉ FIGUEROA."

On the same day the following grant was made:

"Whereas, the late Francisco Maria Castro petitioned the deputation on the fifteenth of April, 1823, a reversion in the tract of land known under the name of Los Cuchigunes, or San Pablo, bounded by the ranchos of San Antonio and El Pinole, and by a portion of the bay of San Francisco; and whereas, his successors did subsequently apply for the lawful ownership of the said tract of land, having previously taken all the steps required with the formalities prescribed by the laws and regulations in such cases made and provided; now, therefore, using the powers with which I am intrusted, and in the name of the Mexican nation,

by decree of this day, I do grant to the said successors the above-mentioned tract of land, declaring the same to be their property by the present letters, in entire conformity with the tenor of the laws and in confirmation of that concession, subject to the following conditions:

"First—That they will comply with the rules and regulations which may hereafter be made for the distribution of public lands, and that they will not, in the mean time, neither they, their grantees, nor their heirs, have the power of dividing nor alienating that which is granted to them; neither will they have the power of laying upon the same any liens, mortgages, nor incumbrances whatever, even for pious causes, nor to make a mortmain transfer of the same.

"Second—They are hereby allowed to fence the same, without prejudice to the passages and ways across the same and other servitudes. They will have the free and exclusive use and enjoyment of the same, cultivating and using the said land as they will think best; but within one year at the latest they must build a house thereon, which shall be inhabited.

"Third—They shall apply to the competent judge for the judicial possession of the said land, in accordance with the present title, for the purpose of having the boundaries of the same marked out, which, beside the ordinary landmarks, will be defined by some fruit trees or other trees of some utility planted for the purpose.

"Fourth—The herein-mentioned tract is of three square leagues, more or less, according to the design which accompanies the expediente granted to them.

"The judge who will put them in possession shall have the said tract measured according to law, so that the boundaries may be marked out, the surplus, if any, reverting to the nation, for such uses as may be proper.

"Fifth—Should they fail to comply with the foregoing conditions, the grantees will lose their rights to the said tract of land, which will become liable to be claimed by others.

"I therefore order that these presents be, to all intents and purposes, a good and valid title to the grantees, that the same be recorded in the proper book, and that it be delivered to the parties interested for their security and for all other ends and purposes.

"Given at Monterey, this 12th day of June, 1834.

"A. V. Z., Secretary. JOSÉ FIGUEROA."

On the twenty-third of June, 1835, Joaquin I. Castro presented a petition for an augmentation of the San Pablo ranch to the political chief, as follows:

"MONTEREY, June 23, 1835.

"Joaquin Castro, a citizen residing within the jurisdiction of the port of San Francisco, presents himself to you, and with due respect says:

"That I have already solicited from your excellency the legitimate possession of the rancho of San Pablo, which we, the heirs of my deceased father, actually occupied, as I have already stated in my first petition, but through inadvertence have neglected to ask for the extent of land included in the plan annexed thereto, and have said that we only claim the three square leagues that we formerly occupied.

"This piece of land being rather too small for the number of cattle grazing on the same, which number we are exerting ourselves to increase, I solicit of you, in the name of the other heirs, and as their attorney in

fact, that said petition be understood to exclude for [from ?] the three leagues which we occupied, the augmentation of the land described in the aforesaid plan.

"Wherefore, I pray your excellency to grant that which I demand, hereby protesting of my gratitude, and taking the necessary oath.

"MONTEREY, June 23, 1835. JOAQUIN ISIDRO CASTRO."

The governor made the following marginal order on this paper:

"MONTEREY, June 26, 1835.

"Let this petition be added to the expediente upon the matter, so that the secretary may report upon the same whatever he may deem expedient for the proper conclusion thereof. FIGUEROA."

This order was obeyed by the secretary, Negrete, on the same day. The secretary made a further report on the twenty-seventh of June, which it is unnecessary to insert here.

On the fourteenth of August, 1835, Figueroa made an order that a grant issue of the whole tract, in the following words:

"MONTEREY, August 14, 1835.

"Considering the petition at the beginning of this expediente, which was obtained on the fifteenth of April, 1823, from the most excellent territorial deputation, the subsequent petition which was made on the twenty-third of June of the present year, praying for the amplification of a little more than a square league according to the plat marked number 2, and also such other additional documents as were furnished in conformity of the law and regulations in such cases made and provided: I hereby decree Don Francisco Maria Castro, and by his demise his heirs and successors, the lawful owner and owners of the tract of land known under the name of Los Cuchigunes, or San Pablo, bounded by the ranchos of San Antonio and El Pinole, and by a portion of the port of San Francisco. I order that a good and sufficient title be made out, that the same be registered in the proper record book, that it be delivered to the testamentary executor and heir, Joaquin Isidro Castro, for all necessary ends and purposes, and that the expediente thereof be archived.

"I, Don José Figueroa, general of brigade of the Mexican republic, commander general, inspector, and political chief of the territory of Upper California, so order and decree, and in faith thereof hereunto affix my name. JOSÉ FIGUEROA.

"F'CO DEL CASTILLO NEGRETE, Secretary."

On the twentieth of August, 1835, a grant issued in the usual form of the whole property, including the augmentation, to the *successors* of Francisco Maria Castro. On the twenty-second of May, 1840, the expediente was presented to the departmental assembly, and the same was approved by the assembly on the thirtieth day of May, 1840.

We have thus presented the matters appearing in the expediente very fully, in order that the history of the title in its inception and consummation might appear herein. Mexico achieved her independence, after a long struggle, in 1821, and became then a republic. The plan of Iguala, adopted by the revolutionary government of Mexico on the twenty-fourth of February, 1821, and the treaty of Cordova of the twenty-fourth of August, 1821, between the then government of Mexico and the Spanish viceroy, mark the close of the struggle by Mexico for her existence as an independent nation. By the treaty of Cordova, the independence of the country was established: United States v. Ritchie, 17 How. 538. Some

time in 1822, the authorities of California recognized and gave in their adhesion to the new order of things established in Mexico.

The first step taken by Francisco Castro for the acquisition of title to the rancho San Pablo was by a petition to the territorial deputation, on the fifteenth of April, 1823. This petition was for a grant "of the possession" of three square leagues in the place called Los Cuchigunes, or San Pablo. The grant was made by the deputation and approved by the then governor, Arguello. (That Arguello was then governor of California, see the list of colonial governors in Dwinelle's Colonial History, *Addenda*, 115.)

It is contended that the territorial deputation never had power to grant land, and several authorities are cited to that effect: United States v. Workman, 1 Wall. 762; Beard v. Federy, 3 Id. 491; Christy v. Pigeon, 4 Id. 203; Hornsby v. United States, 10 Id. 231–238; United States v. Vigil, 13 Id. 450, 451; Ferris v. Coover, 10 Cal. 589.

But in the view we take of this case it is unnecessary to decide this question. The question we especially refer to is, whether the deputation, with the approval of the governor, had the power to grant lands prior to the enactment and promulgation of the decree of the Mexican congress of the eighteenth of August, 1824, relating to colonization and of the rules and regulations of the twenty-first of November, 1828, for the colonization of the territories of the republic of Mexico. See Ferris v. Coover, 10 Cal. 634–637; Rockwell's Spanish and Mexican Law, 451, 453; 1 White's New Recopilacion, 601, for this decree and the rules and regulations.

It may be further conceded that Francisco Castro never complied with the decree and regulations aforesaid, and never acquired any title to the San Pablo ranch previous to his death. That the facts appearing in the expediente above set forth gave him a strong equity to such a grant, we have no doubt; but it is conceded, as contended by appellants, that prior to his death he acquired no title. It may be remarked here that Governor Figueroa, reputed by all to have been an able and learned man, well acquainted with the laws of Mexico, in his order of the twelfth of June, 1834, above inserted, declares in so many words that Don Francisco Maria Castro is the lawful owner of the tract of San Pablo petitioned for. We consider this statement of Figueroa as high authority sustaining the position that Castro was in his life-time the owner of the tract above mentioned; but as we have said above, in the view we take of the case, it is unnecessary to pass on it. Prior to his demise in November, 1831, he made and executed a will, the clauses of which, so far as pertinent, have been stated above. We have seen that he demised one half of this rancho to his wife, and made his son his first executor.

In this condition of things, his son Joaquin, the first executor, presents to the then governor (Figueroa), on the twenty-sixth of May, 1834, a petition for the rancho. In this petition, he states "that, in consequence of the death of his father, who has instituted him heir of a portion of his property and guardian of that of his brothers, as will appear by his testament, a copy of which is registered in this capital;" and *in fulfillment of the obligations* resulting from the trust which he has accepted, he solicits of his excellency the lawful ownership of a tract of land called San Pablo, a plan of which was annexed, with a copy of the first petition for the said tract, presented by his father, dated the fifteenth of April, 1823, and also a copy of the gubernatorial decree of

the same date. He further states that the petition and decree having remained without effect, he thereby renews a demand for this piece of land, with the documents necessary for the security of the rural property thereon situated, consisting of three thousand head of cattle, nine hundred horses, and six hundred sheep.

The documents referred to in this petition were produced before the governor and appear in the expediente (they are set forth above); and Governor Figueroa, having taken into consideration the petition and the papers presented, on the twelfth of June, 1834, orders a grant to be issued for the land, and on the same day a grant was issued.

The order or decree that a grant issue declares "Don Francisco Maria Castro the lawful owner, and by his death his successors," of the tract of land known under the name of San Pablo, and directs that a title be delivered in conformity thereto ("with the above"), have it registered in the proper book, and handed over to the testamentary executor and heredero (heir) Don Joaquin Isidro Castro, for the ends required.

The word translated "testamentary executor" in the above is *albacea*, and it is said to be incorrectly rendered. Escriche defines *albacea* thus: "He who is charged with fulfilling and executing that which is directed by the testator in his testament or other last disposition:" See word *albacea* in Escriche's Diccionario, etc. In the dictionary of the Spanish Academy it is defined *testamenti exsequendi curator*. In Seoane's, Newman & Barretti's Dictionary the definition is "testamentary executor." We think the word is correctly translated. The title or grant was accordingly issued to the successors of Don Francisco Maria Castro. The word translated "successors" in the above document is *herederos*.

The important question arises here, and is to be determined, Who are the *herederos* referred to by Governor Figueroa in the described grant above stated, and to what persons or class of persons did he intend to make the grant or title? The grant is made to these persons, whoever they are. It is contended on behalf of the appellants that the *herederos* referred to are the brothers and sisters. On the other hand, the contention is that the *herederos* referred to are the persons to whom the rancho was devised by the will of Francisco Maria Castro.

Of this word *heredero*, Escriche says that "anciently the proprietor of any inheritance was so called; and it still preserves this signification in some parts." He proceeds further to state that this signification comes to us from the Roman law; that Justinian in his Institutes informs us that the expression *acto de heredero* is the same as the act of the proprietor, giving as a reason that the ancients called heirs, owners or masters: *Veteres enim hæredes pro dominis appellabant.* Upon which text Cuyas observes that *hæres* comes from *herus—lord* or owner. Further as to this word, he says he is the person who by a testamentary disposition or by law succeeds to the rights which a deceased person held at the time of his death; that the word *heredero* is, according to some, derived from the Latin *herus*, signifying lord or owner; according to others from the word *hæres*, which signifies joined or fastened to another, because the heir (*heredero*) is next to the person from whom he inherits, as his relation or intimate friend. Thus it is in Latin, some write *heres* and others *hæres;* that the heir represents the person of the deceased, and they are considered as the same person. That the quality of heir has no other origin than the will of man or the disposition of the law; and hence comes the general division of heirs into *testamentary or intestated* and *heirs by law or*

from intestacy. The testamentary heirs are divided into *forced or necessary* and *voluntary or strangers.* The heirs by the law or from intestacy can be subdivided into heirs by *relationship*, heirs by *matrimony*, or *anomalous:* See word *heredero*, Escriche's Dicc., edition above stated.

The heir can be instituted by will if designated in the will by apt words, so that it can be perceived who is meant: See 2 Moreau and Carleton's Partidas, law 6, on pp. 983, 984; Schmidt's Law of Spain and Mexico, art. 1048–1051; and several persons may be instituted *joint heirs:* See work last cited, art. 1050. The language of the will of Francisco Maria Castro was sufficient in a legal and valid will to institute an heir.

The question then recurs, To whom did Governor Figueroa grant the rancho San Pablo? In our judgment, the governor intended to make the grant to them to whom the property was given by the will of Francisco M. Castro, and in the proportions in which it was so given. The language of the documents signed by him indicates this clearly. To show that such was his intent, we will review the papers briefly.

The petition of the testamentary executor, as Joaquin I. Castro is styled in the decree of the twelfth of June, 1834, bearing date the twenty-sixth of May, 1834, refers to the last will of his father by which he was instituted heir, and states that a copy of it is registered in the capital. He states that he desires the grant that he may fulfill the obligations resulting from the trust which he has accepted and for the due execution of the same. He refers to the application of his father and the decree upon it, and in accordance with the order of the governor produces the documents relating to the application made by his father prior to his death. It is a fair construction of this petition that it referred to the obligations resulting from the provisions of the will, by which one half of the rancho was devised to his mother, and of which will he was the executor. He desires the grant for the due execution of the trusts—referring to the trusts under the will.

But whether this be the proper construction of the petition of Joaquin or not, it is evident that the governor put this construction upon it. He declares that the father was the lawful owner, and by his death his successors (*herederos*) are lawful owners of the land, and directs that a title in conformity with this view be delivered and handed over to the *testamentary executor*, Don Joaquin Isidro Castro, for the ends required. The grant is then issued in conformity with this decree to the successors (*herederos*). No doubt the governor examined and considered the will, which was registered in Monterey, the capital, where he was when he made the grant to the *herederos* who were to succeed under the will. These persons were the successors referred to by the governor in his decree and grant or title. The title or grant was directed to be delivered to the testamentary executor "for the ends required;" that he might execute and fulfill the trusts of the will, and carry out its directions. The governor seemed to have recognized the will as a valid instrument. At any rate, he made the grant to the parties entitled under the will and according to its provisions, which he had power to do under the decree of 1824, and the regulations of 1828.

The same reasoning applies to and is true of the augmentation petitioned for by Joaquin I. Castro on the twenty-third of June, 1835, and granted on the twentieth of August of the same year. It appears from the bill of exceptions that after the death of Gabriella Berreyessa, widow

of Francisco Maria Castro, which occurred in December, 1851, the claim for the rancho San Pablo was presented to the board of land commissioners to ascertain and settle private land claims in the state of California, under the act of congress of March 3, 1851. When the claim was presented to the board, a petition was presented along with it signed by Eugene Musson and Saunders, Hepburn & Bagley for the petitioner. The petitioner was Joaquin I. Castro, who styles himself in it, "administrator with the will annexed of the estate of Francisco Maria Castro, deceased." The petition was filed October 9, 1852, and is in the following words:

"RANCHO SAN PABLO, CONTRA COSTA COUNTY.

"To the United States land commissioners to ascertain and settle the private land claims in the state of California:

"Joaquin Isidro Castro, administrator with the will annexed of the estate of Francisco Maria Castro, deceased, respectfully represents:

"That on or about the fifteenth of April, 1823, said Francisco petitioned the governor of California—at that time Don Luis Arguello—for a tract of land situate in said territory of California, containing three square leagues, and within the boundaries following, viz.: Situate on the coast of the mission of San José, parallel with the port of San Francisco, adjoining the property of the Sergeant Luis Peralta, up to the line of the ridge of mountains to the place called Los Cuchigunes, at the margin of a deep creek that there springs, at something like five hundred varas. The house is built distant three leagues from the place of residence of Peralta, known as the hill of San Antonio, and up to the ravine of El Pinole at the north.

"That afterwards, on or about the day and year aforesaid, said Francisco received from the said governor and territorial deputation of said territory, a grant of said land, and shortly thereafter went into possession thereof, and occupied and improved the same continuously thereafter until his death, in the year A. D. 1831.

"That afterwards, on or about the twelfth day of June, 1834, upon the petitions of said Francisco before his death, and afterwards of this petitioner for himself and others, the claimants under said title—Don José Figueroa, governor at that time of said territory—by order of that date recognizing the grant and title aforesaid, ordered a formal title to said land to be made out for the benefit of said Francisco and his successors in interest, and to be delivered to petitioner as the testamentary executor of said Francisco, which said formal title was made out and delivered as aforesaid, on the day and year last aforesaid.

"That afterwards, to wit, on the fourteenth and twentieth of August, 1835, said Figueroa, governor as aforesaid, upon petition made according to law, granted as aforesaid, all the surplus land of San Pablo, according to a plan thereof annexed to the petitions last aforesaid, copies and translations of all which said documents, petitions, titles, grants, and plats, hereinbefore referred to, are herewith filed.

"That said grants were afterwards confirmed by the departmental assembly of California.

"That said Francisco and his successors in interest have duly complied with the terms and conditions of said grants, and of the laws and regulations of Mexico relative thereto.

"Petitioner further represents that said Francisco was married to Gabriella Berreyessa, and died in the year 1831, leaving surviving him

his wife and eleven children. The issue of said marriage being Alvina, Maria de Jesus, Maria, Francisca, Martina, Antonio, Juan José, Gabriel, Victor, Jesus Maria, and this petitioner. That said Francisco left a will signed, attested, and published according to law, whereby he devised and bequeathed to his wife one undivided half of his said land and other property, the other half to his said children, to be equally divided between them. That said Martina Castro has intermarried with Juan B. Alvarado; that said Francisca married Joaquin Moraga, both of whom died, leaving issue of said marriage five children, viz.: Francisco M. José, Maria de los Angeles, Luisa M. de Briones, and Guadalupe, who married Vicente Martinez, and died, leaving surviving her two children (issue of said marriage) now living, viz.: Francisca and Merced. That since the death of Francisco first aforesaid, his said children Alvina, Maria de Jesus, and Maria have died without issue, and their share of said land descended to their said mother, who thereupon became the absolute owner of fourteen twenty-seconds (14–22) of all said land.

"That afterwards, on the fourth day of August, 1851, said Gabriella Berreyessa de Castro, by deed executed the day and year aforesaid, in consideration of natural love and affection for her said daughter, Martina Castro de Alvarado, gave and conveyed to said Martina all the said interest (14–22) of her, the said Gabriella, to and in said land. That said Martina thereupon became entitled to fifteen twenty-seconds (15-22) of all the land aforesaid.

"Petitioner represents that he was named executor in the said last will of said Francisco, but that he declined to act as such, and afterwards, on the —— day of ——, 1852, he qualified in the probate court of the county wherein said land is situated, as administrator with the will annexed, and that the period of administration is not yet expired. Wherefore, petitioner prays that said land may be confirmed as granted to the parties entitled thereto as aforesaid.

"Eugene Musson, Saunders, Hepburn & Bagley, for petitioner.

"[Indorsed.] Filed October 9, 1852.

"Geo. Fisher, Secretary."

A translation of the will and codicil of Francisco Maria Castro was presented along with it.

It will be observed that in this petition it is stated that a grant to Francisco Maria was made of a tract of land of three leagues, on his petition, by the governor, Don Luis Arguello, and the territorial deputation, on or about the fifteenth of April, 1823, and that shortly thereafter the grantee went into possession of the land granted, and occupied and improved the same until his death, in 1831. The petitions for said grants by Figueroa are also stated, which grants were confirmed by the departmental assembly. It is further stated that Francisco Maria was married to Gabriella Berreyessa, and died in 1831, leaving surviving him his wife and eleven children, the issue of this marriage, viz.: Alvina, Maria de Jesus, Maria, Francisca, Martina, Antonio, Juan José, Gabriel, Victor, Jesus Maria, and the petitioner; that Francisco Maria left a will signed, attested, and published according to law, whereby he devised to his wife one undivided half of his said land and other property, and the other half of his said property to his children, to be equally divided between them. That said Martina Castro has intermarried with Juan B. Alvarado; that said Francisca married Joaquin Moraga, both of whom died, leaving issue of said marriage five children (naming them); that one of these children

last named, Guadalupe, married Vicente Martinez, and died, leaving surviving her two children, issue of said marriage, living when the petition was filed, named Francisco and Merced. That since the death of Francisco Maria Castro, his said children Alvina, Maria de Jesus, and Maria have died without issue, and their share of said land descended to their mother Gabriella, who thereupon became the alsolute owner of fourteen twenty-seconds of all said land; that on the fourth day of August, 1851, said Gabriella Berreyessa, by deed executed on that day, gave and conveyed to her said daughter, Martina Castro de Alvarado, all her interest in said land; that said Martina thereupon became entitled to fifteen twenty-seconds of all of the land aforesaid; that he was named executor in the said last will of Francisco Maria, but declined to act as such, and afterwards qualified as administrator, and that the period of administration has not yet expired. The petition prays for a confirmation of said land "as granted to the parties entitled thereto as aforesaid."

On the seventeenth of April, 1855, the claim of petitioner was confirmed and adjudged to be valid. It also appears that such further proceedings were had that the claim was finally confirmed by the proper United States district court, that the land was afterwards surveyed, and the final survey was approved on the seventeenth of August, 1864, by Honorable Ogden Hoffman, United States district judge. The final survey contained seventeen thousand nine hundred and thirty-eight and fifty-eight hundredths acres, a patent for which was afterwards, on the thirty-first of January, 1873, executed and issued by the United States to Joaquin I. Castro and his heirs and assigns, with the stipulation that neither the confirmation nor patent shall affect the interests of third parties.

In relation to this patent it may be here said, that it was issued after the suit was commenced, and was offered in evidence by the plaintiff after the argument of the cause had commenced. To its admission in evidence, Mr. Brooks, on behalf of the defendants for whom he appeared, objected, "because the said patent issued after the commencement of this suit, and it was not alleged in any supplemental complaint or otherwise." The court overruled the objection, and an exception was reserved on behalf of the defendants who objected. We can not see that any injury was done by this ruling to any party; and therefore, admitting that it was an error, we would not reverse for such error. It is well settled that error without injury furnishes no ground for reversal. It is argued that the will of Francisco Maria is invalid, as it was not executed according to the law as it stood when it was made.

In the view we have taken above, that the grants by Figueroa were made to those who are described in the will as the devisees or heirs of the land, and in the proportion as devised by the will, it is unnecessary to pass on the validity of the will. We will say, however, that this will was before the supreme court of this state in 1856, in a case decided at the April term of that year, in which this point was passed on: Castro v. Castro, 6 Cal. 158. It was held in that case that the will was properly executed; that a sufficient number of witnesses attested it, and that it was in other respects executed according to the law in force when it was made and published. The ruling in this case was approved in Tevis v. Pitcher, 10 Cal. 477. There was proof in this case of the custom by which a will attested by three witnesses was well attested, as in Tevis v. Pitcher and in Castro v. Castro. See also Panaud v. Jones, 1 Cal. 488;

Adams v. Norris, 23 How. 363. Admitting, as argued, that the probate court had no jurisdiction of the probate of will in Castro v. Castro, and that therefore the decision in the case in 6 California is not binding for want of jurisdiction, still we are of opinion that the law was properly declared in the case, and that the rule therein laid down was approved in Tevis v. Pitcher. Therefore we do not think it necessary to review the ruling in Castro v. Castro, considering this point as settled by the judgments of this court. If we were to decide this point we would feel bound to hold the will of Castro to be a valid will, properly executed and attested.

It is further contended that though the will was executed according to law, still that it can not be held to have the effect to pass to Gabriella Berreyessa, the widow, one half of the San Pablo ranch, for the reason that the testator had not, under the Mexican law, the power to make such devise. This point is elaborated with much learning and ability by the learned counsel (B. S. Brooks, Esq.) for the defendants, and there is placed before us an extended discussion of the power of the father over his real property, and the limitations and restrictions thereupon. We have read the brief of counsel with great interest and care. But as stated above, we are of opinion that the devisees under the will were the grantees of Figueroa in both of the grants or titles made and issued by his order, and therefore it is unnecessary to enter upon an examination of the power of Francisco Maria Castro to devise his realty to persons other than his children.

Subsequent to the death of their father, Francisco Maria Castro, and before the death of their mother, Gabriella Berreyessa, three of the children of this marriage, viz., Alvino, Maria de Jesus, and Maria Gregoria, died intestate and without leaving any descendants; the latter, Maria Gregoria, married José Ramon Estrada, who died before his wife. The question arises to whom these interests in the ranch passed. It is contended on behalf of some of the defendants that these interests passed by law to their surving brothers and sisters, and on behalf of the plaintiff that these interests passed to their surviving mother, Gabriella.

On an examination of the Mexican law on the subject, we are of opinion that these interests were vested in the mother. Escriche, in treating of the successions to the estate of intestates, states as the first class, his or her legitimate decendants: See Escriche's Dicc. de Legislacion y Jurisprudencia, Paris ed. of 1852, under the title "Heredero Legitimo ó ab intestato." See also Madrid edition for 1873, under same title, and Don Juan Sala's "Ilustracion del Derecho Real," lib. 2, title 8, sec. 2; Schmidt's Law of Spain and Mexico, arts. 1232-1234.

The second class or order of succession is stated by Escriche to be the ascendants, the nearest ascendant always excluding the more remote. The law is thus given by this learned author and jurist: "There being no descendants to inherit as set forth in the explanation of the first order of succession, there enter upon the succession of the deceased intestate his legitimate ascendants, without distinction of sex, with the absolute exclusion of collaterals, though they are brothers: Citing law 2, title 2, lib. 4, del Fuero Juzgo; law 1, title 2, lib. 5, del Fuero Juzgo; law 4, title 13, part 6; and laws 6 and 7 de Toro; 1 and 2, title 20, lib. 10, Nov. Rec. Further, that the nearest ascendant excludes always the more remote, because among ascendants there is no succession by representation, as among decendants, but by proximity of rela-

tionship. So that if the deceased leaves father and mother, both inherit in equal proportions; but if there is father only, or mother only, the survivor inherits the whole property, and the grandfather of the deceased takes nothing. In the same manner, if there is no father or mother, and there is a grandfather of one and a great-grandfather of the other, the whole inheritance will be that of the grandfather's, to the absolute exclusion of the great-grandfather:" Citing law 4, title 13, part 6. See Escriche's Dicc. de Leg. y Jurisp., above cited, under same title as above given; Sala's Ilustracion del Derecho Real, lib. 11, title 8, sec. 6; Schmidt's Law of Spain and Mexico, secs. 1235–1237; Escriche's Dicc., title Representacion.

It is contended further that these interests passed to the other children of Francisco Maria and his wife Gabriella, by the right of *acrecencia* or *acrecimiento*—accretion. This right is thus defined by Escriche: The right of accretion is the right to unite or aggregate with his portion the portion of him who refuses it and can not acquire it, or the right which the co-heirs or co-legatees have over those portions which remain vacant by reason of renunciation, or by reason that some of them have not the capacity to take. The right of accretion takes place among the legitimate heirs, that is, among the heirs called to the succession by the law by reason of relationship, in the collateral as in the direct line; so that the portion which remains vacant is added to the mass of the inherited property, and is divided with it; and further it is understood that there is a failure of one of the co-heirs or co-legatees, if he is not living at the time that the will is made, if he rejects the inheritance or legacy, if he dies before the testator, if he omits to comply with the condition, or becomes incapable in any other way. In case he survived the testator a single moment, he transmits his part of the inheritance or legacy to his heirs, when acceptance is not necessary for its transmission, according to what is said in the articles "*Acceptacion de harencia y de legado*," and by consequence, there is then no accretion to the other co-heirs or co-legatees. In this case the mother, as we have seen, was the heir, and took the estate.

We see nothing in the contention put forth on behalf of some of the defendants that the interests of the above-mentioned children constitute *bienes reservables* in which the widowed mother only had a life estate. The law on this subject only applied where the widow married a second time: See Escriche's Dicc. de Leg. y Jurisp., art. "Bienes Reservables ó Reservaciones." It does not appear that Doña Gabriella ever married a second time.

According to the above authorities, and there are none of greater weight, it is clear that Doña Gabriella Berreyessa, the surviving mother, inherited the interests of the above-mentioned children, who died without issue and intestate. Some question is made as to the quantity of estate which passed to the widow under the provisions of the will, which we have held was granted to her by Governor Figueroa. The provisions of the will have already been quoted, and we are of opinion that it passed the fee. That was the intention of the testator, as appears clearly from the language of the will: See 2 Moreau and Carlton's Partidas, law 6, title 3, part 6, p. 983. We speak of the will in these terms as a valid will, because, in our judgment, Governor Figueroa so regarded it in making the grants to the heirs instituted by that document. As eleven children survived Francisco Maria Castro, to whom were granted one

half the estate in equal portions, and to the mother the other half, Gabriella Berreyessa, the mother, became entitled to eleven twenty-seconds of the rancho San Pablo under the grant, and as she inherited three shares, or three twenty-seconds, from her children above named, she thus became the owner of fourteen twenty-seconds.

On or about the fourth day of August, 1851, Gabriella Berreyessa de Castro executed to her daughter, Martina Castro de Alvarado, a deed of gift by which, in consideration of love and affection, she conveyed to her and her heirs forever all her undivided interest in the rancho San Pablo. This deed was recorded in the office of the county recorder of Contra Costa county on the ninth of September, 1851.

This conveyance is assailed as null and void because of the mental incapacity of the grantor. The court below found that the grantor, Gabriella Berreyessa, was, on the fourth and twelfth of August, 1851 (at one or the other of those dates the evidence shows that this deed was executed), and from thence to the time of her death, of sound mind, capable of transacting business, and under no mental disability whatsoever, and that the deed was a valid instrument. It is now contended that this finding is not sustained by the evidence. It is sufficient to say that as to the capacity of the grantor to make such a deed, the evidence was conflicting, and under the rule of this court, settled by a great number of cases, we are not at liberty to disturb the finding of the court *a qua*, that she was competent to execute said instrument. Under this deed Martina Castro de Alvarado became the owner of fourteen twenty-seconds of the rancho San Pablo, and already owning one twenty-second, she then was the owner of an undivided interest of fifteen twenty-seconds of the land to be divided, which she held in common with the owners of the other interests in the land, amounting to seven twenty-seconds.

In 1856 steps were taken to partition the ranch between the various parties claiming interests therein. The agreement for or deed of partition appears in the bill of exceptions. It is a long instrument, formally drawn up, between parties of nine parts. The parties of the first part are John H. Saunders, H. P. Hepburn, and Eugene Musson. The parties of the other parts agree to pay to the parties of the first part the sum of two thousand dollars, costs of litigation, assessed to them by the agreement in the case of Castro et al. v. Castro et al., as a condition precedent to the operation of the agreement as a conveyance, as set forth therein. By it, three commissioners were named and appointed, viz.: James Alexander Forbes, John B. R. Cooper, and Nicholas Gray, to make partition of the ranch in the manner mentioned in it, and to that end to make the necessary survey, map, and report, which were to be filed for record among the land records of the county of Contra Costa, "with this deed of partition and release, the whole to take effect when so filed and recorded, and not before."

Other provisions were made in this instrument of partition, as follows: By the third article it was provided that the commissioners above named should first separate from the rancho a tract of fifty acres, said fifty acres to be chosen by Doña Martina Castro de Alvarado, so as to include therein the house where she and her husband then lived, and the orchard attached thereto, and all their title and interest in this fifty acres, the parties of the first, third, fourth, fifth, sixth, seventh, eighth, and ninth parts, and Goodale and Benson, also parties of the second part, thereby convey and release to said Martina and her heirs, the same

to take effect as soon as the said report and map and this deed shall be filed for record as above stated.

By the fourth article of this deed, the commissioners were then to separate from the remainder of the ranch a tenth thereof in value, which tenth they should divide into three equal parts, one of which parts they should assign to Eugene Musson, one to John H. Saunders, and the remaining one to H. P. Hepburn, all their interest and title in which three parts the parties of the other parts thereby convey and release to the said Musson, Saunders, and Hepburn, respectively, and their heirs forever; the same to take effect at the same time as is provided with regard to the fifty-acre tract. In consideration whereof Musson, Saunders, and Hepburn convey and release to all the other parties and their heirs all their right, title, and interest in the rest of the ranch, and particularly Musson releases to the said Martina and her husband, and to Joaquin I. Castro, all his right and claim against them or either of them, by reason of contracts touching the ranch, heretofore entered into by them with him.

It is provided by the sixth article that the commisioners shall then separate from said ranch an eighth thereof in value, of which two thousand acres are to be taken from that part of the ranch lying north of the Arroyo Grande, the particular boundaries of which are given; this tract is to be chosen by Doña Martina Castro de Alvarado, provided her choice shall not exceed one eighth in value of the remainder of the ranch; and the tenth of Saunders, Hepburn, and Musson shall so be allotted as not to interfere with this allotment of two thousand acres. All their interest in this last allotment the other parties release and convey to the said Martina and her husband, the same to take effect at the same time as the other allotments above mentioned. In consideration of the foregoing, Martina and her husband release and convey to the other parties, except Goodale and Benson, all their title in the remainder of the ranch, except the fifty acres above mentioned, to be held as hereinafter specified; and in further consideration of the foregoing, Goodale and Benson, who are parties of the second part and mortgage creditors of Martina and her husband, who are also parties of the second part, release in favor of the parties of the other parts, the lien of their mortgage against the said Martina and her husband from such parts of the ranch as shall be adjudicated to the other parties; and in consideration of this release it is agreed between Goodale and Benson and Martina and her husband, that the lien of the mortgage shall attach to and bind the eighth, so as aforesaid adjudicated, to Martina.

The commissioners were then to divide the remainder of the ranch into seven equal parts in value, one part to be allotted to each of the parties of the third, fourth, fifth, sixth, seventh, eighth, and ninth parts. The parties of the several parts then convey and release to each other respectively the parts so allotted to each party, the same to take effect on the part so released subject to the same rights, liens, and priorities between themselves as existed on the undivided interests of the said parties of the several parts, at the same time with the others above mentioned. In consideration of the foregoing, the parties of the third, fourth, fifth, sixth, seventh, eighth, and ninth parts, respectively, release and convey to the parties hereto, except Goodale and Benson, all their right in the remainder of the ranch; the part of the remainder which shall be allotted to the parties of the fourth part shall be so chosen as to include eight hun-

dred acres of the land now in the possession of Juan José Castro or his tenants.

The seventh article provides for allotments to be made so as to include lands conveyed by certain deeds in the parts allotted to certain of the parties. The eighth article provides that the costs of partition, survey, map, report, etc., are to be paid by certain of the parties therein named. By article 10 it is provided that in consideration of the release before mentioned of Martina and her husband, the parties to the instrument release and convey to Joaquin I. Castro, in trust for his wife and their children, twenty-five acres of the ranch; the same number of acres to Juan José Castro in trust for his wife and their children. Like conveyances in trust of the same quantity of land are made to Gabriel Castro, Antonio Castro, to Victor Castro, to Jesus Maria Castro. In the same article it is provided that these tracts of twenty-five acres shall be so selected as to include the houses in which the trustees themselves respectively lived, and the further provision is made as to what parts these tracts are to be charged respectively; but by article 11, on making these allotments, the houses of Joaquin, Juan José, Antonio, Gabriel, and Victor, are not to be charged to the shares derived from them.

The twelfth article then provides when and under what circumstances the deed, report, and map are to be filed for record by Forbes, one of the commissioners, and that the partition shall be executed and closed within three months from the time this agreement shall be placed in their hands for the purpose of making the partition.

This instrument purports to have been executed and acknowledged by nearly all of the parties to it. The survey, map, and report were made, and the deed, etc., were filed and recorded on the twenty-eighth of August, 1857.

The validity of this partition is called in question by the plaintiff and other parties to the action. In relation to it the court finds the following facts, which in our judgment are sustained by the evidence:

"That said commissioners attempted to make a partition and allotment under said agreement of said land and other lands, and filed a report of their proceedings with the recorder of Contra Costa county, August 28, 1857, and the same was recorded in volume 6 of deeds, pages 1 to 18 inclusive.

"That said agreement was not executed by all the parties interested in the fee of said rancho as tenants in common; that it was not executed by Joseph Emeric, James T. Dean, and others, tenants in common, and owners of divers interests in said rancho; that a large number of the owners and tenants in common in said rancho refused to and did not sign or execute said agreement for partition.

"That said agreement purported to be executed on behalf of certain infants, owners and tenants in common, of an undivided interest in said rancho, to wit: Francisca M. de Soto and Merced M. de Welch, by one Vicente Martinez, as their attorney in fact, who had no power, authority, or right as such to execute for them said agreement, and the same was not executed by said infants, or either of them; and said infants were then married women, and their husbands, then living, did not join in the execution of said agreement.

"That said commissioners included in their survey, attempted partition, and report of the lands of said rancho twenty-seven thousand four hundred and seventy-one acres of highlands, and two thousand four

hundred and seventy acres of marsh lands, aggregating twenty-nine thousand nine hundred and forty-one acres, being an excess of, say, twelve thousand and three acres more than was included in the final survey approved by said United States district and circuit courts, as aforesaid.

"That said commissioners made an attempted partition, recorded as aforesaid, among said tenants in common, of the highlands above mentioned, and did not undertake to partition the marsh or marshy lands mentioned in their report and survey, and that said attempted partition included, say, nine thousand five hundred and thirty-three acres more than ever belonged to the rancho, some of which was part of the adjoining San Antonio or Peralta ranch, and allotted the same as a part of said rancho San Pablo.

"That said nine thousand five hundred and thirty-three acres were wholly outside the bounds of said rancho, as confirmed and patented as aforesaid, and said attempted partition did not allot to the parties to said agreement their equal share of the lands within the bounds of the rancho, and that said allotment of said excess was so made as to destroy the equality of said partition.

"That said commissioners reported, among other things, that as to the surplus marshy lands comprised in their survey, and by them supposed to belong to the said tract of the rancho de San Pablo; said commissioners had called the same to the attention of the parties interested, and that said parties had decided that the surplus of marshy lands should remain for the present undivided; that the division thereof has never been completed; that the said surplus marshy lands comprised in said survey, and referred to by said commissioners, never have been divided; that the decision of some of the parties interested therein to allow such lands to remain undivided was not the decision of all, and did not comport with the terms of the submission to the said commissioners."

The court below, on the facts found by it, held the agreement and deed of partition dated July 14, 1856, void and ineffective. The above-mentioned deed and agreement have been twice before the supreme court of this state: first in January, 1859, in the case of Tewksbury v. Provizzo, 12 Cal. 20; and the second time in October, 1862, in Tewksbury v. O'Connell, 21 Cal. 61.

Both of these actions were ejectment. In the case first cited the plaintiff deraigned title from a party to this deed, who executed it. The defendant's predecessor in interest was also a party to the deed. It is stated in the opinion of the court, that the controversy in the cause turns upon two questions: "The first is, what is the effect of this deed of partition, supposing it to have been regularly carried into execution—that is, is it an estoppel? The second is, has there been such a departure from its terms as to invalidate it, or the proceeding under it?" 12 Cal. 23.

The decision appears to have been made on the deed alone, and it rested the estoppel of defendant on that instrument without other proof. There does not seem to have been any proof that the defendant or his grantor or predecessor ever acted under the deed, that either of them ever took possession under it.

The court states the contents of the agreement and deed of partition, and then proceeds to a discussion of the question of estoppel by the deed. The court in this discussion remarks as follows: "It has thus been seen" (referring to a statement of the contents of the deed) "that this instrument is what on its face it purports to be, to wit, a deed of

conveyance, release, and partition. It is true that the release is not to take effect except by force of a future event, to wit, the making of the partition and the recording of it. But we are unable to perceive why a deed like this may not be effectual on a future event, so at least as to estop a party on the happening of such event to controvert it. It may be conceded that this event was a condition precedent to the vesting of the estate provided for by the deed; as was the payment of the purchase money in the case of Brannan v. Mesick, 10 Cal. 95. But, within the principle of that case, it would seem that on the happening of the event, the deed became effectual as a partition and release. In this respect it is not material whether the several parties were owners or had merely liens, as the deed taking effect on the happening of the event, and purporting to release and convey all the title of the grantor, the grantor would be estopped to deny that he had title at the time. But apart from this we apprehend that when parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he can not dispute. He takes, by virtue of the deed, all *their* interest, and can not be allowed to say that he holds possession of what he conveyed and released, by a title paramount to that which he conveyed. In this case there was no pretense that the possession of the defendant previous to the deed was by any different title than that which he conveyed and released; indeed, such possession was in entire consistency with such interest, and, it is fairly presumable, was held by him as a tenant in common under the title which he showed on the trial:" 12 Id. 24, 25.

The court, it will be perceived, held that the defendant was estopped to deny plaintiff's title to the land sued for set off under the deed of partition, both plaintiff and defendant claiming under parties to the deed.

It does not appear from the report of the case that the fact that the deed was not signed by all the parties to it was brought to the notice of the court, or the further fact that the partition was made of land not included within the ranch. These facts are not adverted to by the court. If the attention of the court was called to them, it seems to us that they would certainly have been noticed and passed on. So in construing this opinion we must take it as a decision not affecting the matters just stated.

There was a question made as to the allotment of Gutierrez. That is disposed of on the ground that the allotment was made by virtue of a contract, authorizing such allotment, to which contract the parties under whom the defendant claimed were parties, of all of which the defendant was a purchaser with notice. Defendant was therefore held bound by this allotment.

The next point considered and passed on by the court was the objection that the partition was not binding, because the entire tract was not divided, but some marsh land was omitted from the division and allotment. We give the remarks of the court on this poi[illegible] words: "The report of the commissioners on this subjec[illegible] as to the surplus of marsh land comprised i[illegible] the said tract of the rancho de San Pabl[illegible] at-

tention of the parties interested, and they have decided that the said surplus of the said marshy lands should remain for the present undivided.' No proof was offered that this land was of any value; or that the division made was affected in any manner by the failure to divide or allot it; or that the allotments made would in any degree have been affected by the allotments of this; or that any injury resulted to any one interested in consequence of this omission. Moreover, no objection seems to have been made to this allotment and partition on this account. Nor was any exception taken to the admission of this report and these proceedings of the commissioners as evidence, for the specific reason that the statement made by them was inadmissible proof of the facts of agreement and consent stated in the report. In no way, for so long a time after the report was filed and recorded, was there any protest or objection on this score until this defense, though, by the terms of the deed, the report and partition was to vest title. Important rights have been vested under these proceedings, which a court will not disturb without great reluctance. There is, besides all this, *some* proof that the defendant, after the report, at least impliedly conceded that, so far as Saunders, one of these parties, was concerned, the title vested; for the witness, Morgan, says he, defendant, recommended a party to purchase from Saunders. Under all these circumstances, we think we shall not be warranted in holding that these proceedings are void because of this omission."

It can not be held that the court would have ruled as they did in this case if the facts mentioned above had been brought to their notice. The deed is treated throughout the opinion as having been executed by all the parties owning interests in the tract of land described. The court in stating the case says: "The plaintiff, on the trial, offered and read in evidence a paper purporting to be a deed of partition of the rancho San Pablo, the parties, who were very numerous, claiming to be the owners and interested in that rancho; and the deed recites that 'it was made in order to settle all disputes touching said rancho and make amicable partition thereof.'"

Further, the court said: "The plaintiff claims the premises through a deed from one of the original owners, whose share, as allotted by the commissioners, he represents." "The defendant's predecessor in interest was a party to this deed of partition:" 12 Cal. 22, 23. The court then proceeds to consider the question of estoppel, and to decide it on the contents of the deed alone.

In the case cited from 21 Cal. 60, Tewksbury v. O'Connell, other points in relation to this deed were presented, considered, and decided. We proceed to examine the case just referred to, to ascertain what was adjudged therein. The plaintiff brought ejectment to recover certain premises which were a part of the San Pablo rancho. The defendant claimed to be the owner of an undivided one twenty-fourth part of the rancho. He set up this title and denied the alleged right of plaintiff, and for a further answer set up as an equitable defense, that the plaintiff claims title in severalty to the demanded premises under and by virtue of a certain agreement for a partition of the same rancho, which agreement, and the proceeding taken under it, the defendant charges are void, and asks to have them so adjudged. The plaintiff filed a replication, in which he admitted that he claimed title in severalty under this agreement, and asserts the validity of the agreement and the proceedings

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The court, it will be perceived, held that the defendant was estopped to deny plaintiff's title to the land sued for set off under the deed of partition, both plaintiff and defendant claiming under parties to the deed.

It does not appear from the report of the case that the fact that the deed was not signed by all the parties to it was brought to the notice of the court, or the further fact that the partition was made of land not included within the ranch. These facts are not adverted to by the court. If the attention of the court was called to them, it seems to us that they would certainly have been noticed and passed on. So in construing this opinion we must take it as a decision not affecting the matters just stated.

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tention of the parties interested, and they have decided that the said surplus of the said marshy lands should remain for the present undivided.' No proof was offered that this land was of any value; or that the division made was affected in any manner by the failure to divide or allot it; or that the allotments made would in any degree have been affected by the allotments of this; or that any injury resulted to any one interested in consequence of this omission. Moreover, no objection seems to have been made to this allotment and partition on this account. Nor was any exception taken to the admission of this report and these proceedings of the commissioners as evidence, for the specific reason that the statement made by them was inadmissible proof of the facts of agreement and consent stated in the report. In no way, for so long a time after the report was filed and recorded, was there any protest or objection on this score until this defense, though, by the terms of the deed, the report and partition was to vest title. Important rights have been vested under these proceedings, which a court will not disturb without great reluctance. There is, besides all this, *some* proof that the defendant, after the report, at least impliedly conceded that, so far as Saunders, one of these parties, was concerned, the title vested; for the witness, Morgan, says he, defendant, recommended a party to purchase from Saunders. Under all these circumstances, we think we shall not be warranted in holding that these proceedings are void because of this omission."

It can not be held that the court would have ruled as they did in this case if the facts mentioned above had been brought to their notice. The deed is treated throughout the opinion as having been executed by all the parties owning interests in the tract of land described. The court in stating the case says: "The plaintiff, on the trial, offered and read in evidence a paper purporting to be a deed of partition of the rancho San Pablo, the parties, who were very numerous, claiming to be the owners and interested in that rancho; and the deed recites that 'it was made in order to settle all disputes touching said rancho and make amicable partition thereof.'"

Further, the court said: "The plaintiff claims the premises through a deed from one of the original owners, whose share, as allotted by the commissioners, he represents." "The defendant's predecessor in interest was a party to this deed of partition:" 12 Cal. 22, 23. The court then proceeds to consider the question of estoppel, and to decide it on the contents of the deed alone.

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under it. The issue arising out of the equitable defense was tried separately, and a judgment was rendered that the agreement was void against the defendant and his grantors, and the further prosecution of the action by plaintiff was enjoined. An appeal was taken by plaintiff from this judgment and an order denying his motion for a new trial. The grantors of both plaintiff and defendant were parties to and executed this agreement, which was the agreement and deed above stated of date fourteenth July, 1856.

On the trial, the plaintiff offered this agreement in evidence. Its admissibility was objected to by defendant, on the ground that it had not been executed by John T. Dean, Francisco Martinez de Soto, Merced Martinez de Welch, and José Ramon de Castro, who were named as parties to it, nor by Joseph Emeric, not named as a party, but who was admitted by the pleadings to be interested in the rancho. The objection was sustained, and plaintiff excepted. The court affirmed the judgment, and we suppose the order denying a new trial.

The court states the point to be decided thus: "No question is made but that this agreement is valid against the defendant, if it was valid against his grantors. The first point, therefore, which arises in this case, is whether this agreement is valid and binding against those who executed it, although it has not been executed by others who are named in it as contracting parties, and who are declared in it to have interests in the land proposed to be partitioned:" 21 Cal. 67.

The contents of the agreement are briefly stated by the court, and it then proceeds to dispose of the point as follows:

"The plaintiff claims that upon such allotment being made, the agreement took effect as a release and conveyance by those who executed it to the other parties, of all their title and interest in the parts allotted severally to those other parties; and thus that the grantors of the defendant have conveyed to the grantors of the plaintiff all their title to that portion of the rancho allotted to the plaintiff's grantors, and which embrace the demanded premises. If this be so, the result will be that the defendant's grantors will have parted with their undivided interest in the whole of the rancho except that portion allotted to them, but have not a complete title in severalty to the portion allotted to them, inasmuch as the agreement and the proceedings under it can have no effect to transfer to the defendant's grantors the undivided interest in the portion allotted to them which belonged to the parties who did not execute the agreement. The defendant claims that the possibility of such an injustice is a conclusive argument in support of his position that an agreement like the one in question, between several parties, where performance by one is the consideration for the performance by the other, could not be intended to be and can not legally be held to be binding upon any party until executed by all. In support of the defendant's position, the case of Townsend v. Corning, 23 Wend. 435, is cited, in which Judge Bronson says: 'A writing *inter partes* is prepared by which one party is to covenant for the payment of money, and the other for the conveyance of lands—each of these mutual covenants being the consideration for the other. One party sits down and executes, but the other stops short, and for some cause, no matter what, does not execute the instrument. It is impossible, I think, to maintain that the party who has refused or neglected to bind himself can set up the instrument as a binding contract against the other party. There was, I think, a condition implied from

the nature of the transaction, that the signing of one party should go for nothing unless the other signed also. But whether I have assigned the proper reason for the rule or not, the conclusion to which I have arrived, that the party who signs can not be bound where the execution is thus incomplete, is not only in accordance with the justice of the case, but is well supported by authority:' See also the cases of Livingston v. Rogers, 1 Cai. 584, and Emery v. Neighbour, 2 Halstead's Com. L. 145. These authorities fully sustain the defendant's position. In the absence of any circumstance other than what appears on the face of the instrument, we think it can not be held that this agreement was executed by the plaintiff's grantors and delivered to take effect like a deed poll, upon their affixing their own signatures, but that it was an inchoate instrument, only to become effective when executed by all the persons named as parties:" 21 Cal. 68, 69.

The question was disposed of, and the agreement held void on the distinct ground that it was not signed by all the persons named as parties.

It does not appear in this case that the attempted partition included lands not within the rancho San Pablo, or if it did it was not noticed by the court. If it did appear, the court no doubt considered the point discussed sufficient to dispose of the case, and therefore did not allude to it. It will be observed that in this opinion the case of Tewksbury v. Provizzo, 12 Cal. 20, was not referred to, although it was cited by counsel for appellant. We see no contradiction in the opinions rendered in these cases. The facts were not the same in both cases, and the former could not and did not rule the latter.

The above decision in 21 Cal. was rendered during the October term, 1862. It has remained unmodified by any subsequent judgment to the present time. We would not be justified in disregarding it, after the lapse of nearly twenty years, during which time doubtless many contracts and conveyances in regard to this land have been made upon it. We are compelled then to hold that the judgment of the court below, that the attempted partition of 1856 was null and void, is correct.

The court finds that the commissioners included in their attempted partition twelve thousand and three acres more than was included in the survey approved by the United States courts. This is sustained by the evidence.

It seems to us that this is fatal to the attempted partition, and that this position is sustained by Hathaway v. De Soto, 21 Cal. 192, which was decided at the same term and by the same court which decided Tewksbury v. O'Connell. The ruling in Hathaway v. De Soto is substantially approved in Sutter v. San Francisco, 36 Id. 116.

We can not see how a partition can stand, in which a much larger tract is included in the partition than the tract to be divided includes. Suppose several of the parties in interest are allotted portions outside of the tract to be divided: is there any equity which would justify such partition? It may be that parties may contract on such stringent terms that they are bound though lands allotted to them are outside of the tract to be partitioned. But there is no such contract called to our attention in this case.

It is said that this partition of 1856 was acquiesced in by all who were parties to it for ten years. The evidence does not convince us of this; further, the court below in effect found the contrary, which in our judgment is sustained by the evidence.

invalid and ineffective, in so far as they purported or purport to convey or affect any interest in the lands of said rancho, or any part thereof."

So far as this lawyers' title depends on the deed of 1856, it must fall with it, for the reasons appearing above. So far as it depends on contract, it appears that the services required under the contracts to be rendered were never performed, and we can not perceive that any right arises under such contracts. Certainly there could not be any recovery upon such contracts as having been performed, for there was never any performance. If performance was waived, and conveyances then made, a different question would be presented; but we do not see that any performance was waived. Whatever waiver there was arose by virtue of the provisions of the deed of 1856, which was properly held null and void.

There can be hardly a doubt that there was no intention to waive the services, under the contracts referred to by the partition deed, unless it was valid. The deed being void, the parties were remitted to their rights under the contracts, and there having been no performance, we can not see that any right vested in the lawyers, save *perhaps* to recover for services accepted what they were reasonably worth. But on this latter point we decide nothing. The contracting parties must seek whatever redress they are entitled to by the remedies which the law affords.

The court below held certain contracts, and a power of attorney set forth in the finding last quoted and in the conclusions of law quoted also above, void and ineffective, and all subsequent acts and claims thereunder or based thereon void and ineffective, in so far as they purport to convey or affect any interest in the lands of said rancho, or any part thereof.

Inasmuch as there was no performance of the services under these contracts, we think the court below properly held that they gave no right, legal or equitable, to the land. We do not understand by this that the court intends to hold that subsequent contracts, valid in their character, though arising out of the contracts referred to, may not have conferred on the lawyers employed—Musson, Sanderson, and Hepburn, or those claiming under them—a legal or equitable right to participate in the division of the land.

In regard to a deed to Henry Wilkins the court found as follows:

"That on the fifteenth day of July, 1856, Martina Castro de Alvarado, and Juan B. Alvarado, her husband, executed and delivered to Henry Wilkins a certain instrument, purporting to be a conveyance of certain interests in the said San Pablo rancho, which said instrument was recorded in the office of the county recorder of Contra Costa county, on September 29, 1857, in volume 6 of deeds, page 57; that on the same July 15, 1856, the same Henry Wilkins executed and delivered to said Martina Castro de Alvarado a certain other instrument, purporting to be a declaration or acknowledgment of trust, which said last-mentioned instrument was recorded in the office of said county recorder on the said September 29, 1857, in volume 6 of deeds, page 58; that by and in said last-mentioned instrument the said Henry Wilkins acknowledged that the lands mentioned in said first-mentioned instrument were held by him in trust; first, to join in such deed and agreement for a partition of said San Pablo rancho as said Doña Martina Castro de Alvarado should become a party to and sign; and secondly, to convey such interest as should remain in him, after joining in such deed of and agreement for a petition, to Joseph Emeric, as soon as said Emeric should so

arrange with Jesus Maria Castro; that said Castro should convey all his interest in said rancho to the said Emeric, and said Emeric should, simultaneously with or after such conveyance, ratify said deed of and agreement for a partition, so that said partition should stand; and in the event that such arrangement, conveyance, and satisfaction should not take place, then to be held in trust for the benefit of the parties to said deed of partition, in the proportion and in the manner therein indicated, and, in so far as might be, to maintain and carry out the same; that said instruments constituted parts of one and the same transaction, and were, in fact, an integral part of said agreement for partition, to stand or fall with the same; and that their object and purpose, and the only consideration upon which they rested, was such partition, to facilitate and perfect which they executed as aforesaid."

This finding is sustained by the evidence.

The conclusion of law as to this deed to Wilkins is that it is void and ineffective and did not convey to Wilkins, as trustee or otherwise, any interest in the rancho out of Martina Castro de Alvarado or her husband, and that no trust was created thereby. The court properly held that the deed was void and ineffective, as it was dependent on the partition deed of 1856.

In regard to certain deeds which in the progress of this cause have acquired the appellation of "lieu deeds," the court found the following facts:

That on March 21, 1862, the said Martina Castro de Alvarado, and Juan B. Alvarado, her husband, by deed of conveyance dated on that day, acknowledged March 21, 1862, and recorded March 22, 1862, in volume 9 of deeds, page 540, in the county recorder's office of said Contra Costa county, gave, granted, bargained, sold, and conveyed to Maria Victoria Delfina Alvarado, daughter of said Juan B. and Martina, all their right, title, and interest, divided or undivided, in and to the said tract of land so known as the rancho de San Pablo; together with all and singular the tenements and hereditaments, including orchards, fences, houses, and all other improvements thereon, belonging to said parties of the first part.

"That afterwards the said Maria Victoria Delfina Alvarado, daughter and grantee of Martina Castro de Alvarado and Juan B. Alvarado, her husband as aforesaid, and who had as aforesaid succeeded to all their right, title, and interest in the said San Pablo rancho, executed and delivered on the dates and to the grantees hereinafter mentioned, deeds of conveyances whereby she in the terms in said deeds contained, and hereinafter specified, remised, released, and quitclaimed to said grantees respectively various undivided sections of said rancho, in lieu of certain specific portions of said rancho, described in certain previous deeds which had been executed and delivered to such persons or their grantors, by said Martina Castro de Alvarado and Juan B. Alvarado, which said previous deeds purported to convey all the right, title, and interest of said Martina and Juan B. Alvarado in said specific tracts, by metes and bounds; that each of said first-mentioned deeds, commonly known as lieu deeds, recited such previous conveyance or conveyances, in lieu of which it was given, and purported to convey an undivided portion of said rancho, equal and equivalent in quantity of land to such specific tract or tracts described in said previous deeds; that said grantees named in said lieu deeds received and accepted the same with the in-

tent to receive and accept, and it was the intent of the grantor thereby to convey undivided interests in said rancho, equal and equivalent in quantity of land to and in lieu of such specific tract or tracts described in said previous deeds respectively.

"That said grantees were not, nor was any of them, deceived, imposed upon, or defrauded into accepting or receiving said lieu deeds, or any of them; nor was there any combination, confederacy, conspiracy, fraud, or undue influence by anybody in connection with said lieu deeds, or the execution or receipt of them or any of them; that said lieu deeds were executed, delivered to, and received by the following-named grantees on the dates, and were recorded by them on the dates, and in the office of the county recorder of said Contra Costa county, as follows, to wit." Here follows a specific list and findings as to the grantees in these lieu deeds.

The foregoing finding of facts is sustained by the evidence.

As regards these lieu deeds, the court found the following conclusion of law, which in our judgment is a correct legal deduction from the facts found:

"That the respective deeds of conveyance executed by Maria Victoria Delfina Alvarado, daughter and grantee of Martina Castro de Alvarado and Juan B. Alvarado, her husband, mentioned in the foregoing finding twenty-fourth, were and are valid and effective for the uses and purposes expressed in them, and take the place of the respective deeds therein respectively mentioned, and in lieu of which they were respectively given and accepted, as between the parties thereto, and their successors in interest."

It is contended that the acceptance of these lieu deeds by the grantees therein did not estop them from claiming under their original conveyances, or divest them of title, legal or equitable, which vested in them thereby.

The parties claiming under the lieu deeds are estopped to claim the lands in their original conveyances, in lieu of which these deeds were given. They are estopped by the terms of their contract. They were given and accepted in lieu of the former conveyances. They can not then hold under the lieu deeds and against them too; in other words, they can not blow *hot and cold*, or assume incousistent positions: See Broom's Leg. Max., *Allegans contraria non est audiendus*, p. 169, etc. Whether they are thus divested of whatever title was conveyed by the original deeds, without a reconveyance in each case, is immaterial. They are in equity; and if necessary in the further progress of the case the court can compel such reconveyances as are required, unless the rights of innocent purchasers have intervened; but there is no finding here that there are any such purchasers.

In relation to certain actions brought by Antonio Castro, the court found the following facts:

"That on October 15, 1851, Antonio Castro, who is otherwise known as Pablo Antonio Maria Castro, commenced an action in the then district court of the state of California, in and for the county of Contra Costa, against Joaquin I. Castro, to recover the sum of four thousand dollars and costs; that on October 23, 1851, the defendant, Joaquin I. Castro, appeared in said action, and filed his answer therein; that on the third day of January, 1854, the following order was entered in said action in the district court of the seventh judicial district of said state, in and for said Contra Costa county, viz.:

"Antonio Castro v. Joaquin I. Castro. 'On motion of plaintiff's attorney, ordered a nonsuit be entered, and that execution herein be stayed until the first of November, 1854, and that the costs herein bear interest at two per cent. per month;' that there are on the page of the judgment book, in which said judgment of nonsuit was entered and under the certificate of authentication thereto, the following word, character, and figures, viz., 'Costs, 62.85$,'" which were placed there long after the rendition of said judgment and the adjournment of the term at which it was rendered, without the authority of said court, and they formed no part of said judgment; that on October 29, 1855, the clerk of said court, treating the said order, word, figures, and character as a monetary judgment in favor of said Joaquin I. Castro and against said Antonio Castro, issued, under the seal of said court, and to the sheriff of said Contra Costa county, a paper purporting to be an execution, reciting that a judgment had been rendered, and commanding him to make out of the property of Antonio Castro the sum of sixty-two dollars and eighty-five cents, with interest at the rate of two per cent. per month from the date of said judgment of nonsuit, and accruing costs.

"That on October 15, 1851, the said Antonio Castro commenced another action in the same third district court against Juan P. Eduarte, to recover the sum of seven hundred dollars; that the same defendant, Eduarte, appeared in said action and filed his answer therein; that afterwards, and before October 4, 1853, the said Eduarte died, as appears by the adjudication of said court, by an order entered on the minutes thereof on October 4, 1853, in the following language, to wit:

"'Antonio Castro v. Juan Pablo Eduarte. The death of defendant being suggested and admitted by counsel, it is ordered that the suit be revived against the heirs and legal representatives of the deceased defendant;' that afterwards, on January 3, 1854, and after the said Eduarte had departed this life, the following order was entered in the district court of the seventh judicial district of said state, in and for said Contra Costa county, in said action, viz.:

"'Antonio Castro v. Juan P. Eduarte. On motion of plaintiff's attorney, ordered that a nonsuit be entered, and that execution herein be stayed until November 1, 1854, and that the costs herein bear interest at two per cent. per month;' that there are on the page of the judgment book in which said judgment of nonsuit was entered, and under the certificate of authentication thereto, the following word, character, and figures, viz., 'Costs, 63.20$,' which were placed there long after the rendition of said judgment and the adjournment of the term at which it was rendered and entered in said book, and without the authority of said court, and they formed no part of said judgment; that on October 29, 1855, the clerk of said court, treating the said order, word, figures, and character as a monetary judgment in favor of Juan P. Eduarte and against said Antonio Castro, issued under the seal of said court, and to the sheriff of said Contra Costa county, a paper purporting to be an execution, reciting that a judgment had been so entered, and commanding him to make out of the property of Antonio Castro the sum of sixty-three dollars and twenty cents, with interest at the rate of two per cent. per month from the date of said order of nonsuit, and accruing costs."

Executions on these proceedings were issued, treating the same as money judgments against Antonio Castro, levies on his interest were made on them, and it was advertised and sold, and deeds made to the

assignee of the purchaser. The court found, as a conclusion of law, these judgments were void and ineffective—or rather, that there were no such judgments—and that the purchaser derived no title under them. It is contended that this conclusion was erroneous.

As the practice act of 1851 stood at the time in which these proceedings were had, the party in whose favor judgment was rendered was required to deliver to the clerk of the court a memorandum of the items of the costs to which he was entitled. The memorandum, sworn to as required by the statute, was to be delivered to the clerk within twenty-four hours after the rendition of the verdict: Pract. Act of 1851, sec. 510. By section 511 of the same act, the clerk was required to include in the judgment entered up by him the costs, the percentage, etc.

In Chapin v. Broder, 16 Cal. 413, in relation to a judgment for costs, bearing date twenty-second August, 1854, the court held that the clerk had no right to insert the costs after the judgment was entered up and the record completed. The court remarked as follows: "The language of the statute was that he" (the clerk) "should include the costs in the judgment, and not that he should enter the judgment and at some subsequent period insert the costs. His authority terminated with the entry of the judgment, and if by mistake or otherwise the costs were omitted, the remedy was by motion to amend. The court alone was competent to grant the relief, and the act of the clerk was illegal and void."

In the case cited, the court held such judgment void on a collateral attack. This ruling must govern in this case. It does not appear from the finding of fact, that the costs were ever included in these judgments entered against Antonio Castro. A note appears to have been made of the amounts of costs, under the certificate of authentication to the entry of the judgment in the judgment book, and these amounts were not included in the judgments. On this ground the court below properly adjudged that the judgments were void. The proceedings of sale, etc., under these so-called judgments, fall with the judgments, and conferred no title on the purchaser.

The petition of J. I. Castro to the board of land commissioners for confirmation of the claim for the rancho San Pablo was offered in evidence. To this, Mr. Brooks, on behalf of the defendants represented by him, objected *generally*, conceding at the same time that it would be admissible "to show the jurisdiction of the land commission, and support the final decree of confirmation," but he states that it was not offered in connection with any other proceedings, but as an independent document. The court overruled the objection, and an exception was made and noted.

It is a mistake that it (the petition) was not offered in connection with other proceedings. It is stated in the bill of exceptions that it was offered along with the copy of the will attached to the petition, the opinion of the board confirming the claim, and the decree of confirmation.

Although such petition was not necessary in presenting the claim for confirmation (see eighth section of the act of congress of third of March, 1851, "to ascertain and settle private land claims in the state of California," 9 Stats. at Large, 631), as the presentation of the claim or grant was sufficient, still we do not see that the evidence was not admissible. In Tappan v. Beardsley, 10 Wall. 427, it was held admissible to prove the fact that such a proceeding was instituted, the date, and the

result. We find no error in the ruling of the court below in admitting the document. The legal effect of the document was not passed on by admitting it in evidence.

The plaintiff offered in evidence a deed from J. I. Castro to Martina Castro de Alvarado et al. This deed was objected to on the ground that the grantor, being a trustee, could not alter the trust or alien the land without the consent of the *cestuis que trust*. The objection was overruled and an exception was taken.

The deed objected to purports to convey the legal title, which it is recited, it had been suggested, had vested in the grantor by virtue of the decree of confirmation of the board of land commissioners of the rancho San Pablo, in trust for the various parties in interest according to their respective interests, viz.: to Martina Castro de Alvarado fifteen twenty-seconds of the rancho, and to five of his brothers five twenty-seconds thereof, and to other parties, heirs of Francisco Maria Castro, or parties claiming under them, an undivided four fifths of one twenty-second part. This conveyance was made with the declared purpose of conveying to the grantees the legal title to their shares in the land.

The objection went merely to the effect of the conveyance. It was properly admitted in evidence. The operation or legal effect of the conveyance was a matter for further consideration, when the court came to render judgment. The court did not err in its ruling.

The motion to dismiss the action was properly denied.

There was no error in disallowing the question put to Forbes as to whether the mental capacity of Doña Gabriella "was sufficient to enable her to comprehend an American deed translated into Spanish." Forbes substantially answered the question in his testimony.

The statement of Carrera to Goodale, made long after the transaction to which it referred, was hearsay, and was properly excluded. There was no evidence of a fraudulent conspiracy. If there was, there is no evidence that Carrera was one of the conspirators, and if he was, it was hearsay, being no part of the *res gestæ*.

We perceive no error in the ruling of the court in relation to disallowing the question as to the difference between the original draft of the partition agreement and the perfected document. Besides, the witness subsequently stated everything that was inquired about when the objection was made.

We have examined the other errors in law to which exceptions were taken, and find that the court committed no error in its rulings in regard to them.

The statute does not require the order appointing a guardian *ad litem* for an infant to appear in the judgment roll: C. C. P., sec. 670. The first subdivision of this section plainly does not require it. The second subdivision specifies what papers shall constitute the judgment-roll in all other cases except where the complaint has not been answered by any defendant. These papers are the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, a copy of any order made on demurrer or relating to a change of parties, and a copy of the judgment. A further provision is made in this section in a case where there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default. In this last case, the summons, with the proof of its service, must also be added to the other papers above mentioned in this second subdivision.

In neither of the subdivisions is the order of appointment of guardian mentioned. The order relating to a change of parties does not include any such order. There is no change of parties by the appointment of the guardian *ad litem*. The guardian does not become a party. The infant is the party, and he only appears by the guardian. The latter is appointed to appear for the infant, and to manage and take care of the suit for such infant when he is plaintiff, and to appear, manage, and take care of the defense for the infant when he is defendant. In case of an infant defendant, the answer is put in by the guardian for the infant. The guardian has authority to appoint an attorney to put in such answer, but the attorney so appointed is the attorney of the guardian and not of the infant. The language of the statute of this state, in all the phases it has assumed, authorizing the appointment of a guardian for infants in actions brought by or against them, shows clearly that the infant only is the party: See Pract. Act, sec. 9; C. C. P., sec. 372. The guardian is to appear for them, and is no more a party to the action than the attorney who appears in an action for one who has attained his majority is a party to the suit in which he enters his appearance: See Fox v. Minor, 32 Cal. 116; Karr v. Parks, 44 Id. 48. For the reasons above given, we do not think that the order relating to a change of parties mentioned in the second subdivision of the section above cited includes an order appointing a guardian *ad litem*, and in no case is such an order required to be inserted in the judgment roll.

In England it appears to be different: See 1 Tidd's Pr. 100; 2 Saund. 1171, note 1. The practice in the English courts seems to be this: In the case of an infant plaintiff suing by guardian or *prochein ami*, it is stated in the declaration that the guardian is specially admitted, and when this is omitted it is error; and the insertion of those words in the declaration or plea has been holden to be sufficient and no error, though there be no admission of the guardian or *prochein ami* on the roll: Rawlyn's Case, 4 Rep. 53 b, 54 a; Swift v. Nott, 1 Sid. 173. If, in fact, there be an admission of the *prochein ami* or guardian by the court, but it is not entered of record, the court will give leave to enter it: Young v. Young, Cro. Car. 86; Canbars v. Walton, 1 Lev. 224.

On appeal from a judgment, the examination in this court is confined to the judgment roll, and any bill of exceptions, statement on motion for new trial, and statement of the case on which the appellant relies: C. C. P., sec. 950. The questions to be considered must arise on these papers. If they do not thus arise, the duty of deciding them is not by law devolved on the court: Rush v. Casey, 39 Cal. 399; McAbee v. Randall, 41 Id. 136; Gregory v. Nelson, Id. 278.

On an appeal from an order denying a new trial, the scope of inquiry is limited to the order appealed from, and the judgment roll, and the affidavits or bill of exceptions or statement used on the hearing: C. C. P., secs. 661, 652. Where an appeal is taken from an order granting or refusing a new trial, on the minutes of the court, or from an order granting a new trial by the court on its own motion, a statement prepared subsequently to such ruling of the court, with the judgment roll and a copy of the order, constitute the papers on which the same are to be heard: C. C. P., secs. 661, 662. Transcripts of these papers are only furnished to this court, in cases of appeal above stated.

Holding, as we have said above, that the scope of inquiry in this court is not enlarged on appeal from an interlocutory judgment in partition,

we do not perceive that we are permitted to look outside of the documents which would constitute the judgment roll when it is to be made up, or to consider any questions not arising on such documents or the statement or bill of exceptions in the case. Neither is the order appointing the guardian, nor the petition for such appointment, one to appear in the record or judgment roll under our practice. In fact we do not think a petition in writing for such appointment is required. The appointment is to be made on application: See Pract. Act, sec. 10; C. C. P., sec. 373. And this application may be made *ore tenus* in open court as well as in writing. Although it would be better practice to file a petition alleging the facts requisite to show the jurisdiction of the court, still it would not be *mala praxis* to make the application for such appointment orally.

We proceed now to consider the matters to which the foregoing observations as to the appearance of infants are pertinent. It is stated in the bill of exceptions that no summons was served upon the infant defendants Francisco Dutra, Juan Dutra, José Dutra, Mary Dutra, Maria Magdalena Dutra, Agustin Dutra, Ignacio Dutra, Maria Dutra, Maria Dolores Dutra, Felecia Dutra, Willie B. Palmer, Laura A. Palmer, Cassie A. Palmer, Nellie B. Palmer, Millie V. Chambers, Fannie R. Chambers, Thomas J. A. Chambers, James Lloyd Chambers, Robert Newcomb Wood, Richard Cross Wood, Lucetta Wood, Annie E. Wood, Frank G. Wood, William Henry Wood, Mary Moitozo, Antonio Moitozo, Ignacio Moitozo, Rosa Moitozo, and Angelica Moitozo, or either of them.

These infants were not original parties to the action, and in regard to them, the following appears by the recital in the decree: "And it further appearing that the other of said infants above named, who were not original parties to said action, were children of original parties, who had died since the commencement of said action, and since the filing of their answers herein; and it further appearing that, in all such cases, the executors or administrators of such deceased persons had been substituted in place of said decedents, and the action continued against them, and that such executors or administrators had respectively appeared herein, on behalf of the interests of the estates of such deceased persons; but that application was also made to have guardians *ad litem* appointed for such infant children of persons who had appeared and answered in such action, and afterwards deceased."

The decree further states that William H. Patterson, Esq., an attorney of this court, was appointed guardian *ad litem*, among others, of Frank Dutra, Juan Dutra, José Dutra, Agustin Dutra, Maria Dutra, and M. Magdalena Dutra, and duly filed answers in the cause as such guardian *ad litem*, and on behalf of such infants, and each of them.

In relation to the Palmer infants above mentioned, it is stated in the decree that B. S. Brooks, Esq., an attorney of the court, was appointed guardian *ad litem* of William Beales Palmer, Laura Adeline Palmer, Clara Augusta Palmer, and Nellie Bell Palmer, and duly filed an answer in the cause as guardian *ad litem*, on behalf of such infants and each of them. The answers for the Palmer infants and the Dutra infants, except M. Magdalena Dutra, appear in the record. As to the Wood and Moitozo infants, the record shows that the action was revived as against them on motion of their general guardians respectively, and on motion the answer of their ancestors was in each case allowed to stand as their

answers. As regards the Chambers infants, it appears by recital in the decree that each of them had a general guardian of their estates regularly appointed; that the guardian, who in this case was Caroline M. Chambers, was allowed by the court to represent them and their interests in the action, and that the guardian did appear and file an answer as such guardian, and for the infants above referred to. This answer appears in the record.

It is unnecessary to issue a summons to bring in the infant parties. It might be done on motion under section 385, code of civil procedure: Prac. Act, sec. 16. This section as it stood in the practice act was somewhat modified by the code of civil procedure, section 385, from what it was as originally framed, and was further modified in 1874, but these changes do not affect the question here. Under the section as it stood in the practice act, or under any of its subsequent modifications, the infants might have been made parties and the suit continued against them on motion. The motion and order were sufficient: See Allen v. Unlter, 10 Abb. (U. S.) 379; Coon v. Knapp, 13 How. 175; Gordon v. Sterling, Id. 405; Green v. Bales, 7 Id. 296. In Gordon v. Sterling, above cited, infant defendants were thus brought in in an action for partition, and it was held regular under section 121 of the New York code of practice, which as to this question is the same as ours. This section 121 provides that if the motion is not made within a year after the death, a supplementary complaint was necessary. In Gordon v. Sterling, the motion was within the year. It is therefore on all fours with this case, as regards the question presented. The order continuing the case as against the infant defendants should have been served, and no doubt was. They appeared in the case and answered regularly. This is sufficient: McCreery v. Everding, 44 Cal. 286. The only objection to the proceeding appearing in the bill of exceptions in the case before us is that no summons was served on the infants. The above, in our opinion, disposes of this point.

As to the appointment of guardians, we see no reason to hold that they were not properly and regularly appointed. The Wood, Moitozo, and Chambers infants appeared by their general guardians, and this was regular, according to Gronfler v. Puymirol, 19 Cal. 629, approved in Smith v. McDonald, 42 Id. 484. These decisions have stood so long as correct rulings that we would hardly undertake to overrule them. As regards the others, and in fact all of them, we think no summons was required to give the court jurisdiction, for the reasons given above. The section of the code of civil procedure (373) referred to by counsel, in our opinion, only applies to the original process issued when parties are brought in for the first time, and not to those brought in as representatives or successors of parties deceased. We see no reason to conclude that the guardians *ad litem* just above referred to were not regularly appointed. The court seems to have been careful in appointing the guardians last named, having selected for that purpose two competent and distinguished members of the bar. It sufficiently appears that these infants were brought in and regularly proceeded against, and in this regard we find no error.

The attention of the court is further called to the fact that there is in the transcript no petition for or order appointing a guardian *ad litem* for George Preston Warfield and Teresa Ada Warfield, minor heirs of Preston Warfield, deceased. These minors were non-residents of the state on the nineteenth of November, 1867, when this action was com-

menced, and were served with summons by publication. Their residences were not known, and therefore no copy of summons or complaint was sent by mail to them or either of them. Neither was the residence of their mother known, and therefore no copy of summons or complaint could be mailed to her. There is no statement in the affidavit or pleadings as to the age of these minors. To sustain the proceedings of the court below, we must presume, until the contrary is made to appear, that these minors were over the age of fourteen years, and in such case the law required no service of summons or complaint on the mother, or other person having them in charge: See Pract. Act, secs. 29, 30; C. C. P., secs. 411, 412.

The transcript shows that an answer for these minors was filed by J. M. Seawell, Esq., then as now an attorney of this court, as their guardian *ad litem*, on the seventeenth day of February, 1871. This answer was verified by Mr. Seawell on the same day. It appears from the bill of exceptions that Mr. Seawell appeared with other counsel for defendants at the trial and took part in it. It is stated in the interlocutory decree that the gentleman above named was duly appointed guardian *ad litem* for the minors above named, "upon proper application therefor, and due proceedings had for that purpose," and that he filed an answer as such guardian for them and each of them. That Mr. Seawell appeared and made defense for these infants, we do not think admits of a doubt.

For the reasons above given, we do not think that the questions as to the petition or order for the appointment of guardian *ad litem* are before us for consideration. The court had jurisdiction of the infants by service of summons: See C. C. P., sec. 416; and answers for them were filed by the guardians *ad litem*. As to the Moitozo infants, the answer is put in by their general guardian. The same is true of the Chambers infants and the Wood infants. The Dutra infants answered by W. H. Patterson, their guardian *ad litem*, and the Palmer infants by B. S. Brooks, their guardian *ad litem*. Upon the facts above stated, we do not see that on this appeal we can reverse the judgment or order of the court below for the reason that the order of appointment does not appear in what in this case is properly the record. We think that we are justified in assuming that the parties having been served and having answered by their general guardian or guardians *ad litem*, where the record is silent, that the order of appointment wherever required was regularly made.

A further consideration here is worthy of notice in regard to the Warfield infants, where the answer was filed by an attorney and counselor of this court, Mr. Seawell, as the guardian *ad litem*. Without an order appointing him, he would be guilty of contempt for misbehavior and might be dealt with for it, and would probably be subject to a proceeding for removal or suspension from the discharge of his function as attorney: C. C. P., sec. 1209, subds. 3, 6; sec. 282, subds. 2, 4; sec. 287, subd. 2. This we can not presume.

A few remarks further on this point will explain the significance of the ruling here made. An absence of the order appointing a guardian *ad litem* in the case like the one before us is a defect in the proceedings known as an irregularity: Keaton v. Banks, 10 Ired. 381. Irregularity, as defined by Chitty, "is the technical term for every defect in practical proceedings or the mode of conducting an action or defense, as distinguished from defects in pleadings, which can only be objected

to by demurrer or motion in arrest of judgment, or by writ of error:" 3 Chit. G. P. 509. The learned author proceeds thus: "It is a comprehensive term, including all formal objections to practical proceedings, and is of three descriptions, viz.: first, such deviations as constitute a total *nullity;* secondly, such as are mere *irregularities*, and can only be objected to in a reasonable time and subject to certain qualifications; and, thirdly, the non-observance of certain rules or enactments that have been deemed merely *directory:*" 3 Chit. G. P., *ut supra.*

Under the English practice, where there must appear in some shape in the record the fact of the appearance of an infant defendant by guardian *pro lite*, when no such matter appeared in the record, it was error, and the defect might be redressed by writ of error. If the appearance by guardian was recited in the count or plea, or appeared in the record, and in fact no such guardian had been appointed, it was that kind of error known as error in fact, which error is one which occurs where there is error in the process or proceeding, not apparent on the record, and which must be shown to the court by affidavit or petition: See Pickett v. Ledgerwood, 7 Pet. 148; 2 Saund. 101 a. Conceding that a writ of error might be brought in this state, still no such remedy is resorted to here. This remedy need not be further mentioned. In fact, it appears that when such a writ does not exist, the same result may be reached by motion—the usual mode of correcting irregularities. It has been held that the motion is a substitute for such writ of error: See Pickett v. Ledgerwood, 7 Pet. 146. The same is said in 4 Minor's Institutes, 856, as to the practice in Virginia.

The defect in this state is an irregularity, and may be redressed on motion: See Whitwell v. Barbier, 7 Cal. 54; Shaw v. Gregoire, 35 Mo. 467. On a motion to strike out the answer of the person appearing as guardian *ad litem* for want of authority, the court below can pass on the question. If denied, a bill of exceptions may be drawn up and filed. The question is thus placed on the record, and may be reviewed on appeal from the judgment. Or the question may be brought before this court by motion for a new trial under the first subdivision of section 657, code of civil procedure, as an irregularity in the proceedings of the court, making the fact appear by affidavit, as required by section 658, code of civil procedure. The question in either case is called to the attention of the court below, and if the order appointing such guardian was actually made, and not entered by default or misprision of the clerk, the court can have the proper entry *nunc pro tunc*, and thus the defect is cured.

We will add here that it has been frequently held in New York, under a statute no less stringent on the subject than that of this state, that a judgment against infants, where no guardian *ad litem* had been appointed for them, was voidable and not void: See Croghan v. Livingston, 17 N. Y. 218; and McMurray v. McMurray, 66 Id. 177; and that the failure to appoint a guardian *ad litem* for an infant defendant was an irregularity which might be redressed on motion: Keaton v. Banks, *ut supra.* It will not be too late to move in regard to this matter of guardian *ad litem* when the case goes back to the court below.

The twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second findings are as follows:

"27. That no assessment was made or tax levied for the fiscal year 1855–6 upon the property described as follows: 'The one undivided

eighth part of the rancho de San Pablo, or two thousand seven hundred and twelve and one half acres thereof,' as against the said Antonio Castro, or any other owner thereof, or person interested in the said San Pablo rancho, and which property is described in a deed dated August 26, 1856, made by one John F. S. Smith, then late sheriff, and as late sheriff of the county of Contra Costa, to Charles P. Pollard, recorded September 5, 1856, in the recorder's office of said county, in volume 5 of deeds, p. 215; that on August 10, 1856, the said Charles P. Pollard executed and delivered to Jacob M. Tewksbury an instrument purporting to convey to said Tewksbury all the right, title, and interest which he had in and to the land described in said instrument purporting to be a sheriff's deed, and that said instrument purporting to be a deed from said Pollard to said Tewksbury was recorded February 26, 1857, in volume 5 of deeds, page 366, in the recorder's office of said county of Contra Costa.

"28. That no tax assessment or tax levy was made for the fiscal year 1859–60 upon or against the lands purporting to be described as follows: 'The certain tract or lot of land situate in township No. 1 of Contra Costa county, and numbered and designated on a map of survey of the San Pablo ranch as made by Nicholas Gray, deputy surveyor, in August, 1856, under an agreement of partition and release among the owners thereof, dated July 14, 1856, and made of record, together with the report of the commissioners therein named to make partition of said rancho, in the recorder's office of the said county, in volume 6 of deeds, pages 1 to 20 inclusive, reference to which is made for full and perfect description of the same, as follows, to wit: All of lot numbered 49, except twenty-five acres of north corner, set off in said partition to Jesus Maria Castro; the remainder, being about two hundred and thirteen acres, valued at one dollar per acre,' and for which a paper purporting to be a tax deed, dated October 5, 1860, was executed by James C. Hunsaker, sheriff of said Contra Costa county, to said Jacob M. Tewksbury.

"29. That no tax assessment or tax levy was made for the fiscal year 1859–60 upon or against the lands purporting to be described as follows: 'Twelve acres of land situated in township No. 1 of Contra Costa county, and being the west end of lot No. 132 of the ranch of San Pablo, as designated on a map of survey of the said ranch, made by N. Gray, United States deputy surveyor, in August, 1856, and made of record in volume 6 of deeds, pages 19 and 20, in the recorder's office of said county, to which reference is made, and also to a deed from J. M. Tewksbury to said party, for which see index of deeds in said office;' and for which a paper, purporting to be a tax deed, dated October 6, 1860, recorded June 17, 1862, in volume 10 of deeds, page 28, in said recorder's office, in and for Contra Costa county, was executed by James C. Hunsaker, sheriff of said Contra Costa county, to said Jacob M. Tewksbury.

"30. That no tax assessment or tax levy was made for the fiscal year 1859–60, upon or against the lands purporting to be described as follows: 'Lot No. 54, of the partition of the San Pablo ranch, containing forty-eight acres; for particulars of description see map of survey of said partition, as made by Gray, Forbes, and Cooper, commissioners appointed to divide the said ranch among the heirs and owners thereof, in the year 1856, all of which is of record in book of deeds, No. 6, of Contra Costa county records, pages 1 to 20, inclusive, reference to which is made; said land being in township No. 1 of said county;' and for which a paper purporting to be a tax deed, acknowledged December 6, 1860, recorded

December 8, 1860, in the office of the recorder of Contra Costa county, in volume 8 of deeds, page 383, was executed by James C. Hunsaker, sheriff of said Contra Costa county, to said James M. Tewksbury.

"31. That no tax, assessment, or tax levy was made for the fiscal or the revenue years 1860–1, upon or against the lands purporting to be described as follows: 'Forty-eight acres of land lying in the county of Contra Costa, township No. 1, being a part of the San Pablo rancho, known and designated as lot No. 54, of the survey of said rancho and map thereof, made by N. Gray, United States deputy surveyor, under an agreement of partition and distribution of said rancho, in 1856, which map and report and deed is of record in the recorder's office of Contra Costa county, in volume 6 of deeds, pages 1 to 20, inclusive, reference being thereunto made for particular description;' and for which a paper purporting to be a tax deed, dated December 9, 1862, recorded December 9, 1862, in the office of the county recorder of Contra Costa county, in volume 10 of deeds, page 309, was executed by John J. McEwen, sheriff and tax collector of said Contra Costa county, to said Jacob M. Tewksbury. That the justice's court purporting to have rendered the judgment recited in said last-mentioned tax deed had no jurisdiction or authority to render the judgment therein recited against any person or property.

"32. That no tax assessment or tax levy for taxes for the fiscal or revenue year recited in a paper purporting to be a tax deed, bearing date December 13, 1862, and recorded December 13, 1862, in the office of the recorder of Contra Costa county, in volume 10 of deeds, page 325, was made upon or against the property purporting to be described as follows: 'All the south-west fractions of the north-east quarter of section number twenty-four, and the north-east fraction of the north-west quarter of section number twenty-four, and the south fraction of the east half of the south-west quarter of section number thirteen, in township number 1 north, range number 5 west, meridian of Mount Diablo, the same being swamp or overflowed land, and the same piece surveyed by J. B. Abbott, county surveyor, for Joseph H. Brenneman, as appears by the receipt of Hiram Fogg, county treasurer of Contra Costa county, recorded in volume 1 of tule land records, in county recorder's office, pages 132 and 133, containing one hundred and thirty-three and fifty-seven one-hundredths acres, and also about twelve acres of land of the embarcadero near San Pablo, county of Contra Costa, known as Davis' landing, reference for a more perfect description being had to a deed of record in the recorder's office, county aforesaid;' and for which the paper purporting to be a tax deed above referred to was executed by John J. McEwen, sheriff of Contra Costa county, to said Jacob M. Tewksbury, as against any person or persons mentioned in said last-mentioned deed. That the justice's court purporting to have rendered the judgment recited in said last-mentioned deed had no jurisdiction or authority to render the judgment therein recited against any person or property."

The findings just above quoted, as to the various assessments mentioned in them, are not in accordance with the law. The statute requires of the court, in giving the decision, to state separately the *facts* found and the conclusions of law. We interpret this to require of the court to find the facts specially, unmixed with the law, so that the judicial mind may see that the conclusion of law is a deduction of the law from the facts—the unmixed and ultimate facts—found. Such as we un-

derstand to have been the ruling of the court in Breeze v. Doyle, 19 Cal. 101. In this case, the test of the sufficiency of a finding is given in these words: "Would they answer, if presented by a jury in the form of a special verdict?"—and further, the special verdict "must present the facts so distinctly as to refer the court clearly to the questions of law arising on them." We are not aware that this case has ever been overruled. It is cited as authority in Lucas v. San Francisco, 28 Id. 596, and Pralus v. Pacific G. & S. M. Co., 35 Id. 35. Blackstone says such verdict must present the *naked facts:* 3 Bla. Com. 377.

Now, tested by the rule above stated, would such a finding be sufficient? In finding a special verdict, a jury must find the facts, leaving the law to be pronounced by the court on the facts so found. A jury was originally permitted to find a special verdict, so as to escape the responsibility and avoid the danger of having their verdict attainted: 3 Bla. Com. 377. This responsibility was a very serious matter, the penalties on conviction being very severe: Id. 403–405. Such verdicts (special) arose on statute Westm. 2; 13 Edw. I., c. 30, p. 2; Boote's Suit at Law, 176, and note 3 on same page; 3 Bla. Com. 377.

As an instance for illustration: The issue whether there was an assessment of a particular piece of property for taxes for a year designated, is left to a jury to find a special verdict; or in other words, to find the facts specially as to such assessment, so that the court may pronounce the judgment of the law upon the facts so found. The jury render a verdict in this form: "We find that there was no assessment for taxes for the year mentioned." What facts are specially found in such a verdict upon which the court can pronounce as matter of law whether there was an assessment or not? Clearly none. No facts are presented to which the judicial mind can be applied. The jury has found that there was no assessment, and has referred nothing to the court to act on. In fact, the jury has found by such a verdict fact and law both, which is a general and not a special verdict: Boote's Suit at Law, 176—definition of general and special verdicts.

It must be remembered that an assessment is made up of several constituents. In the first place, there must be the name of the person to whom the property is to be assessed: Pol. C., sec. 3650. This person must usually be the owner if known to the assessor, and if not known, it may be assessed to unknown owners: Id., sec. 3636. 2. There must be a list or description of the property: Id., sec. 3650. 3. The cash value of the property listed or described: Id. Such are the material factors of an assessment, and they must appear on the assessment roll or book: Id., sec. 3650. Further, the valuation must be made by the proper officer authorized by law. Reference is herein made to the political code, but such were the elements of an assessment before the code, and, in fact, during the entire history of the state.

The jury now, in finding the facts specially, where the issue presented is whether there was an assessment or not, may find in the very words what appears on the assessment roll or book, or may find that no owner, known or unknown, of the property was inserted in the roll or book, or that there was, or the property was or was not described, or that a valuation or no valuation was made, as the evidence may show.

If either of the factors above mentioned is lacking, in judgment of law, there is no assessment; or if it is found that the valuation was made by a person not authorized by law, there can be no valid assessment. So

when the verdict finds *in hæc verba* the entries in the roll or book, or finds with regard to each element as above, the court can readily determine the judgment that the law pronounces on such facts. If any one fact or element required is wanting, there is no assessment; if all are present, there is an assessment. In this mode the object of the law is attained—which is to have the facts on which the issue depends found distinctly and clearly, so as to refer the court clearly to the questions of law arising on them.

The finding as to the assessments in this case is not of the character required. It finds no fact on which a question of law can arise. The court, in looking at the finding, sees nothing but that there was no assessment. This being so, there is nothing to be determined, and the inquiry is ended.

The thirty-second finding is defective, in finding no facts at all. It is stated in this finding that there was no tax assessment or tax levy upon or against certain property (describing it) in a fiscal year mentioned in a certain deed bearing date December 13, 1862, and recorded the same day in the office of the recorder of Contra Costa county, but the contents of the deed are not found in any way, either by finding the deed *in hæc verba*, or by finding its substance. Whether, therefore, there was or was not any tax assessment or tax levy for any fiscal year, can not in any way be perceived by the court, and hence no conclusion of law can be pronounced on the finding. Neither is the court informed what fiscal year is referred to. Reference is made to a deed, which may be inferred to be evidence of the fiscal year alluded to. If the evidence were found, it would not be sufficient; the law requires the facts, and not the evidence of them, to be found.

It is found also in the same findings that no tax levy was made for the fiscal years mentioned in them. If the words "tax levy" were used as synonymous with assessment, then what has been said above disposes of the question in relation to such levy. Levying a tax usually means the fixing of the rate at which property is to be taxed, and this is usually done by the legislature, either mediately or immediately; that is to say, by the legislature for the purpose of state taxation, and by the local governing bodies, such as boards of supervisors, etc., for local taxation, to which bodies the power of levying the tax is delegated by the legislature. During the years mentioned in the above findings, such was the mode of levying which prevailed in this state: See Stat. 1854, p. 88; Stat. 1857, p. 325; Stat. 1858, p. 31; Stat. 1860, p. 365, for revenue acts of years mentioned.

We can not conclude that the court below intended by the findings under consideration to declare that the legislature and the various local bodies to which this duty of levying the tax pertained did not perform it. If it did so intend, a reference to the acts of the legislature, and of the local bodies referred to, would show that this was not true.

At the end of findings 31 and 32 are findings in regard to certain judgments rendered by justices' courts in suits for taxes, to the effect that the courts referred to had no jurisdiction or authority to render such judgments against any person or property. The jurisdiction over the subject-matter, where the amount of taxes sued for did not exceed two hundred dollars, was vested in justices' courts by the act of April 3, 1861: Stat. of 1861, secs. 1, 2, 4, 5, p. 121, 122. If such courts did not have jurisdiction of the person by reason of the fact that there was no service

of process to bring such person into court to make answer in the action, that fact should have been specially found. The court can not know such to be the case, under a finding expressed in the general language of the finding referred to.

The findings as to these judgments refer to them as the judgments recited in the tax deeds mentioned in the findings. The tax deeds are not found *in hæc verba*, nor are the recitals; but if we are at liberty to examine them, it will be seen that the judgments recited in them were rendered in March, 1862, at which date, under the constitution of 1849, the jurisdiction of the district courts did not embrace cases in equity, where the amount in dispute was under two hundred dollars. We are of opinion that the justices' court had jurisdiction in suits for taxes where the amounts sued for were less than two hundred dollars, under the act above mentioned. If the amounts sued for exceeded two hundred dollars, then such court did not have jurisdiction. But we can not know whether this is so or not, unless such is shown to be the fact by a finding to that effect.

The findings in regard to these judgments are insufficient, in not presenting the facts so found that this court can say whether the justices' courts had or had not jurisdiction: See on this point Suydam v. Williamson, 20 How. 427; Birckhead v. Brown, 5 Hill, 634, opinion by Bronson, J.; Miller v. Shackelford, 4 Dana, 261; 4 Minor's Institutes, 752.

Upon these issues—these as to the assessments for taxes and the jurisdiction of the justices' courts to render the judgments aforesaid, on which findings were not waived—there are really no findings.

In regard to the assessment and levy of taxes for the county of Contra Costa for the years mentioned in the findings above quoted, we refer further to the fact that the assessment of taxes upon all property real and personal for the county aforesaid, for the fiscal years ending respectively on the first of March, 1860, and on the first of March, 1861, were legalized by the act of the eighth of April, 1861: See Stat. 1861, p. 119.

It is said that the allegations of the answer of defendant Jacob M. Tewksbury, as to the deed of Gabriella Castro to Martina Castro de Alvarado, are not negatived by the findings, and are therefore to be taken as true. On this point we are referred to certain portions of the answer, which we have examined. The portions referred to are paragraphs 15 to 18, both inclusive, of the amended answer of the defendant, Tewksbury. We think the material allegations are disposed of by the findings. The material allegations in the answer are, that the document referred to was not under seal when signed or delivered or acknowledged, but that a seal was placed on it afterwards by some person unknown to the defendant, "without any authority from said Gabriella;" and further, that at the time it is claimed she executed this instrument, she was not of sufficient mental capacity to enter into such contract as indicated by the paper, that she was not competent to execute a deed. Whatever other allegations appear in the portions of the answer referred to are allegations of evidence or conclusions of law, as to which no findings are by law required.

The material allegations above mentioned are, in our judgment, disposed of by the eighth and twenty-third findings. The matters found in the eighth finding substantially find that the instrument of conveyance referred to in it, and in the answer of Tewksbury above mentioned, was sealed on the fourth of August, 1851, when it was executed. The issue

made by the allegations as to the mental capacity of Gabriella de Castro is clearly passed upon in the twenty-third finding.

It is argued that the adverse possession of the appellants is a bar to the partition. Conceding this to be so for the purpose of the argument, the court finds that there was never any adverse possession (see sixteenth finding) by any one of the defendants, and as a conclusion of law, that there was never any ouster (see eighth conclusion of law).

But it is said that the evidence is insufficient to sustain such finding. In answer to this, it may be said that the statute of limitations did not commence running in this case until the final approval of the survey by the proper district court of the United States: Morris v. De Celis, 61 Cal. 55. The survey was not finally approved until the seventeenth of August, 1864, and this action was commenced on the nineteenth of November, 1867. If we are in error in holding that the statute of limitations did not commence running at the time just above mentioned, then it could not have begun to run until the issuance of the patent: Gardner v. Miller, 47 Cal. 570; Same v. Schamelzle, Id. 588; McManus v. O'Sullivan, 48 Id. 17; Hagar v. Spect, Id. 408; Galindo v. Wittenmeyer, 49 Id. 12; Hoadley v. San Francisco, 50 Id. 273; Reed v. Ybarra, Id. 465; Miranda v. Toomey, 51 Id. 165; and the patent was not issued until after the action was begun. Such being the case, it is unnecessary to consider the question of the insufficiency of the evidence to sustain the finding as to the character of the possession, whether adverse or not.

The decree in this case is made under section 760, code of civil procedure, which is in these words: "Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire." Under this section, before any interlocutory decree for a partition is made, the rights of the parties must be ascertained by the court. The different sections of a chapter, in any one of the codes, must be so construed as to reconcile all apparent conflicts, and if there are conflicting provisions in the different sections of a chapter, the provisions of the section last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter. Such is the direction, in our judgment, of section 4484 of the political code.

Construing the sections 759, 763, and 764 together, it is evident that the rights of all the parties to the action must be ascertained and determined by the court before any partition can be ordered. Is there a different rule laid down in section 760? We think not. That section, in our judgment, does not dispense with ascertaining the rights of all the parties, but allows the further or additional ascertainment of the shares or interest respectively of each of the original co-tenants, and then adjudging a partition in the first instance of the land between the original co-tenants as if they were the only parties. To make such a partition so that it may be of any aid in making the further partition between all the

parties to the action, it must be made to include in the land allotted to each co-tenant the possessions and improvements of each one claiming under him. To enable the referees to do this (for they can not do it themselves), the court must ascertain the right and title of each party, showing under which of the co-tenants such party claims. The interlocutory decree must be made before there can be any partition ordered, that is, the rights of the parties determined by the court, and specified in such decree. Such, we think, is the meaning of section 760. An interlocutory decree must be made ascertaining and declaring the rights of all the parties. The court can, in addition to ascertaining the rights and title just mentioned, and specifying them in the decree, ascertain the rights and interests of the original co-tenants, and specify them also in the decree; indeed, this last mentioned may be done first, and then, after ascertaining the titles of the original co-tenants and all the parties and declaring them in the decree, the court may thereupon adjudge and cause a partition to be made as of the original co-tenants.

The proper construction of section 760, in our judgment, is, under the conditions mentioned in it, to first ascertain and determine the shares or interest respectively held by the original co-tenants, as well as the shares or interest respectively held by each one of the parties to the action, and upon such ascertainment being made and a judgment rendered in accordance therewith, thereupon to adjudge and cause a partition to be made as if such original co-tenants were the sole parties in interest. We understand the foregoing provision as forbidding any partition until an interlocutory decree is made. The statute allows but one interlocutory decree. Therefore we say that the interests of each party to the action must be ascertained and determined before any interlocutory decree is made. If this is not so, there must be two interlocutory decrees, and we find no warrant for this in the statute. This section is intended to allow, and does allow, two partitions, one as between the original co-tenants and then another between all the parties to the action. After this first partition is made, which is allowed as an aid to accomplish the second one, the court is authorized to proceed "in like manner to adjudge and make partition separately of each share or portion so ascertained and settled as between those claiming under the original tenant to whom the same shall have been so set apart."

The language just above used is, "to adjudge and make partition;" as to the first partition the language used is, "to adjudge and cause a partition to be made." The words as to ordering partition are substantially the same in each case, the only difference being between the words that follow "adjudge and," as to the first partition, "adjudge and cause a partition to be made," and as to the second partition "adjudge and make partition." Thus two partitions only are allowed: one preliminary and ancillary to the other, partial in its character; the other complete, and embracing all parties to the action. Though there are two partitions, there is but one interlocutory decree. This being the case, the interlocutory decree should embrace all the rights to be ascertained and determined, those of the original co-tenants, and also of all the parties to the action. These rights, so ascertained, should be set out clearly in the decree. And the interlocutory decree or judgment is not complete until this is done. The judgment in this case is not so made, and hence there is no complete interlocutory judgment. A further reason is suggested to us as sustaining the view that there is but one interlocutory judgment,

which is to be found in section 939, code of civil procedure, regulating appeals. It allows "an appeal from an interlocutory judgment in actions for partition of real property," and from interlocutory judgments in such actions. We think it clear that the statute did not intend to allow more than one appeal from the interlocutory judgment in partition. It was not intended that parties to such actions should be put to the trouble and expense of several appeals from a judgment of this character.

It may be that the interlocutory judgment may in form be divided into two parts, one part directing a partition as to the original co-tenants, as above indicated, and the other part directing a partition between all the parties; but when this is the case the two parts constitute the interlocutory decree or judgment. That there is but one such judgment is borne out by all the provisions of the chapter of the code of civil procedure in relation to partition. We refer particularly to sections 759, 761–765, code of civil procedure.

The interlocutory decree herein adjudges that the partition of the rancho San Pablo shall be made, in the first instance, in accordance with the provisions of section 760, code of civil procedure, as among the original co-tenants, and according to the shares and interests, as ascertained and determined in the decree to have been originally held by them respectively, and as if they were the sole parties to the action, and that thereafter, upon due proceedings for that purpose to be instituted and taken, partition shall in like manner be adjudged and made separately of each share or portion so ascertained and allotted as between those claiming under the original co-tenants to whom the same shall have been so set apart, or that they may be allowed to remain tenants in common thereof, as they may desire.

The decree then proceeds to declare who are the original co-tenants among whom partition in the first instance shall be made, and the shares and interests of each of such co-tenants, as follows: Martina Castro de Alvarado, fifteen equal twenty-second parts of said rancho; Antonio Castro, Joaquin I. Castro, Juan José Castro, Gabriel V. Castro, Victor Castro, and Jesus Maria Castro, each one equal twenty-second part of same; Luisa Moraga de Briones, Maria de los Angeles Moraga de Briones, José Moraga, Guadalupe Moraga de Martinez, Francisco Moraga, each one equal one fifth part of one equal one twenty-second part of same.

The decree then proceeds to appoint referees to make the partition, divide and allot the several portions of the rancho to the original co-tenants as aforesaid, giving to each share and interest its due proportion of land, quality and quantity relatively considered, and directs the referees that after excepting the ways, roads, and streets afterwards referred to in the decree, to divide and allot to the original co-tenants as follows:

1. A portion of said rancho, equivalent to fifteen twenty-second parts thereof, quality and quantity relatively considered, and in as far as practicable, without prejudice to any other interests, including the so-called "Alvarado homestead," and the improvements and possessions of persons claiming under said Martina Castro de Alvarado, to be allotted and set aside by the referees, to be known as the "Martina Castro de Alvarado share and interest," which will thereafter, as the decree proceeds, "upon due proceedings had in accordance with law, be separately partitioned between those persons claiming under said Martina Castro de Alvarado according to their respective rights."

A like direction *mutatis mutandis* is given to the referees with regard to the shares above indicated of each of the original co-tenants above mentioned, giving a name or title to each share, adopting for that purpose, as in the one just above stated, the name of the original co-tenant to whom the portion is to be allotted—for instance, the "Antonio Castro share and interest," the "Joaquin I. Castro share and interest," the "Luisa de Moraga share and interest," etc.

It is then directed that the improvements and possessions of persons claiming under the co-tenants aforesaid are, as far as practicable, without prejudice to any other interest, to be included "in said respective shares and interests so to be allotted, segregated, and set aside," in manner following: The "Martina Castro de Alvarado share and interest" is to include all the improvements upon the tracts of land known upon Gray's map of the rancho San Pablo, filed for record in the recorder's office of said Contra Costa county on August 28, 1857, as lots 58, 170, 131, south ninety-nine acres of 55, 79, 80, 105, east half of 31, west forty acres of 172, 46, part of 81 north of road and 51, and six acres of 112 north-east of county road.

Like directions are given *mutatis mutandis* as to the other shares and interests, directing location by reference to Gray's map, and in one instance, that of the Juan José Castro share and interest, reference is made to a tract of land (to be included in said share) of one hundred and forty acres, "now in the possession of H. A. Benson, and including his improvements, described in a certain deed from John H. Saunders and H. P. Hepburn to said Benson, dated January 28, 1857, recorded in the county recorder's office of said Contra Costa county on January 29, 1857, in volume 5 of deeds, page 327."

A direction is then made that the improvements heretofore specially referred to, to be embraced in the respective shares if the same can be done without prejudice to the other shares, are to be included without placing any value on them, and a direction is then given in accordance with the statute, code of civil procedure, section 764, as to setting apart portions of the rancho for ways, roads, and streets.

Further directions are made to the referees to proceed without delay to divide the rancho, and allot the several portions thereof to the said original co-tenants, designating each of such portions by proper landmarks, with authority to employ a surveyor mentioned, with the necessary assistants to aid him, that the allotments to each share may be in one or more parcels, as may be most convenient, "and in accordance with the reservations, improvements, and interests hereinabove provided for," that the referees make a written report to the court of their proceedings, etc. The decree concludes with a description, by metes and bounds, of the rancho San Pablo, taken from the patent of the United States above referred to, and a declaration is added to this description that by the grant, decree, and survey the south boundary of the San Pablo ranch is identical with the north line of the rancho San Antonio, or Peralta ranch.

A summary of this decree is given, as some important questions arise thereon, which are to be considered and determined. The statute in reference to partition (see code of civil procedure, sections 752, 753, et seq.) declares that the rights of the several parties plaintiff and defendant may be put in issue, tried, and determined in the action; and when a sale of the premises is necessary (to effect a partition) the title must be ascer-

tained by proof to the satisfaction of the court before the judgment or sale can be made: C. C. P., sec. 759.

By section 763, code of civil procedure, it is provided that if it be alleged in the complaint and established by evidence, or if it appears by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition can not be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition, according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

It is enacted by the section next ensuing, 764, that in making partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, *according to the respective rights of the parties* as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, etc. Various other directions are given in this section as to the duties of the referees, which need not be here detailed. The referees are required to make a report of their proceedings, specifying therein the manner in which they have executed their trust, and describing the property divided and the shares alloted to each party, with a particular description of each share: C. C. P., sec. 765. The court may confirm, change, modify, or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment must be rendered, that such partition be effectual forever: C. C. P., sec. 766.

In the system of partition devised by statute in this state, as in the common-law action of partition, and the proceeding for that purpose in a court of chancery, there were two judgments, an intermediate or interlocutory and a final judgment. Mr. Freeman, in his work on Co-tenancy and Partition, section 516, styles the interlocutory judgment *the first judgment.* He has accurately stated the proceedings (see sections 516, 517, et seq.), both in law and equity. According to his statement, whether the proceeding was at law or in equity, it was first necessary to decide whether the parties were co-tenants and entitled to partition.

This question being resolved in the affirmative, it was next necessary to determine *the respective moieties* of each of the parties. "The result of the decision of these two questions was the judgment *quod partitio fiat.* This was the first or interlocutory judgment in partition. It directed that partition be made between the parties, and commanded the sheriff to go to the premises, and in the presence of the parties, if they be willing to be present, after being first forewarned, 'by the oath of good and lawful men of his county, respect being had to the true value of the said tenements with the appurtances, he cause to be divided' into certain moieties which the judgment proceeded to specify, and that he deliver one moiety to A. and another to B., etc. In chancery the decree for partition ordered: 1. That a partition be made between the plaintiffs and defendants, in certain moieties, which it specified; 2. That a commission or commissions issue to certain persons to be therein named; 3. That the commissioners do make a partition [here specifying the manner in which it shall be made]; 4. That all writings, surveys, muniments of title, etc., be produced before the commissioners; 5. That the commissioners ex-

amine witnesses as they may think fit; 6. That after such partition has been made that the parties execute conveyances to each other respectively. The decree, in addition to these directions, usually contained another in reference to the title deeds, and one in regard to costs."

The learned writer cites as authority for the above statements: 3 Ch. Pl. 1392; Booth on Real Actions, 244, 245; Seton's Forms, 184; Daniell's Ch. Pr., 4th ed., 2254. But "whether the proceeding was at law or in equity, the province of the court was to determine between whom, and in what proportions, the division should be made. In no case could the commission determine title, or prosecute any inquiry in regard thereto:" Freeman on Co-tenancy and Partition, sec. 517, citing Ham v. Ham, 39 Me. 218; Agar v. Fairfax, 17 Ves. jun. 542; Phelps v. Green, 3 Johns. Ch. 304; Ledbetter v. Gash, 8 Ired. 463; see also Calmady v. Calmady, 2 Ves. jun. 568.

It will be observed that in the proceeding at law the *moieties* are specified in the interlocutory judgment. In Agar v. Fairfax, 17 Ves. jun. 542, the master of the rolls (Sir William Grant) said that the writ of partition always stated the proportions in which the partition was to be made. This was the writ which issued on the first judgment, and is called the writ *de partitione facienda:* See 3 Ch. Pl. 1394, 1401. The entire record in an action for partition at law may be found in 3 Chitty's Pleading, 1396 et seq. By an examination of the references just above given, the form of the writ *de partitione* may be seen, in which it will be observed that the moieties in which the land is to be divided are distinctly specified. The moieties are also specified in the decree in the proceeding in chancery and the commission issued thereon.

This was the very point in judgment in Agar v. Fairfax, above cited. In that case the master of the rolls said: "It seems to me to have been soundly objected, that it is impossible in the present situation to issue a commission; as then it must be referred to the commissioners, first, to ascertain their interests and the proportions in which they are entitled [referring here to the interests and proportions of the co-tenants], and then to make the allotment. The former was never done by commissioners. The court is to ascertain the proportions and rights of the parties; and when that is done, then the duty of the commissioners begins, to make the division in those ascertained proportions:" 17 Ves. jun. 543.

The master of the rolls directed a reference to the master to ascertain the estates and interests of the parties and report to the court. On a petition for an appeal this order was in substance affirmed by Lord Chancellor Eldon, following Calmady v. Calmady, 2 Ves. jun. 568, above cited. In this case the lord chancellor said: "This court issues the commission, not under the authority of any act of parliament, but on account of the extreme difficulty attending the process of partition at law; where the plaintiff must prove his title, as he declares, and also the titles of the defendants; and judgment is given for partition according to the respective title, so proved. That is attended with so much difficulty, that by analogy to the jurisdiction of a court of equity in the case of dower, a partition may be obtained by bill. The plaintiff must, however, state upon the record his own title and the titles of the defendants; and, with a view to enable the plaintiff to obtain a judgment for partition, the court will direct inquiries to ascertain who are, together with him, entitled to the whole subject.

"If, therefore, the state of the record, as originally framed, is not such

as to authorize the court to say that the plaintiff and the defendants are respectively entitled in distinct shares, comprehending the whole subject, the proper course is to direct a reference to the master, to ascertain what are the estates and interests of the plaintiff and defendants, respectively; and if it appears that they, or some of them, are entitled to the whole, then to order a partition, according to the rights of all, or such of them as appear entitled, dismissing the bill as against those who do not appear to have any right. The decree in Calmady v. Calmady is perfectly regular, directing the inquiry, and afterwards a commission to issue, to divide the estate among the several parties who appear upon the master's report entitled to it:" 17 Ves. jun. 552, 553.

It thus appears clearly that the moieties in which the partition is to be made are specified in the first judgment, and the writ *de partitione facienda* issued thereon in the action at law, and in the first judgment and the commission issued thereon in the suit in chancery, and that in neither case are the shares or interests of the parties or any matter of title to be determined by the sheriff in the one case or the commissioners in the other.

We think this is clearly the case under our system, from the provisions above cited from the code of civil procedure, viz., that before any partition is ordered or can be made, the interests and shares of the parties are to be determined and adjudged by the court: See De Uprey v. De Uprey, 27 Cal. 337; Lorenz v. Jacobs, 53 Id. 24; and the moieties in which the land is to be partitioned; and such moieties must be specified in the interlocutory judgment, so that the referees may have no question of title to determine, and that they may intelligently discharge the duties as to making the allotments devolved on them by the decree. The provisions referred to are in sections 759, 763, 764, code of civil procedure. In no case should a question of title be left to the referees.

In the decree herein this rule is not observed. The referees have to determine questions of title in order to execute the decree. As stated above, the referees are directed, in making the partition ordered by the judgment, to include in the respective shares and interests indicated in the judgment, "the improvements and possessions of persons claiming under the co-tenants aforesaid, as far as practicable, without prejudice to any other interest." The referees will be compelled to determine who the persons are who claim under the respective original co-tenants, or they can not execute the directions of the judgment. The judgment is their only authority to act at all, which will be in their hands in the shape of a certified copy. This reference of a title to be determined by them is irregular, contrary to the statute, and a duty is thus imposed on them by the court which it has no right to impose.

Under the general laws of the land, and the enactments of the statute, the parties have a right to have all such questions determined by the court. And the court has not the power without the consent of the parties to delegate such power to another tribunal, officer, or person. In some instances in this cause, more than one party is claiming the same interest, and the party out of possession may claim that the party in possession is holding for him. How can the directions of the judgment be executed without determining these questions? These are questions of title, and may be difficult of determination. Must not the court determine them? It appears to us that this is clearly the duty of the court, conferred on it by the law of the land, which it can not put away

or evade. The court should determine who the parties are who claim under the respective co-tenants, whose improvements and possessions are to be included in the particular share or interest, specifying such persons and their possessions in the decree or judgment, so that the referees may be clearly informed as to their duties, which are mainly if not entirely ministerial. They can then execute the directions of the decree, without having to determine any questions of law in reference to title of any of the parties.

The pointed language of the master of the rolls and of the lord chancellor in Agar v. Fairfax, above quoted, on this subject in relation to the writ of partition, and to the commission issued in the chancery suit for partition, is worthy of observation in this connection: See also Ham v. Ham, 39 Me. 218; 1 Story's Eq., Redf. ed., sec. 650; and note 1, sec. 651. The proceeding in this state very much resembles the suit by bill, in fact is almost identical with it. In Gates v. Salmon, 35 Cal. 593, which was a case for a partition, it is said by Rhodes, J., speaking for the court, of the action for partition in this state, that "the action, though regulated to a great extent by the statute, partakes more fully, both in respect to the remedies provided and the mode of procedure, of the principles and rules of equity than those of law;" and further in the same case (p. 596) remarked "that the main features of the action, as prescribed by the statute, closely resemble those of a suit in equity brought for the same purpose."

Ham v. Ham, cited from Maine, was a case of partition under the statute of that state. As to the ascertainment of title, it appears to be substantially the same as that of this state: See Rev. Stat. of Maine of 1857, c. 88, title 9, pp. 557, 558, where the provisions referred to in the opinion appear. The same is true in New York, viz., that the titles must be ascertained by the court: See 5 Wait's Prac., 87 et seq., and pp. 91 and 93, where the forms of the interlocutory judgments are given; see also 3 Id. 95, and pp. 346, 347.

In section 764, the following provisions were made: "Before making partition or sale, the referees may, whenever it may be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient, in the judgment of said referees, to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. Whenever it shall appear in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set

apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance; *provided*, that in all cases the court shall direct the referees in making partition of land to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace, as far as practicable, the improvements made by such co-tenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvement, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land."

These provisions are usually inserted in the interlocutory decree in partition. We can not see how these provisions can be carried out by the referees, unless the interest of each party is ascertained by the court and stated specifically in the decree. And when the decree for a partition is made, as it is in this case, the court must determine under which of the original co-tenants each party claims, and state it in the decree, so that the referees can perceive clearly and be enabled to execute the provisions in section 764, when inserted in the decree. The judgment herein should be modified in this regard; that is to say, the judgment should be so modified as to specify in it the parties who claim respectively under the original tenant, and set forth the possessions of such parties as are to be included in the share allotted to such original tenant.

We think it proper to call the attention of court and counsel to the fact that there is a map referred to in the judgment as "Gray's map," as recorded in a certain office. Where a map or other paper is referred to in the judgment as a material part of it, it should be identified by the judgment and made a part of it; it should not be referred to as a paper recorded elsewhere. A contention might arise on the identity of the paper before the referees when they come to act, and therefore the document should be identified by the court, and this should appear in the judgment: See Crosby v. Dowd, 61 Cal. 557.

If, by reason of any acts of the parties to the alleged partition of 1856, any equities have grown up in favor of any of the parties to this action, or of those under whom they claim against any of the parties to it affecting their interests in the land to be partitioned, we can not see any good reason why they should not be enforced and adjudicated herein and be allowed their proper effect in the final decree of the partition to be rendered in the action. Under the chapter (4, title 10, part 2) of the code of civil procedure touching actions for the partition of real property, all equities arising between the parties, whether plaintiffs or defendants, concerning the land to be partitioned, can be determined. This relates to all equities, if any there are, whether arising under the so-called partition deed of 1856, or otherwise, not already passed on in the court below. The court below can yet pass on them in the further progress of the cause, can make such findings on the issues not yet found on as may be proper, and allow them their just legal effect in its judgment.

If it is requisite to find on any issue made by the allegations of any answer, which allegations it is argued are in support of the alleged partition of 1856, it can yet be done when the cause goes back to the court *a qua*, but we can not see that any of these allegations, or the issues arising on

them, are material, in the view taken of the instrument of 1856 by the court below and this court, viz., that it is no partition at all.

An appeal was taken from the order in this cause appointing a receiver, and we are asked to review it. We are met with the contention on behalf of respondents that the order above mentioned is not appealable in its character. This order was made on the eighteenth of November, 1878, after the rendition of the interlocutory decree, which was on the fifteenth of July, 1878. On the question whether such order is appealable or not, we are referred to many decided cases by counsel for the respective parties.

The French Bank case, 53 Cal. 550, was an application for a writ of *certiorari* to review an order in the case appointing a receiver. In passing upon the point discussed, whether the case made was one for the writ of *certiorari*, the court said: "The statute concerning this writ, section 1068, provides that it may be resorted to 'when * * * there is no appeal,' etc. If there be an appeal, the writ of *certiorari* can not be awarded; but no direct appeal is given by the statute, and we are of opinion that such an order is not subject to be reviewed on an appeal from the judgment under section 956 of the code of civil procedure."

In the case under discussion, as we have stated above, the order for the receiver was made after the interlocutory judgment. In the case cited, the order was made *ex parte* at the time of the filing of the complaint. No final judgment has been entered in this case, and therefore the appeal can not be sustained as one taken from a special order made after final judgment. In Whitney v. Buckman, 26 Cal. 448, which was an action of ejectment, after verdict and judgment for plaintiff, a receiver was appointed. Subsequently an order was made that the receiver pay over the money in his hands to the prevailing party, and from this order an appeal was taken. The court held that the order appointing the receiver, which was not appealed from, could not be reviewed on the appeal which was taken from the subsequent order. It may be that an appeal could have been taken from the order of appointment, as a special order made after final judgment, and such, it may be, was the view of the court in the case cited, though it is not said expressly. But the ruling in Whitney v. Buckman can not be considered in any way an authority that an appeal can be taken in the case before us.

In Williamson v. Munroe, 3 Cal. 385, which is cited on behalf of appellant, it does not clearly appear from what the appeal was taken, but it may well have been taken from the order appointing the receiver, as the practice act then in force allowed an appeal from any order made affecting "a substantial right in an action or special proceeding:" Pract. Act of 1861, sec. 347, Stat. 1861, p. 106.

Guy v. Ide, 6 Cal. 99, was an action to foreclose a mortgage. Prior to judgment, a receiver of the rents and profits was appointed. A judgment of foreclosure was rendered, and afterwards a motion was made to vacate the order appointing the receiver. This motion was made by Ide, who was a purchaser from the mortgagor, subject to the mortgage. The motion was denied, and the appeal was taken from the judgment and the order denying the motion to vacate. The court affirmed the judgment, and reversed the order appointing a receiver. No point was made as to the appealability of the order. Its appealable character was not contested, and it may well have been that counsel waived this point, desiring to have the opinion of the court on the point decided as to the

receiver. It may be remarked, *that the order appealed from* was one made after final judgment in the action, and it may be that it was accepted as one appealable in consequence, as a special order made after final judgment.

In Neall v. Hill, 16 Cal. 149, the appeal was from a final judgment, and the appointment of the receiver was made by the judgment or decree. The judgment was reversed, and the order of appointment (from which no appeal was prosecuted), as a part of the judgment, shared its fate.

Corcoran v. Doll, 35 Cal. 479, was an appeal from "an order granting an injunction and appointing a receiver." The court affirmed the order. The order granting the injunction was appealable, and the appeal brought up the whole order, just as in Neall v. Hill the appeal from the final judgment brought up the order appointing the receiver as a part of it. The order in Corcoran v. Doll was a writ, as was the judgment in Neall v. Hill. The reversal of the judgment in the latter case reversed the entire judgment, as the affirmance of the order in the former affirmed all its parts. The court, in Corcoran v. Doll, treated the order as but one order.

In Meadow Valley Mining Co. v. Dodds, 6 Nev. 262, the appeal was from an order made before trial, in which order there were words of restraint upon the defendants, and also language appointing a receiver. The order is stated at length in the opinion of Lewis, C. J., on pages 262, 263. The question whether the statute allowed an appeal from this order was considered by the court. The statute of Nevada allowed an appeal "from an order granting or dissolving an injunction." The court held that the order, so far as it related to the appointment of a receiver, was not appealable. So far as it could be considered as an order of injunction, the court, of course, under the statute, did take cognizance of the appeal, and affirmed the order.

We consider this a distinct ruling, that an order appointing a receiver is not appealable. And as the statute of Nevada is, so far as concerns the question under consideration, like the statute of this state, we hold it to be authority on the point of the character of the order as to its appealability. The case from Nevada, and the French Bank case above cited, expressly hold that such an order is not appealable. We find none holding the contrary.

We do not consider Schlecht's Appeal, 60 Pa. St. 172, as laying down a different rule. We interpret that case as reversing an order appointing a receiver, because it was part of an injunction order, from which an appeal was and could, under the Pennsylvania act of assembly, be prosecuted. The court professes to reverse the receiver order only in this way, and does not treat the latter order as at all appealable. The decree for an injunction and receiver was declared by the court to be a unit; and as it was erroneous in part as to the injunction, such error affected the entire decree, and must have led to a reversal, though the order of appointment may have been lawful and regular. There is nowhere in the clear and unmistakable language of the opinion any intimation that the order appointing a receiver is appealable. On the contrary, the intimation is the other way.

But it is argued, and with much plausibility, that the order here appealed from is in fact an injunction, and the appeal should be upheld as one from an order granting an injunction. It is argued that the order,

if executed, must operate as a restraint upon the rights of the parties to hold and manage their lands. While this may be so, still there are no restraining words used in the order, and we can not then hold it an injunction order. If we held such an order to be an injunction, the same must be held as to every order appointing a receiver, for such orders, when executed, must to some extent be a restraint upon the rights of some one.

Moreover, we can not conclude that we should be justified in holding that the law-making power intended to give an appeal in so important a matter as the appointment of a receiver, by the words giving an appeal upon granting an injunction. Should we so hold, ought we not also to rule that an appeal is given from an order refusing to appoint a receiver, by the words which allow it when an injunction is refused? It will be observed that "injunctions" and "receivers" are treated of in distinct and separate chapters of the code of civil procedure. On granting an injunction, an undertaking with sureties is, with a few exceptions, always required of the applicant: C. C. P., sec. 529; while in the case of the appointment of a receiver, such an undertaking is only required of the applicant when such appointment is asked for *ex parte:* Id., sec. 566. The condition required in the former undertaking is entirely different from the one required in the latter: See sections last cited.

If an order appointing a receiver is an injuction order, then the undertaking prescribed by the law upon making the latter order, must be required and given on making the order for a receiver, or the procedure will be irregular. According to our observation of the practice, such an undertaking is never required when a receiver is appointed. This shows unmistakably a general concurrence, both by bench and bar, that an order appointing a receiver is not an injunction.

Considering all these circumstances, we are of opinion that we should go astray from the law in holding that the order appealed from is an injunction, and appealable as such. We feel compelled, although strongly impressed with the argument of counsel for appellants, to hold that the order appointing the receiver in this case is not appealable, and that the appeal from it should be dismissed.

In holding the order here not appealable, we are in accord with the French Bank case and the Meadow Valley Mining Co. v. Dodds, above cited. In the latter case the court expressed the opinion that such an order would be reviewed on an appeal from the final judgment. This was clearly *obiter*, as no such question was before the court for decision. The contrary conclusion was reached by our predecessors in the French Bank case, where the question was presented for decision. The question does not arise here, and we decide nothing in regard to it. If an appeal should be allowed from an order appointing a receiver, the legislature will no doubt supply the proper legislation. In accordance with the foregoing, it is ordered that the appeal from the order appointing a receiver be and is hereby dismissed.

It is further ordered that the court below, on the return of this cause to it, do proceed to vacate the orders denying a new trial as prematurely made, and upon such evidence as has been already taken, and such other and further evidence as will be adduced by the parties, proceed to determine the issues as to the tax assessments and the tax levies mentioned in the 27th, 28th, 29th, 30th, 31st, and 32d findings, and as to the judgments of justices' courts mentioned in the 31st and 32d findings, and

find the facts as to the same in accordance with the directions of this opinion; that as to any issues of fact not already determined in this cause, that it proceed upon such evidence as has been already taken, and upon such other and further evidence as shall be adduced before it, to determine such issues and find the facts in regard to the same, taking care in all cases where there is a contest as to a fact to find the naked fact segregated from any question of law. That the findings of fact, except as to the issues above mentioned to be passed on, are correctly determined.

And it is further ordered that the judgment be set aside and reversed, and that the court below on the return of this cause to it do proceed and ascertain and determine the rights and interests of all parties to the suit in the land to be partitioned, and that after all issues of fact yet to be tried have been determined and interests of all parties in the land to be divided, ascertained, and determined, that the court will proceed upon the findings heretofore made and herein approved, and those hereafter to be made under the directions of this court, to render the first or interlocutory judgment herein; that it specify in said judgment the rights and interests of all parties to the action, that it then proceed to adjudge a partition of the land between the parties according to the rights and interests so ascertained and determined, with liberty to the court, if it should be of opinion that the conditions exist as prescribed by section 760 of the code of civil procedure, to order by such judgment a partition in accordance with such section among the original tenants. And if such partition is ordered under said section 760, that the said court specify in the judgment the parties claiming under the original co-tenants, whose possessions and improvements are to be embraced and included in the share allotted to the original tenant under whom they claim; and after making such partition among the original tenants, that it proceed to adjudge and make partition so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or allow them to remain tenants in common thereof as they may desire.

And it is further ordered, that in all further proceedings herein in the court below that regard be had to the rules laid down in the foregoing opinion.

MORRISON, C. J., and MYRICK, J., concurred.

SHARPSTEIN, J., concurring. It being the opinion of the majority of my brethren that the findings of the court below, with the exceptions specified by Mr. Justice Thornton, ought not to be disturbed, I concur in the foregoing judgment.

MCKEE, J., concurring. I concur in the judgment of reversal. The first thing necessary to be done by a court in which an action of partition has been commenced is to obtain jurisdiction of the persons of those who claim to be entitled to the land sought to be partitioned. Having obtained jurisdiction, by any of the modes prescribed by law for that purpose, the parties of whom jurisdiction has been obtained are required to answer as to the nature and extent of their respective interests; and if any of the answers made raise issues of adverse claims for any parts of the land, the court must then proceed to try and determine such issues. As in an action for the settlement of partnership affairs, the first inquiry

is whether the parties to the suit are partners, so in an action of partition the first inquiry must be, whether all the parties to the action are tenants in common; and that inquiry can only be reached after the final determination of the rights asserted by adverse claimants to any parts of the land; for the issues raised by the assertion of such rights are in the nature of issues of law, and must be decided before any steps can be taken in the proceeding for partition. It is only after their decision that the court can know who are entitled to partition.

And having disposed of those issues, and ascertained who are the tenants in common, between whom the land is to be partitioned, the next step in order is to ascertain and determine the respective rights and interests of each of the tenants in common in the mode prescribed by sections 763–765, and 799, code of civil procedure, and adjudge partition between them according to their respective rights.

The ascertainment and determination of these things in the order named are essential to the validity of an interlocutory decree in a partition proceeding: C. C. P., chap. 4; and such has been the procedure followed in such actions by courts of chancery from the time when the English court of chancery (by judicial construction of statutes 31 and 32, Henry VIII., which made joint tenants and tenants in common accountable to each other) assumed jurisdiction of actions of partition, upon the ground that under that statute tenants in common of real property held possession as trustees for each other. Before that statute partition at common law was not enforceable against either joint tenants or tenants in common. By the passage of that statute they were placed upon the same footing, as to partition, with coparceners, and partition enforced against them by a writ of partition; and concurrent jurisdiction of such actions was exercised by courts of law and courts of equity until the writ of partition was abolished by statutes 3 and 4, William IV.; and thereafter the only mode of enforcing partition was by bill in chancery.

The procedure in chancery in actions of partition has been substantially embodied in the provisions of chapter 4 of the code of civil procedure. In some circumstances it differs: in chancery, partition proceedings were suspended until the issues raised by adverse claimants to any portions of the land were tried and determined by actions of ejectment in the courts of law. The same legal effect follows the raising of such issues in a partition proceeding in this state, under the code; only, instead of sending the parties to a court of law to litigate the questions of title between them, the court in which the proceeding is pending has jurisdiction to try and determine all issues, whether at law or in equity, and must determine them as part of the proceeding itself: C. C. P., sec. 759; De Uprey v. De Uprey, 23 Cal. 352; Morenhaut v. Higuera, 32 Id. 294; Gates v. Salmon, 35 Id. 597; and until those issues are disposed of, and the tenants in common of the property are ascertained and enumerated, and their respective interests and rights have been ascertained and determined, the case can not be considered as tried. Section 760 of the code of civil procedure is not in conflict with these views. That section provides:

"Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-

tenants, and thereupon adjudge and cause a partition to be made as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire."

The thing to be observed is, that the authority of the court "to adjudge and cause a partition to be made between the original co-tenants, as if they were the parties and the only parties in interest, or to the action," is made to depend upon the fact that it will be made "impracticable or highly inconvenient to make a complete partition, in the first instance, between *all* the parties in interest." But who are *all* the parties in interest? That must be ascertained and determined before it can be decided whether a complete partition in the first instance between the parties is impracticable or inconvenient. But how shall it be ascertained and determined before the issues made by the answers of adverse claimants are finally disposed of? The ascertainment of those who are "the parties in interest," or tenants in common of the land, is therefore a fact which lies at the threshold of every action of partition, and at the foundation of every one's right to partition; and whether it would be impracticable or highly inconvenient to make partition between them, in the first instance, is also necessarily connected with the fact. Both are judicial questions, and the latter can not be determined if the court has not ascertained and does not know who are the parties entitled to partition.

That has not been done in this case. Issues of law between adverse claimants of parts of the ranch sought to be partitioned have never been heard and decided. It has never been found who are the tenants in common of the ranch, and what are their respective interests and rights therein, or whether it would be to their prejudice, or impracticable or highly inconvenient, to make partition between them.

It may be, after it shall have been ascertained who are the owners of the ranch, and what are their respective interests therein, that the court may find it neither impracticable nor inconvenient to make partition between them. If so, it would plainly be the duty of the court to decree partition in the first instance between them, without the necessity of double investigations, double interlocutory decrees, double commissioners, double reports, double confirmations of reports, and without the burden of costs and expenditures which such an elaborate judicial proceeding would entail.

I therefore think the interlocutory decree should be reversed, because the court has not heard and determined the issues raised in the proceedings by the answers of adverse claimants to portions of the ranch; because it has not been ascertained who are the tenants in common of the ranch; and because the respective rights and interests of the tenants in common have not been found. The court below should be directed to proceed to hear and decide these things upon the evidence already taken in the case and such other evidence as may be given by the parties.

Ross, J., dissenting. I dissent from the judgment, and am of the opinion that the interlocutory decree appealed from should be affirmed. Except with respect to the construction of section 760 of the code of civil procedure and to the findings in relation to taxes and judgments for taxes, I agree with the conclusions reached, and with much that is

said in support of them in the opinion of Mr. Justice Thornton. I do not agree to the conclusions reached in the opinion in regard to the findings just alluded to. Nor am I able to agree with my associates in their construction of section 760 of the code of civil procedure. By them it is held that under no circumstances can any interlocutory decree in partition be made until the interest of each and every owner is first ascertained and determined. In the absence of the above-cited statutory provision, that would undoubtedly be so. But the legislature has seen fit to declare that "whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition in the first instance, among all the parties in interest, the court *may* first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire:" C. C. P., sec. 760.

It seems to me that the view taken by my associates in effect nullifies this provision of the statute.

McKINSTRY, J., being disqualified, took no part in the decision.

PACIFIC BRIDGE CO. v. KIRKHAM.

Department One. Filed January 31, 1884.

THE ACT OF THE LEGISLATURE OF APRIL 1, 1876, AUTHORIZING THE CITY OF OAKLAND to construct a bridge across the estuary of San Antonio, between Eighth street and East Ninth street, is not unconstitutional.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This was an action to recover an assessment levied against the defendant, to pay for a public bridge constructed in the city of Oakland. The further facts appear in the opinion.

C. T. Botts, for the appellant.

Vrooman & Davis and *J. C. Martin*, for the respondent.

The COURT. The principal point argued by counsel for appellant is, that, under the principle established by the case of People v. Lynch, 51 Cal. 15, the act of the legislature entitled "An act to authorize the city of Oakland to construct a bridge across the estuary of San Antonio, between Eighth street and East Ninth street," approved April 1, 1876, is unconstitutional and void. To this we are unable to assent. Nor can we say that the evidence is insufficient to sustain the findings of the court below.

Judgment and order affirmed.

Gleason v. Hill et al.

Department Two. Filed February 2, 1884.

Order of the Lower Court Refusing to Set Aside a Sale under Execution of four ditches and the water rights connected therewith, which were sold in one parcel, will not be reversed when the evidence as to whether such ditches constituted a single system of water supply or not was conflicting.

Appeal from an order of the superior court for Placer county, denying a motion to set aside a sale under execution. The opinion states the facts.

Hale & Craig, for the appellants.

C. A. & C. Tuttle for the respondent.

Sharpstein, J. The code provides that "when the sale [under execution] is of real property, consisting of several known lots or parcels, they must be sold separately:" C. C. P., sec. 694. In this case the property, which consisted of four ditches and the water rights connected therewith, was sold in one parcel. The appellant contends that each ditch and the water right connected with it constituted a separate lot or parcel of real property, and should have been so sold. On the other side, it is insisted that the several ditches and the water rights connected with them constitute a system of water supply, all connected, as shown by a diagram accompanying the transcript, and that if divided or sold in parcels and owned by different parties the branch between two of them, which cost over three thousand dollars, would be useless, and that owing to the character of said ditches and their connections it would be difficult to bid on the same in parcels or fix a price upon the separate parcels. The court below, having refused to set aside the sale, must be presumed to have taken that view of the matter, and unless we could clearly see that the view so taken was erroneous, the order appealed from ought not to be disturbed. The question whether said ditches constituted one or several parcels of real property was one of fact, upon which the evidence was conflicting. The ditches are so connected that they might constitute but one parcel, and according to the allegations of the respondent such is the fact.

Order affirmed.

Myrick and Thornton, JJ., concurred.

Hog's Back Con. Min. Co. v. New Basil Con. G. Min. Co.

Department Two. Filed February 2, 1884.

Remittitur, when to Issue—Judgment by Default.—Where one of the departments of the supreme court, on the eighth of February, 1883, reversed a judgment by default, and on the twenty-third of February modified such judgment and remanded the cause, with leave to the appellant to file an answer within twenty days after the filing of the *remittitur* in the court below, such *remittitur* should not be issued until thirty days after the last date. If issued before such time has elapsed, a judgment by default for failure to answer within twenty days after its filing in the court below will be set aside. And the same effect will be given to a judgment by default for not answering within the time required after the *remittitur* has rightfully issued, where such default was occasioned by the inadvertence of a deputy clerk of the supreme court, in failing to enter of record the date on which such *remittitur* was issued, and in repeatedly informing the attorney for the party in default that no *remittitur* had issued.

APPEAL from an order of the superior court for Placer county, refusing a motion to vacate a default judgment. The opinion states the facts.

Daingerfield and *Lynch*, for the appellant.

Hale & Craig, for the respondent.

MYRICK, J. This is an appeal from a default judgment, and from an order denying defendant's motion to vacate and set aside the judgment and the default. This case was before this court on appeal from a former default and judgment, and this court, in department two, on the eighth of February, 1883, made an order reversing the judgment, on the ground of defective service of an amended complaint: 11 Pac. C. L. J. 60. The dates herein mentioned become material. On the thirteenth of February, the appellant moved the department that the judgment be modified so as to give time to file an answer in the court below. On the twenty-third of February, the department made an order reversing the judgment of the court below and remanding the cause, "with leave to appellant to file an answer to the complaint within twenty days after the filing of the *remittitur* in the court below." On the twelfth of March the clerk of this court, by a deputy, issued a *remittitur*, which consisted of a certified copy of the order of February 8th, to which was attached a copy of the order of February 23d; this *remittitur* was filed in the court below, March 14th; but, by inadvertence, the deputy clerk of this court failed to note in his register or elsewhere that it had been issued, and the fact of its issuance escaped his recollection until April 9th. Not until April 7th did the appellant learn of the issuance of this *remittitur;* he made frequent inquiries at the office of the clerk of this court whether a *remittitur* had been issued, and if not, when it would be, and was informed (through the inadvertence above mentioned) that none had been issued, and that none would be until the expiration of thirty days from February 23d, which would be March 25th. The appellant's attorney had requested the clerk of the court below to inform him at once whenever a *remittitur* should be filed. The clerk's office was at Auburn, Placer county, and the attorney for appellant resided in the city and county of San Francisco. On the twenty-seventh of March, a *remittitur*, based on the order of February 23d, was issued, and filed in the court below, March 31st. The attorney for the appellant, supposing he had twenty days from this day to answer, prepared an answer, which was verified April 3d, and on the ninth of April sent it by mail to the clerk, and a copy for service. On the tenth of April, the court, on motion of respondent, caused the default of the defendant to be entered, and rendered judgment thereon in favor of plaintiff. This action by the court was based on the proposition that the first *remittitur*, being filed in the court below March 14th, and the defendant having twenty days thereafter to answer, and not having answered within that time, was in default.

We think the motion to set aside the judgment and default should have been granted, for two reasons:

1. The first *remittitur* was improperly issued; a judgment by a department is not final until the expiration of thirty days from its rendition, unless the chief justice and two associate justices shall approve it: Const., art. 6, sec. 2. The judgment of February 8th remained unquestioned but five days, and then a motion to modify was made, which was taken under advisement, and not decided until February 23d, when a judgment as modified was entered. The *remittitur* should not have been issued for thirty

days thereafter, the order not having been a *nunc pro tunc* order. This *remittitur* would doubtless have been recalled on motion. The second *remittitur* was issued March 27th, and filed below March 31st. The defendant had twenty days thereafter to answer, and within that time its attorneys did all that they could to that end.

2. The defendant's attorney having made repeated inquiries of the clerk of this court if a *remittitur* had been issued, and having been repeatedly informed that none had, and that none would be until March 25th, and no entry of the issuance of the *remittitur* having been made (through the inadvertence of a deputy, as above stated), we think he might well have relied upon such information, coming as it did from an officer having custody of the records where an entry should regularly have been made. Admitting that the *remittitur* of March 12th was regular on its face, yet, when that of March 27th, showing the order of February 23d, was called to the attention of the court below, it should have permitted defendant to be heard and interpose its defense.

The order denying defendant's motion to vacate is reserved, and the cause is remanded, with instructions to set aside the judgment and default, and that the answer of defendant be filed at any time within thirty days from the filing of this opinion, and that further proceedings be thereupon had as provided by law.

THORNTON and SHARPSTEIN, JJ., concurred.

PEOPLE etc. *v.* BARNES ET AL.

Department Two. Filed February 2, 1884.

THE LARCENY OF A BULL, COW, STEER, OR CALF IS GRAND LARCENY, irrespective of the value of the animal stolen, under section 487 of the penal code.

A BAIL BOND, GIVEN FOR THE RELEASE OF A PERSON HELD FOR GRAND LARCENY, is not void on the ground that no offense was alleged, and that the names of the owners of the property were not stated, when the complaint on which the prisoner was held charges him with the larceny of "two head of cattle of the value of twenty-five dollars each," the same being "the property of Page Bros."

APPEAL from a judgment of the superior court for Solano county, convicting the defendant of grand larceny. The opinion states the facts.

George A. Lamont, for the appellant.

A. J. Buckles, for the respondents.

MYRICK, J. This is an action on a bail bond. One Wilson was arrested on a complaint charging him with grand larceny in stealing "two head of cattle of the value of twenty-five dollars each," "the cattle being the property of Page Bros." The magistrate held him to answer, and admitted him to bail in the sum of one thousand dollars. The bond in suit was given, and he was released from arrest. He failed to appear, and the bond having been declared forfeited, this action was brought. The plaintiffs had judgment. On the trial it was stipulated that Page Bros. was the firm name of a copartnership consisting of Charles Page, Frank Page, and George Page, and that the cattle alleged to have been taken were the property of the copartnership.

The defendants claim that the bond is void, in that no offense was alleged, the charge being that Wilson stole two cattle, without specifying what kind of cattle; that the complaint did not state the name of

the owners, "Page Bros." being no statement of the name; and that the magistrate had no jurisdiction to bind him over, but should have proceeded to try him for a misdemeanor, the value of the property not being more than fifty dollars.

The word "cattle" is defined by Worcester to be "a collective name for domestic quadrapeds, including the bovine tribe, also horses, asses, mules, sheep, goats, and swine; but especially applied to bulls, oxen, cows, and their young." By section 487, penal code, it is made grand larceny to steal "a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog." If the party charged stole a bull, cow, steer, or calf, it was grand larceny, irrespective of the value. The use of the word "cattle," which included at least all these, would not render the bail bond void. Neither would the use of the words "Page Bros," as designating the owners.

The judgment and order are affirmed.

THORNTON and SHARPSTEIN, JJ., concurred.

ESTATE OF LANG.

Department Two. Filed February 2, 1884.

IN DETERMINING THE SPECIAL ISSUES SUBMITTED TO THEM, IN PROCEEDINGS FOR THE PROBATE of a will, the jury should not take into consideration family difficulties, except as bearing on the testamentary capacity of the deceased.

COURTS WILL NOT PRESUME, BECAUSE A TESTATOR IS A DRUNKARD, that therefore he is of unsound mind.

THE INTENT WITH WHICH A TESTATOR TORE HIS SIGNATURE FROM HIS WILL, while of unsound mind, does not constitute an element of revocation.

DECLARATIONS OF A TESTATOR, WHILE OF UNSOUND MIND, TO THE EFFECT THAT HE was of unsound mind and under the undue influence of his wife, at the time of the execution of a prior will, does not prove, or tend to prove, the truth of the matters declared by him.

FINDING OF THE JURY, THAT A TESTATOR WAS INDUCED TO EXECUTE A CERTAIN WILL by the undue influence and threats of his wife, held unsupported by the evidence.

APPEAL from an order of the superior court for Solano county, refusing to admit to probate a certain will. The opinion states the facts.

Wendell and *Kelly*, for the appellant.

McKenna and *Coghlan*, for the respondent.

MYRICK, J. Three papers were offered for proof as to which, if either, was the last will of the deceased. The widow of deceased was the proponent, and certain of his children were contestants. The papers are dated, respectively, October 6, 1879, November 9, 1880, and December 3, 1880. The case arising on the contest was tried by a jury, and answers were returned to the special issues submitted. We do not see the basis upon which some of the answers were founded, unless the jury were of opinion that they were arbitrators of some matters of difference between the widow and children, instead of determining as to the condition of the deceased. The jury should have had nothing to do with the family feuds, except as bearing on the testamentary capacity of the deceased. Further than that, likes and dislikes are of no moment in this case.

The jury found that the deceased was of unsound mind at the date of the paper of October 6, 1879, and that he was induced to execute it by

the undue influence of his wife. There is no evidence appearing in the transcript to support either of these findings; the evidence is the reverse, and is uncontradicted. The deceased had been addicted, for years, to the use of intoxicating liquors; but, as we said in Estate of Johnson, 57 Cal. 529, "we can not say, as a rule of law, that because a man is a drunkard, therefore he is of unsound mind." The jury had not evidence before them of the effect his intemperate habits had upon his testamentary capacity in October, 1879.

The jury found that the deceased tore his signature from the paper of October 6, 1879, with intent to revoke it as a will, and that he was of unsound mind at the time of the tearing. There is evidence to sustain these findings; though, if he were of unsound mind, the intent was nothing but an insane intent, and would not constitute an element of revocation.

The contestants claim that by declarations made by deceased during his last illness he was of unsound mind and under the undue influence of his wife in the execution of the paper of October 6, 1879. Conceding—which we do not—that such declarations were competent evidence, it is sufficient to say that it was part of the contestant's case to establish his unsoundness of mind at the time of his last illness; such unsoundness was established and was found by the jury; therefore, such declarations would not prove, or tend prove, the truth of the matters declared by him.

The jury found that the deceased was induced to execute the paper of November 9, 1880, by the undue influence and threats of his wife. How far this was sustained by evidence is apparent from the testimony of the witnesses present. "Mrs. Lang was in the room at the time. He dictated the will; she had a good deal to say about it; he reprimanded her for her dictation; the will was drawn as he dictated it." Again: "She opposed the making of it and provisions of it. She objected particularly to the brother having an interest in it. * * * He would damn her, and tell her to dry up. He threatened to put her out of the room, and persisted in making the will in spite of everything she said." We see here no evidence that the will was procured to be executed by the undue influence or threats of the wife.

The jury found that at the time of the execution of the paper of December 3, 1880, the deceased was of unsound mind. There is evidence to support this finding. The jury also found that the deceased was induced to execute this paper by the undue influence *or* threats (which is not stated) of the wife; but as he was then of unsound mind, threats or undue influence cut no figure for the purposes of this appeal.

The judgment and order are reversed, and the cause is remanded for a new trial as to issues 1, 2, and 6. As to the other issues, the verdict will stand, subject to what is above said regarding the answer to issue 4.

THORNTON and SHARPSTEIN, JJ., concurred.

ESTATE OF JAMES.

Department Two. Filed February 2, 1884.

A LEGACY WHICH THE TESTATOR DIRECTS TO BE PAID OUT OF THE FIRST MONEYS realized from his estate, after the payment of debts and funeral expenses, does not become due and payable, and consequently does not bear interest, until after such debts and funeral expenses are paid.

APPEAL from a judgment of the superior court for Solano county. The opinion states the facts.

Wendell and *Coghlan*, for the appellants.

George A. Lamont, for the respondent.

The COURT. The will of Orpha James contains this provision: "I give and bequeath to my eldest son, John Harvey James, five thousand dollars ($5,000), to be paid to him by my executors hereinafter named, out of the first moneys realized from my estate, when that amount shall come into their hands after the payment of all my just debts and funeral expenses; and in case that amount is not realized from my estate, then I give and bequeath the whole amount realized to him; and in the event of the death of my said son, John Harvey James, before I die, then I leave the portion bequeathed to him in this testament and will to his lawful children."

The court below held that this legacy became due and deliverable at the expiration of one year after the testatrix's decease, and consequently bore interest from that date. We think the testatrix's express intention was that it should not become due and payable until after her debts and funeral expenses had been paid. As we construe the language of the will, it was to be paid out of the first moneys realized from the estate after the payment of said debts and funeral expenses. This being the only question presented on this appeal, it follows that so much of the decree as awards nine hundred and sixty-two dollars and fifty cents interest to respondent on said legacy of five thousand dollars must be reversed; and it is so ordered.

URTON v. WILSON ET AL.

Department Two. Filed February 2, 1884.

ONE NOT AN ACTUAL SETTLER, WHO FILES HIS APPLICATION TO PURCHASE LANDS suitable for cultivation from the state, prior to the adoption of the present constitution, but who makes no payment thereon, acquires no right to purchase such land after the adoption of such constitution.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the defendants upon an agreed state of facts which appear in the opinion.

Stetson & Houghton and *Garber, Thornton & Bishop*, for the appellant.

Graves & Chapman, J. H. McKune, and *J. M. Lesser, as amicus curiæ*, for the respondents.

MYRICK, J. A controversy arose before the surveyor general of the state as to the conflicting claims of plaintiff and defendant regarding the purchase from the state of certain lands, which controversy was by the surveyor general referred to the court below for determination.

The land was surveyed by the United States and listed to the state, and thereafter, July 14, 1870, Wilson made application to purchase. April 25, 1872, his application was approved, and June 4, 1872, he made the first payment of the purchase money, and received the register's certificate. On the twentieth of September, 1878, the plaintiff filed his application to purchase, and demanded that the controversy be sent to the proper court for adjudication. The plaintiff was not in possession, and has paid nothing. The plaintiff claims that defendant's application was invalid, on the ground that there was no law in force at the date of that application for the sale of land in lieu of the sixteenth and thirty-sixth sections lost to the state. The land is the west half of a section 28.

For the purposes of the controversy between the plaintiff and defendant, it is necessary only to say that plaintiff has no right to purchase the land. Section 3, article 17 of the constitution of this state declares: "Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law." The plaintiff was not an actual settler. It is true, he made his application before the constitution was adopted, but he thereby acquired no rights which the state could not annul; he had paid nothing. This question was directly considered and passed on in Johnson v. Squires, 55 Cal. 103. So long as the statute remained in force, the plaintiff's application might have been entitled to be considered, if defendant's application was void; but when the statute was modified by the constitution, he was obliged to bring himself within the constitutional provision. We note, as referring, in principle, to the plaintiff's case, what is said by the court (by Sawyer, C. J.) in Hutton v. Frisbie, 37 Cal. 490–498, regarding pre-emption laws and the effect of their repeal.

In one of the briefs filed on behalf of appellant, the attorneys who prepared the same were unfortunate in not having carefully considered some of the cases cited, or in their construction of the decisions. In speaking of the decision in Johnson v. Squires, 55 Cal. 103, counsel said: "All that the court said about the effect of the new constitution upon the judgment was *obiter dicta*. There were no facts before the court upon which the constitutional question could be decided." Let us see what the opinion of the court says. After holding that the defendant's application was not good, the court *in terms*, and upon the ground that plaintiff was not in possession and had paid nothing, applied to his application the provision of the constitution, and held, that under it the land could be granted only to an actual settler; and thereupon, holding that defendant's application was invalid, and that plaintiff could not, under the constitution, purchase the land, reversed the judgment which had been rendered in favor of defendant, and declined to enter judgment for plaintiff (although his application was correct in form), and sent the case back for the parties to make such applications to amend their pleadings as they should be advised. How could counsel say "there were no facts before the court upon which the constitutional question could be decided," when the right of plaintiff to judgment turned upon that very question?

The counsel say: "In Medley v. Robertson, 55 Cal. 396, this court held that an application made prior to the adoption of the new constitution was not affected by its provisions." Referring to the opinion and to the transcript and briefs, we find that the subject was not alluded to.

The only questions decided in that case were as to when land should be deemed surveyed, and when the title to a particular sixteenth and thirty-sixth section vested in the state.

In citing Pollard v. Putnam, 54 Cal. 631, counsel say: "Plaintiff, an adverse applicant, had gone into possession, and article 17 of the new constitution was invoked in his favor and cited in the briefs; but the court decided in favor of defendant, virtually holding that the new constitution had nothing to do with the case." In the briefs filed before the decision in that case in department, the constitutional provision was not referred to; neither was it mentioned by the court. After the decision in department, a substitution of attorneys took place, and the incoming attorney filing a petition for a hearing in bank raised the question. A hearing in bank was denied, presumably for the reason that the court would not entertain questions raised in petitions therefor for the first time, on the ground that counsel should at first present their cases in this court in full and not piecemeal. In denying the hearing in bank, the court modified the judgment in department, by sending the cause back for a new trial—it may be for the very purpose of permitting the constitutional question to be raised in the court below.

Citing the case of Langenour v. Shanklin, 57 Cal. 76, counsel say: "In a similar case, this court, in bank, said: 'Section 3 of article 17 of the present constitution has no application, for the reason that the rights of the petitioner attached to the land long prior to its adoption.'" Why did this court in Langenour v. Shanklin say the present constitution had no application? Because, as counsel will observe by reference to the facts of the case, the state had sold to Langenour two land warrants, and Langenour had paid six hundred and fifty dollars therefor into the state treasury, and when he made his application to purchase the land in controversy he *surrendered these warrants to the state*, thus paying for the land the price at which, and in the mode through which, the state had agreed to sell it.

We fail to see a single element in either of these cases to sustain the proposition on behalf of which they were cited.

As the state is not a party to this proceeding, it is not necessary to express any opinion as to the validity of the defendant's certificate; it is sufficient to say that the plaintiff has no right, and that the controversy, as between the two, should be decided against him.

The judgment of the court below, so far as it is against the plaintiff, and in favor of defendant for costs, is affirmed. In other respects, we express no opinion.

SHARPSTEIN and THORNTON, JJ., concurred.

ALLENBERG ET AL. *v.* ZELLERBACH.

Department Two. Filed February 4, 1884.

FAILURE TO FIND UPON AN IMMATERIAL ISSUE IS NOT ERROR.

DECREE DIRECTING SALE OF STOCK SUBJECT TO INJUNCTION.—In an action to foreclose a lien upon certain mining property and certain stock, the sale of which is restrained by an existing injunction, there is no error in a decree which provides for the sale of the mining property, and if a deficiency then exists, that the plaintiff may, upon notice to the defendant, apply to the court for an order directing the sale of the stock, subject to the injunction, and the application of the proceeds of said sale to the payment of said deficiency, and that until such order no process issue for the sale of such stock.

APPEAL from a judgment of the superior court for Sierra county, entered in favor of the plaintiffs. This was an action to foreclose a lien upon certain mining property and certain stock given to secure an indebtedness. The court found that in another action between the same parties the sale of the stock had been restrained by injunction, and that such injunction was still pending. In its decree the court ordered the sale of the mining property, and that the proceeds thereof should be applied to the payment of the debt, and then provided that if any deficiency remained after such sale, the plaintiffs might apply, upon notice to the defendant, for an order directing the sale of the stock subject to the injunction, and that the proceeds thereof should be applied to the payment of such deficiency, and that until such order no process issue for the sale of such stock. The further facts appear in the opinion.

R. H. Taylor, *Crittenden Thornton*, and *F. H. Merzbach*, for the appellant.

S. B. Davidson and *Jarboe & Harrison*, for the respondent.

THE COURT. It is urged here that there is no finding as to the manner in which plaintiff Allenberg got possession of the thirty thousand shares of Altoona stock. We have examined the findings, and find all the issues in relation to this stock found upon. There is no issue as to the manner in which Allenberg got possession of the stock. There are averments in the answer that on the fifth day of May, 1879, defendant filed his complaint in another court in an action against Allenberg and the Goldsteins, in which complaint certain allegations were made in regard to the manner in which Allenberg got possession of the stock referred to. The issue raised by these averments, so far as material, was found upon.

We see no error in the decree. The court recognizes in the decree the pendency of the injunction order restraining the sale of the stocks referred to above, and forbears to make in the decree any order for their sale. It may never become necessary to make any order for their sale, as the other property ordered by the decree to be sold may bring enough to pay the indebtedness secured. If on the sale of the property last mentioned there should be a deficiency, the court directs, in its findings and decree, that the plaintiff may, upon notice to the defendant, apply to the court for a writ or order directing the sale of the stock. When such application is made, the defendant may set up the injunction order restraining the sale, if it is then in existence, and we can not anticipate that the court will then make an order directing the sale of the stock, unless it shall appear that the injunction order has been dissolved.

The judgment is affirmed.

THORNTON, SHARPSTEIN, and MYRICK, JJ., concurred.

BAKER ET AL. v. EVERHART ET ALS.

Department Two. Filed February 4, 1884.

SUPERIOR COURT HAS NO JURISDICTION TO MAKE A DECREE DISCHARGING AN ALLEGED INSOLVENT, where the schedule filed by him was not sworn to before the judge having jurisdiction, as required by section 4 of the insolvency act of 1852, but was sworn to before a notary public.

APPEAL from a judgment of the superior court for Placer county, entered in favor of the defendants. This was an action to recover of the defendants the unpaid balance of a judgment against them. The defendants set up in their answer, and the court so found, that such indebtedness had been abrogated by virtue of certain proceedings in insolvency, and the final decree of the superior court discharging them. The further facts appear in the opinion.

J. E. Prewett and *Freeman & Bates*, for the appellants.

Jo Hamilton, for the respondents.

THE COURT. The superior court did not have jurisdiction to make a decree discharging the alleged insolvents; the schedule was sworn to before a notary public, whereas section 4 of the act of 1852 required it to be sworn to "before the judge having jurisdiction," etc. The judgment is reversed and the cause is remanded, with instructions to render judgment for plaintiff on the findings.

TYLER v. CONNOLLY, Sheriff, etc.

In Bank. Filed February 5, 1884.

NO APPEAL LIES TO THE SUPREME COURT FROM A JUDGMENT OF THE SUPERIOR COURT, CONVICTING A PARTY OF CONTEMPT, and imposing on him a fine exceeding three hundred dollars.

NO APPEAL LIES TO THE SUPREME COURT IN CRIMINAL CASES, unless the same are prosecuted by indictment or information.

APPLICATION for a writ of prohibition. The facts constituting the contempt referred to in the opinion are stated in In re Tyler, 1 West Coast Rep. 337. The further facts appear in the opinion.

George W. Tyler, in propria persona, for the petitioner.

Sullivan and *Darwin & Murphy, contra.*

THORNTON, J. This is an application made to this court to prohibit the sheriff from proceeding to execute the judgment rendered against George W. Tyler in a proceeding against him for a contempt. The prohibition or stay is asked for on the ground that Tyler has taken an appeal from the judgment of contempt above mentioned, has perfected his appeal by giving the undertaking required by law, and that such undertaking operates as a stay; that, nevertheless, steps have been taken to execute the judgment. If the judgment of contempt is appealable, the moving party is entitled to a stay.

The appellate jurisdiction of this court is conferred on it and is defined by the constitution. It has such jurisdiction "in all cases in equity, except such as arise in justices' courts; also in all cases which involve the

title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; and also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone:" Const., art. 6, sec. 4.

It is argued that because the judgment against Tyler exceeds three hundred dollars, that the appeal is given by the constitution. But the constitution does not give an appeal in all cases where the judgment exceeds three hundred dollars; it gives it only when the demand, exclusive of interest, exceeds that sum. There was no demand for any sum in the proceeding against Tyler. The demand made appears in the pleadings, either in the complaint or answer: Dashiell v. Slingerland, 60 Cal. 653. We know of no demand for a sum of money in a proceeding for a contempt. The law does not require or authorize such demand to be made. It would be most unusual to make it, and if made, it would be entirely unnecessary and without avail. The contention on the ground stated can not, in our opinion, be maintained.

It has been held by this court that a proceeding for contempt is a criminal case: Ex parte Crittenden, 62 Cal. 534. But as it is not prosecuted by indictment or information, its character as a criminal case furnishes no ground for an appeal. The constitution expressly limits appeals to criminal cases prosecuted in the mode above stated. We find no warrant in the constitution for an appeal in a proceeding for contempt.

Conceding that the legislature may confer appellate jurisdiction on this court in cases not provided for in the constitution, we have been referred to no statute giving the right to appeal from a judgment in a contempt case. On the contrary, in our judgment, such right is withheld by section 1222, code of civil procedure. That section is as follows: "The judgment and orders of the court or judge made in cases of contempt are final and conclusive."

In appeal of S. O. Houghton, 42 Cal. 35, these words, "final and conclusive," in a statute in regard to a judgment of the county court, were held to deny an appeal from such judgment. It may be added here that it was conceded on the argument that an appeal was not given by statute.

The conclusion here reached is sustained by the reasoning in Huerstal v. Muir, 62 Cal. 479. In People v. O'Neill, 47 Cal. 109, we think the court mistook the law in holding that the judgment in that case (which was one for contempt) was appealable. No authority is referred to in the opinion to sustain such a rule, nor is any law constitutional or statutory granting a right of appeal referred to or cited. We think a sounder conclusion on this subject was reached by the learned justice (Crockett) who wrote the opinion in the case above cited, and another justice (Rhodes), in Aram v. Shallenberger, 42 Cal. 275, 279. What is said in Ex parte Hollis, 59 Cal. 408, as to an appeal is mere *dictum*.

We are of opinion that O'Neill's case does not properly declare the law on the point under discussion, and should be overruled: See Larrabee v. Selby, 52 Cal. 508. The cases cited from New York, Sudlow v. Knox, 7 Abb. Pr. 411, and Erie R. R. Co. v. Ramsey, 45 N. Y. 637, throw no light on the subject discussed as the decisions in those

cases were made on statutes entirely different in their provisions from the provisions of the constitution and statute governing the matter in this state.

The motion must be denied, and it is so ordered.

McKINSTRY, MYRICK, SHARPSTEIN, and ROSS, JJ., concurred.

MORRISON, C. J., concurring. By the order of the superior court of San Francisco the petitioner was adjudged guilty of a contempt of court, and was fined five hundred dollars. From this order or judgment petitioner has taken steps to appeal the matter to this court, and to that end has filed the notice and statement appropriate under proceedings on appeal. It is claimed that the right of appeal does not exist, and notwithstanding petitioner's attempted appeal, steps are being prosecuted to collect the fine imposed in the matter of the adjudged contempt. Petitioner now asks this court for an order staying all proceedings under the order of the court below. The right to the order asked for depends upon the question whether an appeal will lie in this case.

Section 1222 of the code of civil procedure declares that "the judgment and orders of the court or judge in cases of contempt are final and conclusive;" and to give these words of the statute effect, it must be held that no appeal can be taken in such cases under the code. It is claimed, however, on behalf the petitioner, that the right of appeal is a constitutional right—not to be taken away by the legislature. If the premises are correct, the conclusion is equally so. But let us see if the right of appeal exists under the constitution.

The appellate jurisdiction of the supreme court is fixed by section 4, article 6, of the constitution, which reads: "The supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; and *also in all criminal cases prosecuted by indictment or information* in a court of record on questions of law alone."

In the case of New Orleans v. Steamship Company, 20 Wall. 392, the supreme court of the United States held that "contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion. In Crosby's Case, Mr. Justice Blackstone said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively, and without interfering, to each respective court.'" In the case of Ex parte Crittenden, 62 Cal. 534, the above case was followed by the present supreme court, and I see no reason to depart from the principle there stated.

It follows, then, that if the proceeding for contempt is in its nature a criminal proceeding, the right of appeal under the constitution must be referred to that clause which authorizes an appeal in criminal cases. The language there found is the following: An appeal will lie "also in

all criminal cases prosecuted by indictment or information in a court of record on questions of law alone." This is not such a case, and it can hardly be seriously contended that it comes within the language or meaning of the provision of the constitution above quoted. In denying the right of appeal under the circumstances of this case, we in no sense endanger the liberty of the citizen. If the power of punishing for contempt is exercised by a tyrannical court in an arbitrary or unjustifiable manner, there are other modes of relief provided by law. Such a case may be reached, generally, by *certiorari* or *habeas corpus*. The power is given for wise and salutary purposes, and the exercise of it by an upright and honest judge will but seldom occur in cases which do not demand a resort to this summary mode of punishment. To hold that the party in contempt may arrest the proceeding by appeal would be to defeat in a measure the object and end of the law in conferring the power.

I concur in the judgment of the court, that there is no right of appeal.

Ex parte Moynier.

Department Two. Filed February 8, 1884.

Laundry Ordinance—Validity of.—The provisions of the ordinance of the city and county of San Francisco, approved June 25, 1883, declaring it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are cleansed for hire, within certain named limits, without having first obtained a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of fire wardens that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property; and providing that no person or persons owning or employed in such laundries shall wash or iron clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M., nor upon any portion of that day known as Sunday, are not in conflict with the fourteenth amendment of the constitution of the United States, nor with section 1 of article 1 of the constitution of California, guaranteeing to all men the inalienable right of acquiring, possessing, and protecting property, and pursuing and obtaining happiness; nor with section 11 of the same article, declaring that all laws of a general nature shall have a uniform operation; nor with section 21 of the same article, declaring that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

Application for a writ of *habeas corpus*. The opinion states the facts.

Wilson & Perry, for the petition.

Alfred Clarke, for the respondent.

Myrick, J. The prisoner was arrested and is in custody for a violation of section 4 of order No. 1719, of the board of supervisors of the city and county of San Francisco. The ordinance was approved June 25, 1883. Section 4 declares, that "no person or persons owning or employed in the public laundries or public wash-houses, provided for in section 1 of this order, shall wash or iron clothes between the hours of *ten* o'clock P. M. and six o'clock A. M., nor upon any portion of that day known as Sunday." Section 1 declares it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are cleansed for hire, within certain named limits, without first obtaining a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate

from the board of fire wardens that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property. The petitioner claims that the order is void, in that it conflicts with the fourteenth amendment of the constitution of the United States, and with sections 1, 11, and 21 of article 1 of the constitution of this state.

We do not see that the enforcement of this order would abridge the privileges or immunities of citizens of the United States, or that it would deprive any person of liberty or property without due process of law, or deny to any person in this state the equal protection of the laws. Section 1 of article 1 of the constitution of this state declares that all men have the inalienable right of acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness; section 11 of the same article declares that all laws of a general nature shall have a uniform operation; and section 21 declares that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

We do not deem it necessary to go into an elaborate and extended consideration of the propositions advanced, nor to do more than quote another section of the state constitution, and show its application to the subject in hand. Section 11 of article 11 provides, that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

That the regulations of the order are, as to portions (perhaps all), police regulations, and, as to some, sanitary, we have no doubt. Those portions of the order relating to safety from fire, are police regulations; that relating to drainage, may also be classed as police, and is sanitary; that relating to drainage is also sanitary. It is true, all persons may acquire, possess, and protect property, and may pursue and obtain safety and happiness; but these rights must be exercised with reference to the rights of others; and whenever it is necessary for the health or protection of members of the community that regulations should exist and be enforced, the power is given by the constitution to local authorities to make and enforce such regulations. We can not say that proper drainage in carrying on the laundry business is not necessary to health; neither can we say that property is secure from fire if proper precautions are not taken.

The order is not discriminating and special, in any such sense as to make it repugnant to the constitution. Its terms apply to all persons establishing, maintaining, or carrying on the business of a public laundry or public wash-house where articles are cleansed for hire within certain limits. It is no more special or discriminating than the prohibition of the storage of powder or the slaughtering of animals, both of which may be necessary to be done, but for the regulation of which the power is unquestioned. We can not say the limits prescribed in the order are not proper limits for public health and safety. As to the provisions of section 4 of the order, which the petitioner was charged with having violated, we can not say it is not necessary for the proper police and sanitary condition of the city that the business referred to should cease during the hours from ten o'clock P. M. to six o'clock A. M., and during the day known as Sunday.

The petitioner is remanded.

MORRISON, C. J., and THORNTON, J., concurred.

SANDERSON *v.* MCINTOSH ET AL.

Department Two. Filed February, 8, 1884.

THE SUPERIOR COURT HAS JURISDICTION OF AN EQUITABLE ACTION BROUGHT TO COMPEL AN ASSIGNEE IN INSOLVENCY to perform his trust, and account for the property assigned. The remedy afforded creditors in such cases, under the law regulating insolvency proceedings, is not exclusive.

APPEAL from a judgment of the superior court for Butte county, entered in favor of the defendants. The opinion states the facts.

Fuller and *Howser*, for the appellant.

Park Henshaw, for the respondents.

MYRICK, J. This action was brought to compel an assignee in insolvency to perform his trust, and account for the property assigned. The court below gave judgment of nonsuit, on the ground that the plaintiff had mistaken his remedy. We are of opinion that the remedy afforded creditors under the law regulating insolvency proceedings is not exclusive, but that courts of equity have jurisdiction.

Judgment reversed and cause remanded for a new trial.

THORNTON and SHARPSTEIN, JJ., concurred.

WEST COAST REPORTER.

No. 8. FEBRUARY 21, 1884. VOL. I. No. 8.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

AGAIN, since no exclusive *property* is or can be acquired in the water while still remaining or flowing in its natural condition, distinct and separate from the property in the land over which it runs,[1] it follows, as a second indispensable requisite of the appropriation under consideration, that there must be an actual diversion of the water from its natural channel or bed, by means of a ditch, canal, reservoir, or other structure.[2] For this purpose, however, a dry ravine or gulch may be used as a part of a ditch, with the same effect as though the structure were wholly artificial;[3] and a "flume" is in all legal respects the same as a ditch or canal.[4] Not only may the appropriator use another natural ravine as a part of his ditch for conducting the water which has been diverted; he may even use a lower portion of the same natural channel from which the water was taken, for a like purpose. If, after diverting and using the water, the appropriator returns it into its original natural channel, without any intent to "recapture" it, then, as will be shown hereafter, he abandons it. But after duly diverting the water at some point, he may turn it back into the natural channel of the stream at a lower point, with the design of using a certain portion of such channel as a ditch, and of "recapturing" the water, and may then divert the same quantity originally appropriated at a point still lower down the stream.[5]

The fundamental doctrine is well settled that, in order to constitute a valid appropriation of the kind under consideration, two distinct elements are absolutely essential—the intent to appropriate water from a particular stream, and physical acts by which this intent is carried into act, without abandonment, until the appropriation is completed.

[1] [illegible]nal & M. Co. v. Hoyt, 57 Cal. 44; [illegible]aird, 15 Id. 161.
[2] [illegible] Bowker, 8 Nev. 190.
[3] [illegible] Stone, 7 Cal. 46.
[4] Ellison v. Jackson, 12 Cal. 542.
[5] Richardson v. Kier, 37 Cal. 263; Butte County etc. Co. v. Vaughn, 11 Id. 143.

Either without the other is insufficient. How this intent may be signified, and what physical acts may be sufficient to carry it into operation, must depend somewhat upon the natural condition and situation of the locality, and other circumstances of the case. "In appropriating unclaimed water on the public land, only such acts are necessary, and such evidence of the appropriation required, as the nature of the case and the face of the country will admit, and are under the circumstances and at the time practicable. For example, surveys, notices, blazing of trees, followed by actual work and labor, without abandonment, will in every case, where the work is completed, give title to the water against subsequent claimants."[6] It follows, therefore, that a notice alone of an intent to divert or to use the water of a specified stream will not of itself constitute an appropriation thereof;[7] nor, on the other hand, will the mere act of commencing or digging a ditch, even with the intent to appropriate, be sufficient of itself to give an exclusive right to the water of a stream, without some notice or publication of the intent.[8] "Public land is appropriated by one character of act, water by another. The digging of a ditch on public land is not an appropriation of land sufficient for a mill site, nor is the mere appropriation of a mill site an appropriation of water for purposes of milling."[9] While a notice of the intent to appropriate is essential, the mode of giving it depends upon the circumstances of the case, the nature and situation of the stream and of the adjacent country. The usual mode seems to be by posting written or printed notices on or near the margin of the stream or lake at the point where the diversion is to be made, and perhaps at other points along the projected line of the canal.[10] No particular form of notice is prescribed. All that is required is, that its terms shall be sufficient to put a reasonably prudent man upon inquiry;[11] and to this end its language must be liberally construed.[12] If an appropriator, after duly posting a notice, and while prosecuting his work with diligence, posts a second notice of appropriation of the same water, he does not thereby abandon his claim under the former notice.[13] After a notice of the intention to

[6] Kimball v. Gearhart, 12 Cal. 27; Osgood v. El Dorado etc. Co., 56 Id. 571; Thompson v. Lee, 8 Id. 275; Kelly v. Natoma W. Co., 6 Id. 107; Weaver v. Eureka Lake Co., 15 Id. 271; Davis v. Gale, 32 Id. 26; Robinson v. Imperial Silver M. Co., 5 Nev. 44; Columbia M. Co. v. Holtie, 1 Mont. 296.

[7] Thompson v. Lee, 8 Cal. 275; Robinson v. Imperial S. M. Co., 5 Nev. 44; Columbia M. Co. v. Holtie, 1 Mont. 296.

[8] Kimball v. Gearhart, 12 Cal. 27.

[9] Robinson v. Imperial S. M. Co., 4 Nev. 44.

[10] See Osgood v. El Dorado etc. Co., 56 Cal. 571.

[11] Kimball v. Gearhart, 12 Cal

[12] Osgood v. El Dorado etc. (Cal. 571, 579.

[13] Osgood v. El Dorado etc Cal. 571, 579.

appropriate the water is given, the works by which the appropriation is to be effected must be actually commenced, and must then be prosecuted with reasonable diligence unto completion, in order to perfect the exclusive right to the use of the water which is obtained through a valid appropriation.[14] Whether the work has been begun and prosecuted with due and reasonable diligence, is a question of fact for the jury, and their verdict will, in general, be conclusive.[15] The due and reasonable diligence in constructing the works will depend mainly upon the physical circumstances of the locality, upon the nature and condition of the region through which the ditch runs, its accessibility, the length of the season in which work is practicable, the difficulty of procuring adequate supply of labor, the extent and magnitude of the works themselves, and the like, and not upon the personal circumstances—especially the pecuniary circumstances—of the parties themselves.[16] In Ophir Silver M. Co. v. Carpenter, it was held that "diligence in the prosecution of work, such as the appropriation of running water by constructing a ditch for its use, does not require unusual or extraordinary efforts, but only such constancy and steadiness of purpose or of labor as is usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs—such assiduity in its prosecution as will manifest a *bona fide* intention to complete it within a reasonable time. In the consideration whether reasonable diligence has been exercised in the construction of a ditch necessary to the appropriation of water, requiring the outlay of much capital and the labor of many men, the illness of the appropriator and his want of pecuniary means to prosecute the work, being matters *incident to the person and not to the enterprise*, are not such circumstances as will excuse great delay in the work." In Kimball v. Gearhart, the court held: "On the question of due and reasonable diligence in constructing the works, the jury may take into consideration the circumstances surrounding the parties at the date of the appropriation, *such as* the nature and climate of the country, and the difficulty of procuring labor and materials. * * * When parties begin the construction of a ditch, who have not at the time the pecuniary means to complete it in a reasonable time, and they project the work and claim the water with full knowledge of their own lack of means, they can not rely on

[14] Osgood v. El Dorado etc. Co., 56 Cal. 571, 581; Parke v. Kilham, 8 Id. 77; Kimball v. Gearhart, 12 Id. 37; Weaver v. Eureka Lake Co., 15 Id. 271; Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Woolman v. Gawinger, 1 Mont. 535.

[15] Osgood v. El Dorado etc. Co., 56 Cal. 571, 581; Weaver v. Eureka Lake Co., 15 Id. 271.

[16] Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Weaver v. Eureka Lake Co., 15 Cal. 271; Parke v. Kilham, 8 Id. 77; Kimball v. Gearhart, 12 Id. 27; Osgood v. El Dorado etc. Co., 56 Id. 571.

such want of means as an excuse for delay or for not prosecuting the work to completion with due diligence." In Parke v. Kilham, it was also held that "when A. stands by and sees B. constructing a ditch at great expense, for the purpose of appropriating certain water to his own use, and does not inform B. of his own prior claim to such water, A. and his vendees are thereby estopped from afterwards setting up or asserting such claim, even though it was originally the prior one."

The appropriation does not become perfect and final until the works are completed, so that the actual use of the water has begun—or at least, so that its actual use can be commenced. Although, as will be shown hereafter, if the works are constructed with due diligence, the appropriation relates back to the date of the initial step; during the process of their construction, in the interval between their commencement and their completion, the appropriator acquires no vested, exclusive right to the water of the stream, and can maintain no action against other persons for their use or diversion of the water. Such right of action only arises when the works and the appropriation are completed; although on the question of priority between the appropriator and other claimants, his appropriation then relates back to the time of his giving notice. In Nevada County etc. Co. v. Kidd,[17] these conclusions were fully established: "A court of equity will not restrain the diversion of water until the plaintiff is in a condition to use it. While the plaintiff's dam and ditch are in the process of construction, but are not yet ready to actually appropriate or use the water, the use of the water by other persons causes no injury to the plaintiff, and gives to him no cause of action for relief, either equitable or legal. When a party claiming water is constructing a dam and ditch, until he is in a position to use the water his right to it does not exist in such a sense as to enable him to maintain an action against another person, either to recover the water itself, or to recover damages for its diversion." The scope and effect of this decision should not be misapprehended. The case arose from an attempted or inchoate appropriation of the water of a stream on the public domain—an appropriation of the kind sanctioned by congress and now under consideration. Although the language in some portions of the opinion is quite general, yet it should, of course, be confined to and limited by the facts of the case before the court. The rule adopted by the court is plainly confined to appropriators of water on the public lands of the United States, under the customs and laws of the state as recognized by the congressional legislation; and it has no reference what-

[17] 37 Cal. 282.

ever to private owners who have obtained titles to lands on the banks of streams, nor to the "riparian rights" of such proprietors. The court clearly had no intention of holding that owners of lands bordering on a stream can maintain no action against other persons for an infringement of their "riparian rights," unless they have made an actual appropriation or use of the water by means of a completed dam, ditch, or other structure. Such a ruling would be in direct conflict with numerous *dicta* and decisions by the same court.

2. *The Time from Which the Rights under an Appropriation Become Vested and Date.*—It has been shown that an appropriation does not become final and perfect until the works, by which the water is diverted so as to be actually used, are completed. When, however, the right has thus been perfected, the doctrine of *relation* may operate and determine the question of priority between the appropriator and other opposing claimants to the waters of the same stream. If a notice of the intention to appropriate was properly given, and the work of constructing the dam, ditch, reservoir, or other necessary instrumentalities of the diversion was begun within a reasonable time, and was prosecuted with due and reasonable diligence until their completion, then the exclusive right thus acquired by the perfected appropriation will relate back at least to the time of commencing the work, even if not to the time of giving the notice. If, however, the work was not prosecuted to completion with due and reasonable diligence—in other words, if there was unreasonable delay in its prosecution—the right of appropriation accrues and dates only from the time when the works were finally completed, and the diversion of the water actually began.[18] Both branches of the rule are concisely and clearly stated in the case of Ophir Silver M. Co. v. Carpenter: "In the appropriation of running water for the purpose of acquiring a right thereto, if any work is necessary to be done to complete the appropriation, the law gives a reasonable time within which to do such work; and protects the rights during such time by relation to the time when *the first*

[18] Osgood v. El Dorado etc. Co., 56 Cal. 571; Maeris v. Bicknell, 7 Id. 261; Parke v. Kilham, 8 Id. 77; Kimball v. Gearhart, 12 Id. 27; Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Woolman v. Gawinger, 1 Mont. 535. Although the cases generally say that the right relates back to the time of *commencing the work*, there would seem to be no reason why the relation should not extend back to the time of giving the notice. The notice is the essential, initial step in one entire continuous proceeding, and the due diligence must be used from the date of giving the notice. Is it possible that the rights of another claimant could intervene between the date of the first appropriator's notice and the time when his work is actually begun, no matter how short the interval? Yet this result must be *possible* if the right of appropriation relates back only to the time of actually beginning the work. The supreme court uses the language, "the first step was taken."

step was taken. Where the work necessary to complete an appropriation of running water is not prosecuted with diligence, the right to the use of the water does not relate back to the time when the first step was taken to secure it, but dates from the time when the work is completed or the appropriation is fully perfected." What constitutes the due diligence in constructing the works was discussed under the preceding head. This doctrine of relation is practically important in determining the priority of the appropriation as against subsequent appropriators and claimants of water from the same stream, and as against subsequent grantees or purchasers of lands on its banks.

J. N. P.

(TO BE CONTINUED.)

SUPREME COURT OF MONTANA.

WETZEL ET AL. *v.* POWER ET AL.

Filed January 9, 1884.

WHERE GOODS ARE SHIPPED TO A CONSIGNEE IN PURSUANCE OF AN AGREEMENT BETWEEN HIM AND THE SHIPPER that the same are to be sold, and the proceeds applied to the payment of prior advances made by the former to the latter, the title to the goods and the right of possession thereof vest in the consignee upon delivery to the carrier; and an action to recover for a wrongful attachment of such goods while in the hands of the carrier should be brought by the consignee, and not by the consignor.

APPEAL from a judgment of the third district court for Lewis and Clarke county, entered in favor of the defendant. The opinion states the facts.

W. F. Sanders and *William E. Cullen*, for the appellants.

John H. Shober and *E. W. Toole*, for the respondents.

GALBRAITH, J. This is an action brought by the appellants to recover damages for the alleged wrongful attachment of a quantity of buffalo robes, which were claimed to be the property of the appellants, but which they allege had been attached by the respondents as the property of J. J. Healy & Bro., St. Louis, Missouri, in August, 1876, in an action brought by the respondents against J. J. Healy & Bro., in the circuit court of St. Louis county, state of Missouri. It appears from the evidence contained in the record that the cause of action in which the attachment was issued was an indebtedness claimed to be due from J. J. Healy & Bro. to the respondents. The evidence also indicates that the property in question was purchased by the appellants from J. J. Healy & Bro. before the attachment.

The introductory portion of the statement on motion for a new trial contains the following recital of facts which bear upon the question hereafter considered, and is as follows: "The buffalo robes were a lot consisting of three thousand four hundred and eight robes, in two hundred and eighty-four bales, marked by having a tag or label on each bale, upon which was written, "W. S. Wetzel, St. Louis, Missouri."

They were consigned to George A. Baker, of St. Louis, Missouri, on account of advances made by him, amounting to something over twenty thousand dollars, made to plaintiffs, which were to be and were consigned to said George A. Baker and shipped to him accordingly, he paying freight, and were attached before they reached the hands of the consignee and while they were in the hands of the common carrier, to whom they had been intrusted for delivery to said consignee." The statement does not purport to contain all the evidence, but, as itself recites, "was all the testimony in said case bearing upon the proposition upon which the court instructed the jury." The above recital of facts appears to be a brief abstract of the evidence contained in the statement, and a careful examination of the evidence warrants us in concluding that each fact is not only uncontradicted, but that there is no attempt at controversy in relation thereto. The statement also contains the following evidence bearing upon the question involved, and explaining the above recital of facts, of which there is no attempt at contradiction. George A. Baker was asked the following questions:

"Q. 4. You say in your former deposition that Wetzel & Co., the

plaintiffs, were largely indebted to you, that the robes were to be consigned to you on account of it, and that they were so shipped and consigned to you. Do you say that they were in fact so indebted at the time of the consignment mentioned? if so, in what sum? Give the exact amount as near as you can get at it. Do you mean now to say that said goods were so consigned and shipped on account of the arrangement above stated? and if so, how much did you realize from the same, and how much did you place to the credit of said plaintiffs? A. I do, in the sum of fourteen thousand seven hundred and twenty-six dollars and twenty-one cents on account, besides a note of five thousand dollars, with interest due at the date of the attachment of two hundred and ninety-one dollars and sixty-six cents, making a total of twenty thousand and eighteen dollars and seventeen cents. The goods were consigned to me as stated. The net amount of sales was fifteen thousand three hundred and eighty-three dollars and ninety-four cents, which amount I placed to their credit."

The same witness, who was the consignee, also testified that he was notified, both by letter and the bill of lading, of the consignment and shipment of the goods to him. The bill of lading showed the consignment of the goods to Baker, he paying freight.

The goods were released from the attachment by the respondents and taken possession of by Baker, sold by him, and the proceeds appropriated to the payment of the indebtedness of W. S. Wetzel & Co. The highest market price of the goods during the period of the attachment was five dollars per robe.

The objections of the appellants are to two instructions of the court, either of which was fatal to their case.

The first instruction was as follows: "The evidence, without conflict in their case, shows that the goods in question were shipped to George A. Baker, consignee, on account of past advances, and the bill of lading showing that such consignment was made to him, he paying freight, and it appearing without contradiction that the said goods, at the time of the alleged trespass, were so in possession of said consignee, the said plaintiffs have failed to show such ownership, possession, or right of possession in said property as will enable them to recover in this action, and you will find for the defendants."

The question presented by the objection to this instruction is, which of the parties—viz., the appellants, being the consignors of the property in question, or George A. Baker, the consignee thereof—should bring the action to recover damages sustained by reason of the attachment? As before observed, the facts that the goods in question were shipped to George A. Baker, that the shipment was on account of past advances, and that he was the consignee thereof, paying freight, as shown by the bill of lading, are not controverted. The language of the instruction, "and it appearing without contradiction that the said goods were so in possession of said consignee," is simply the statement of a conclusion of law from the facts before stated in the instruction that said consignee was in the constructive possession of the goods in question.

It must be borne in mind that this is not an action against the common carrier, but against one who has committed an alleged injury by procuring a writ of attachment to be issued against property when in the actual possession of the carrier. It is an action of trespass. In order to support this action, therefore, the party bringing the same

should have the actual possession or the right to the immediate possession of the property. "To maintain an action of trespass for the wrongful taking of goods, a person must have had, when the goods were taken, the actual or the constructive or a general or special property in them, and a right to the immediate possession:" 6 Wait's Actions and Defenses, 101. The property in this instance being in the actual possession of the carrier, it must have been under the circumstances shown by the evidence in the constructive possession of the party, being either the consignor or consignee, who had the right to its immediate possession—that is, the right to the possession thereof at the time of the trespass.

The delivery to the common carrier *prima facie* vested the right to the immediate possession of the property in the consignee, Baker. "The law implies that by delivery to the carrier the goods became the property of the consignee and at his risk. * * * The delivery to the carrier presumptively vests the property in the goods in the consignee. * * * In general, the property vests in the consignee by the mere delivery to the carrier. * * * If goods by a bill of lading are consigned to A., he is *prima facie* the owner:" 1 Ch. Pl. 6.

"The effect of a consignment of goods by a bill of lading is to vest the property in the consignee:" 2 Kent's Com., 10th ed., p. 698.

The right of property draws to it the right of possession. Putting out of view, therefore, for the present, the fact that the goods were shipped and consigned to George A. Baker, on account of past advances, he paying freight therefor, the fact alone that he was the consignee thereof, *prima facie* entitles him to the immediate right of possession, and presumptively, as between him and the appellants, he was the proper party to bring the action for damages. How does the fact that the property was shipped and consigned to George A. Baker, on account of past advances, he paying freight therefor, affect this presumption? This question will be best solved by a careful analysis of the nature of the transaction, as shown by that testimony.

The facts recited in the statement, that the goods "were consigned to George A. Baker, * * * on account of advances made by him, amounting to something over twenty thousand dollars, made to plaintiffs, which were to be and were consigned to said George A. Baker, and shipped to him accordingly, he paying freight," taken in connection with the uncontradicted appellants' testimony of witness Baker, viz., that the appellants were indebted to him in more than the above amount, that the robes were to be consigned to him on account of this indebtedness, and that, "on account of the arrangement above stated," they were so shipped and consigned to him by delivery on the steamboat, and that he placed the amount realized from the sale of the goods to the credit of appellants, and also that the value of the property would not reach the indebtedness, point distinctly to a previous agreement or understanding between appellants and Baker that this specific lot of robes was to be shipped to Baker, he paying freight, to be sold by him, and the proceeds appropriated to the payment of the indebtedness due from appellants to him.

We think that the effect of such a transaction is to vest the title of the goods in the consignee upon delivery to the carrier, and that consequently the right of action for damages for a trespass thereto is in him. "If * * * the consignee * * * has made advances upon" the goods, "with the agreement that they shall be shipped to him to be sold in order that he may retain the proceeds for his reimbursement, or if,

being a creditor of the consignor, the goods are delivered to the carrier to be shipped to him in satisfaction of his debt, according to a previous agreement to that effect, the title to the goods will vest in him upon delivery to the carrier. * * * The legal presumption is, that when goods are sent to a consignee the title to them vests in him as soon as the shipment is made:" Hutchings on Carriers, sec. 135, and cases cited.

Halliday v. Hamilton, 11 Wall. 560, was a case in which the decision was rendered upon the following facts: "In 1867, Sherwood, Karns & Co., commission merchants of St. Louis, had a standing agreement with Hamilton & Dunnica of New Orleans, to ship produce to them, and to draw drafts on the shipment, which they were to accept and pay. In case the proceeds of any shipment left a balance, they were to apply the proceeds of any other shipment in payment of it. At this time, Cole Brothers were the correspondents in St. Louis of Hamilton & Dunnica, and were advertised to make advances on shipments made to them, and often during the season of 1867 made advances upon shipments to this house by Sherwood, Karns & Co. In this condition of things, the transaction occurred which was the subject of this controversy.

On the thirty-first of August, 1867, Sherwood, Karns & Co. purchased of Halliday Brothers, of Cairo, Illinois, through their agent (one Booth) in St. Louis, one thousand two hundred and fifty sacks of corn lying at Price's landing on the Mississippi river, a hundred and fifty miles, more or less, below St. Louis, and a short distance above Cairo, and obtained an order for the delivery of the same. This order they handed over to the agent of the steamboat Bee, then at her wharf in St. Louis, who issued a regular bill of lading to deliver the corn to Hamilton & Dunnica, at New Orleans. On the same day, Sherwood, Karns & Co. drew their bill of exchange for two thousand five hundred dollars on Hamilton & Dunnica, and in it told them to charge the same to this specific shipment. At this time there was a large balance due Hamilton & Dunnica on account of previous shipments of produce.

This bill of exchange was taken to Cole Brothers for discount, and sold, indorsed, and delivered to them with the bill of lading attached by Sherwood, Karns & Co., to whom they paid the proceeds. Shortly after this, Cole Brothers deposited the bill of exchange, thus accompanied with the bill of lading, with a banking house in St. Louis, who sent them forward, and Hamilton & Dunnica accepted the bill of exchange without notice of any difficulty in the matter, and paid it at maturity. In a day or two after the bill of lading was issued and transferred to Cole Brothers, the steamboat Bee proceeded on her voyage to New Orleans as far as Price's landing, and having obtained the corn, stopped at Cairo, arriving there September 5th. On the day, however, before she got there, Booth, the agent at St. Louis of Halliday Brothers, telegraphing to them that Sherwood, Karns & Co. had failed, had not paid for the corn, and had no effects in St. Louis, directed them to stop the delivery of the corn. Thereupon Halliday Brothers got an attachment, and, upon the arrival of the steamboat at Cairo, the corn was levied on and taken from the possession of the boat by virtue of the same. Halliday Brothers stated to their agent Booth his impression was that "they attached the corn." These attachment proceedings resulted in the sale of the corn and the payment of the net proceeds by the marshal to Halliday Brothers. Hamilton & Dunnica hereupon brought trespass against

Halliday Brothers. The jury found for the plaintiffs, and judgment accordingly.

Under the foregoing statute of the facts, the right of H. & D. to bring the action must have arisen from the agreement implied or presumed from the standing agreement with S., K. & Co. As above stated, as well as the facts that a bill of exchange was drawn by S., K. & Co. on H. & D. against the specific shipment of corn and paid by them, and also that the bill of lading attached to the bill of exchange was to deliver the corn to H. & D., and came into their possession, this, with the exception of the matter of the bill of exchange, is substantially the condition of the case at bar. Now, in the case at bar, there is an agreement to ship the goods to pay a previous indebtedness, a shipment thereof in accordance with the agreement, and a bill of lading consigning the property to Baker, which came into his possession before the attachment. "Usage has made the possession of such document" (a bill of lading) "equivalent to the possession of the property itself:" Broadwell v. Holland, 77 Ill. 305. The question simply is, Do the facts show an agreement upon sufficient consideration to appropriate the specific property to the purpose indicated by the agreement? If so, the legal title thereto vests in the consignee on its delivery to the carrier, just as in the case of a shipment of goods upon an executed consideration by a vendor to a vendee. The distinction between the cases as to the draft can make no difference as to the principle involved, for a previous indebtedness is as much a sufficient and valuable consideration as a draft honored against a specific shipment.

It is certainly just and reasonable that under such circumstances the right of action for damages should be in him for whose use and benefit the shipment and consignment of the goods are made. In Halliday v. Hamilton, *supra*, the court, by Justice Davis, says: "There is no difficulty on principle and authority in determining the right of the parties to this controversy. On the conceded facts of this case there can be no question that the legal title to the twelve hundred and fifty-six sacks of corn passed to Hamilton & Dunnica before the levy of the attachment of Halliday & Brothers, and if so, the judgment of the circuit court must be affirmed. * * * If this were the case of a mere agreement to ship produce in satisfaction of antecedent advances, which will not in general give the factor or consignee a lien upon it for his general balance until he obtains actual possession of it, the attachment would hold the property; but the agreement in question is of a different character and rests upon a different legal principle. It appropriates specifically twelve hundred and fifty-six bags of corn to Hamilton & Dunnica, with an intention that they shall sell it to pay the draft drawn against it, and if there is any surplus remaining after this is done, to apply it in liquidation of the advances previously made for Sherwood, Karns & Co. And this appropriation did not rest in intention merely, for it was executed, as far as the parties in St. Louis could execute it, by the transmission of the bill of lading to Hamilton & Dunnica. As soon as the corn was deposited with the common carrier, who was the bailee for the purpose, the title to it and the right of property in it was changed, and vested in Hamilton & Dunnica, to whom it was to be delivered." This is the effect of all the cases on the subject.

A contrary rule would defeat the object which the parties to the agreement intended to accomplish by it, and would severely embarrass com-

mercial men in their dealings with each other, for it can be readily seen that the mode of transfer adopted in this case is necessary for the purposes of commerce. If Hamilton & Dunnica had purchased the corn outright, they could not have got a better legal title to it than they acquired under the admitted facts in this suit.

The legal title to the property passed to them to carry out certain designated purposes, and they had the right to the undisturbed possession of it until these purposes were effected. It may be said that Sherwood, Karns & Co. had an equitable interest in any surplus that might remain of the proceeds of the corn after the claims of Hamilton & Dunnica were satisfied, and that this equitable interest was liable to attachment by the laws of Illinois. "But that liability," says Chief Justice Taney, in Gibson v. Stevens, 6 How. 384, "will not authorize the attaching creditor to take the property out of the hands of the legal owner before his claims upon it are discharged." Besides, it is clear from the evidence, that the proceeds from the corn fell far short of liquidating the indebtedness due Hamilton & Dunnica from Sherwood, Karns & Co." So in the case at bar, the highest value of the property at any time during the attachment did not reach the amount of the indebtedness from the respondents to Baker.

In Gibson v. Stevens, *supra*, the facts, as stated in the opinion of the court, were as follows: The pork and flour were purchased by McQueen & McKay at Fort Wayne, in the state of Indiana, on the fourth of April, 1844. The articles were in the warehouses of the respective vendors at the time of sale, and the purchasers took from each of them a written memorandum of the sale, with a receipt for the money, and engagement to deliver them on board of canal boats soon after the opening of navigation. There was also a written guaranty from the respective vendors that the articles sold should pass inspection. By the order of McQueen & McKay, they were to be sent by canal boats to Ludlum & Babcock, their agents at Toledo, in the state of Ohio, to be held by them until they received orders from McQueen & McKay. The documents executed by the warehousemen hereinbefore mentioned transferred the property and the possession of the pork and flour to McQueen & McKay, and the vendors from that time held it for them and as their bailees. Being thus in possession, McQueen & McKay afterwards, on the seventeenth of April, in the city of New York, in consideration of the advances of money mentioned in the statement of the case, delivered to Gibson, the plaintiff in error, the evidences of title which they had received from the vendors, indorsing thereon an order upon them to deliver the property to Gibson. They at the same time delivered a letter to Ludlum & Babcock, their agents at Toledo, stating that they had received an advance from Gibson upon this property, and directing them to deliver it to him and to comply with his orders.

Gibson was a commission merchant, residing in New York, and it is admitted that this transaction with McQueen and McKay was in the usual course of business. On the twenty-second of April, ten days after this transfer, the property was seized by the defendant in error, as sheriff, under an attachment issued on the same day, at the suit of the bank, to obtain satisfaction for the debt due to it from McQueen & McKay. At the time of the attachment, the pork and the flour still remained in the warehouse at Fort Wayne, and neither the warehousemen nor the at-

taching creditor had notice of the transfer to Gibson. The agent dispatched by him arrived two days afterwards, and claimed the property. The sheriff refused to deliver it up, and this action of replevin was thereupon brought to recover it. The state of facts, therefore, upon which Gibson claimed to establish his interest in the property must, in brief, have been, that he, being a commission merchant in New York city, made advances in the usual course of business to the owners of the goods stored at Fort Wayne, Indiana, receiving from them their evidences of title, and the letter to their agent at Toledo, to deliver the property to him, as above stated.

In delivering the opinion, Chief Justice Taney says: "Nor as respects the legal title can there be any distinction between the advances made by Gibson and an actual purchaser. To the extent of his advances, he is a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor who makes advances for his principal upon goods in his possession. But even in that case the property can not be withdrawn from his hands until his advances are repaid. But in the case before us the title of Gibson is not a mere lien. The legal title, the right of property, passed to him, and McQueen & McKay retained nothing but an equitable interest in the surplus, if any remain after satisfying the claims of Gibson. * * * Neither is the equitable interest of McQueen & McKay in the surplus, if any remain, material to the decision. This equitable interest is no doubt liable to attachment by the laws of Indiana." Then follows the language before given in the case of Halliday v. Hamilton. According to this decision, Baker was a purchaser of the goods "*to the extent of his advances*," and the legal title was conveyed to him to protect his advances. As we have seen, the advances by Baker to the appellants were in excess of the value of the property. At no time, therefore, after the shipment of the goods in question was there any interest therein belonging to the appellants or possession thereof which gave them the right of action for damages for a trespass thereto.

It is claimed that there was a conflict of testimony as to the facts assumed by the court contained in the instruction, and that they should have been submitted to the jury. As we have before stated in relation to these facts, they were not contradicted, nor was there any attempt at controversy in relation thereto. They went entirely as to the question of the disability of the appellants to sue, which we have found to be the case, both from the uncontradicted facts and the law applicable thereto. If the case had been submitted to the jury and a verdict rendered for the appellants, it would have been the obvious duty of the court to set it aside. There has been no claim that additional evidence bearing upon these facts is available, and the presumption is that all the evidence in the case has been submitted. Under the above state of facts, the judgment must have been for the respondents, and a submission of them to the jury was vain and useless.

The appellants having no right of action, the instruction to find for the respondents was correct. This being decisive of the case, it is not necessary to consider the objection to the second instruction.

The judgment is affirmed.

BOYD *v.* PLATNER ET AL.

Filed January 10, 1884.

AN INJUNCTION WILL NOT ISSUE TO RESTRAIN PROCEEDINGS UNDER A JUDGMENT rendered in favor of a plaintiff in an action prosecuted by him by a name in which merely the initial of his Christian name was stated, when no objection was made to the complaint on that ground.

COURTS HAVE NO AUTHORITY, UNDER SECTION 813 OF THE CODE OF CIVIL PROCEDURE, TO REVIVE A JUDGMENT rendered in favor of a partnership, and continue the same in the names of the surviving partners, and issue execution thereon in such names after more than six years have elapsed since the rendition of the judgment.

APPEAL from a judgment of the first district court for Madison county, entered in favor of the defendants. The opinion states the facts.

J. E. Calloway, for the appellant.

Henry N. Blake, for the respondents.

GALBRAITH, J. This action was brought by the appellant to restrain one of the defendants, the sheriff of Madison county, from making and delivering a deed for certain real property sold by him under an execution, and also to stay further proceedings under the judgment on which the execution issued, and that the judgment itself be declared null and void. The complaint alleged in substance that on the fifth day of September, 1870, a certain action was begun in the probate court of Madison county, Montana territory, entitled "E. Creighton & Co., plaintiffs, against Robert Hedges, James Boyd, and A. S. Potter, defendants." That on the nineteenth of September, 1870, the probate court rendered and entered a judgment in favor of E. Creighton & Co. against said Hedges, Boyd, and Potter for the sum of four hundred and twenty-nine dollars, and costs of suit. That on the fifteenth day of December, 1879, Edward Creighton, John A. Creighton, and Patrick A. Largey filed in the same court a certain paper, entitled in their names, and against said defendant, appearing from its contents to have been a notice that on the fifteenth day of January, 1880, or as soon thereafter as counsel could be heard, they would apply to the court for an order reviving the said judgment, and for leave to issue an execution thereon, and that it be issued in the name and favor of John A. Creighton and Patrick A. Largey, surviving partners of E. Creighton & Co. This was signed by John A. Creighton and Patrick A. Largey, "surviving partners of firm E. Creighton & Co., by Samuel Word, their attorney." That an affidavit to revive the judgment, and notices that Patrick A. Largey and John A. Creighton were partners with Edward Creighton, and composed the firm of E. Creighton & Co., was filed the same day.

That on the twentieth day of January, 1880, after a hearing "upon the notice of the plaintiffs for leave of court to order an execution upon the judgment," the said court made and entered an order in the case now entitled "Edward Creighton, John A. Creighton, and Patrick A. Largey, plaintiffs, v. Robert Hedges, James Boyd, and Anson Potter, defendants," "that plaintiffs have an execution upon said judgment against the defendants James Boyd and Robert Hedges," these being the defendants served with the above notice. That afterwards, at the instance of Patrick A. Largey and John A. Creighton, a certified transcript of said judgment was filed with the clerk of the district court of Madison county, and was docketed in the manner prescribed by law,

and an execution issued thereon, directed to Marshall D. Platner, sheriff of Madison county, who, in obedience thereto, levied upon certain real property of the appellant James Boyd, and sold the same to Patrick A. Largey, one of the respondents. It was further alleged that the judgment rendered in the probate court, in favor of E. Creighton & Co., and against Robert Hedges, James Boyd, and M. D. Platner, was "null and void," for uncertainty in this, that neither the Christian name of the said "E. Creighton, nor of any one of the company, is given, set forth, or mentioned in said action." "That E. Creighton & Co. was a company and copartnership at the time said action was instituted," and not a corporation. That more than six years had elapsed since the rendition of said judgment, at the date of this proceeding to revive the same, and that in the mean time the property of the defendant was sold, under an execution issued by virtue of said judgment. That before the revival of the judgment Edward Creighton had died, and that no one had been appointed to administer upon his estate; nor had he any executors or legal representative. That unless restrained, Marshall D. Platner, sheriff of Madison county, will execute and deliver to Patrick A. Largey a deed for the real property sold by him, as above stated, which, if done, will cast a cloud upon the title of plaintiff. The prayer of the complaint was for an injunction *pendente lite;* that upon the said hearing the sheriff be perpetually enjoined from making or delivering a deed of the property so sold, or any part thereof, to Patrick A. Largey; and that "the said Patrick A. Largey and John A. Creighton, their agents, attorneys, and legal representatives, and also as the legal representatives and surviving partners of the firm of E. Creighton & Co., be perpetually restrained from taking any action or proceeding under" said judgment of E. Creighton & Co., and that said judgment be declared null and void, and of no effect.

On the second of November, 1881, an order was made by the judge at chambers enjoining the sheriff from making or delivering a deed for the said property until the further order of the court. The grounds of demurrer were that the complaint did not state facts to constitute a cause of action. The court sustained the demurrer, and the appellant abiding by his complaint, judgment was rendered dismissing the action and dissolving the preliminary injunction, and for the defendants for costs.

The only question presented to the court by the argument of the appellant relates to the legality of the proceedings and judgment in the original action of E. Creighton & Co. in the probate court. The law requires that the "action" should be presented in the name of the real party in interest, and that the complaint should contain "the names of the parties to the action, plaintiff and defendant."

There was no statute providing that a suit might be brought in a firm or copartnership name. E. Creighton & Co. was not the name of a person; the record showed it to have been the name of a company or copartnership. But it may be assumed that E. Creighton was the name of an association of persons constituting a partnership whose name was E. Creighton & Co. That defendant should therefore have demurred to the complaint for a defect of parties: A. M. Gilman & Co. v. Cosgrove, 22 Cal. 357. But it is further claimed that E. Creighton is not a legal name, and that the Christian name of Creighton should have been stated in the complaint in the original action in the probate court, and the judgment rendered in the case is therefore void for uncertainty.

Reliance for their position is had upon the case of Webold v. Herman, 2 Mont. 609. It is true, that in this case the majority of the supreme court so held.

But the question then came before the court on the overruling of a demurrer to the complaint, on the ground that the Christian name of the plaintiff did not appear therein. The bearing of such a defect upon the judgment, when no objection had been made to the complaint on that ground at the proper time, was not before the court, and so far as the effect in the judgment was concerned, the language of the court was *obiter dictum*. The same question came before the court at the same term in the case of Nichols v. Dobbins, 2 Mont. 540, as an appeal from an order overruling a motion for a new trial, when the objection came too late, being taken after answer, and it was held by the court, the same judge, Wade, C. J., delivering the opinion who had rendered the opinion in Webold v. Herman, "that the appellant waived this objection by answering, thus recognizing the respondent by the name in which he brings this action." The court says it is too late to raise this objection to the complaint after answering, and it can not be presented for the first time to the court after the verdict on appeal. In the case of Webold v. Herman, we held that the failure to set forth the Christian name of the plaintiff rendered the complaint uncertain. But this uncertainty must be taken advantage of by demurrer, and defendant shall be taken to have waived the same: Civil Practice Act, Mont., sec. 55.

In case at bar no such objection was ever made, and it is now too late to urge it in this application to stay proceedings at law, and to nullify the judgment. The argument presented to the court by the appellant only raises the above question. But this is an appeal from an order sustaining a demurrer and a judgment for the respondents, and in consequence thereof the whole question is therefore properly before us of the sufficiency of the complaint to warrant the relief demanded.

The law in relation to issuing executions on judgments after five years from the entry thereof, contained in the revised statutes, section 813, code of civil procedure, limits the court to the exercise of their power alone upon compliance with its provisions, and grants no authority to modify the judgment in any way whatever, or to change the record upon which it was obtained. "As a general rule, no final judgment can be amended after the term at which it was rendered:" Freeman on Judgments, sec. 70. There are exceptions to this rule, as, for example, when the judgment can be amended by the record, as in the case of correction of mere clerical errors or misprisions by the clerk, which may be made so as to conform the record to the truth. But the application that the execution issue in the name and favor of John A. Creighton and Patrick A. Largey was not based upon any of the above grounds, but simply upon the fact that they were the surviving partners of E. Creighton & Co. The only foundation for the order authorizing the issue of an execution in their favor, the effect of which, if it had any at all, was to make them parties plaintiff to the action, was an affidavit made at the time, being more than six years after the rendition of the judgment, in substance that the above persons were, at the time of the rendition thereof, partners with Edward Creighton under the firm name of E. Creighton & Co. We think that at this time, upon this showing, the probate court had no power to make the above order, so far as P. A. Largey and John A. Creighton were concerned, for want of jurisdiction. The record shows that at this time E. Creighton was de-

ceased, and the application for a revival of the judgment was not made by an administrator or other legal representative of the estate, nor was there ever a suggestion of his death upon the record, nor the substitution of such administrator or other legal representative. Under these circumstances, the order could not have the effect to revive the judgment to authorize the issue of an execution. At the time, therefore, that the transcript of the judgment was entered in the district court, it was dormant, and was so at the time the execution was issued under which the sale of the real property was made, the delivery of a deed for which was asked to be enjoined in this proceeding. A dormant judgment is not a lien against real estate. Our conclusion, therefore, is that the judgment was only in favor of E. Creighton, that there was no revival thereof, that the filing thereof in the district court did not make it a lien against real estate, and execution could not issue thereon.

The judgment is reversed, and the preliminary injunction continued in force until proceedings are had in accordance with this opinion.

SUPREME COURT OF NEW MEXICO.

TERRITORY OF NEW MEXICO *v.* KINNEY.

Filed January, 1884.

A MOTION FOR A CHANGE OF VENUE IS ADDRESSED TO THE SOUND DISCRETION of the trial court, and the action of such court thereon will not be reversed unless it appears that such discretion has been grossly abused.

IN REVIEWING THE RULING OF THE TRIAL COURT IN REFUSING to grant a prisoner a continuance, so that the testimony of absent witnesses might be produced to prove an *alibi*, the appellate court is authorized to examine the whole record, as well subsequent to as before such ruling, in order to determine whether there was any abuse of discretion. It may also consider the fact that the defendant did not himself take the stand as a witness, as it is only at his trial and before the facts are passed upon by the jury, that his failure to do so shall not raise any presumption against him, and under such a state of the record it will not be held that there has been an abuse of discretion.

THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE may be sufficient to warrant a conviction.

REFUSAL OF THE COURT TO GIVE AN INSTRUCTION WHICH HAS ALREADY BEEN GIVEN in substance, in reference to the nature of and degree of credibility to be attached to the testimony of an accomplice, is not error.

THE TESTIMONY OF A WITNESS TO THE EFFECT THAT HE SAW THE DEFENDANT AT HIS HOME, and in the vicinity of the place where the crime was committed, is corroborative of the testimony of an accomplice as to the defendant's guilt, when the defense relied on is an *alibi*.

TO CORROBORATE THE TESTIMONY OF AN ACCOMPLICE, the evidence must not only corroborate his story in a general way, as to the fact of the crime itself, but must tend to show that the defendant took part in the commission of the crime.

APPEAL from a judgment of the district court for Doña Ana county, convicting the defendant of larceny. The opinion states the facts.

William Breeden, attorney general, for the territory.

W. T. Thornton, for the appellant.

BELL, J. The appellant was jointly indicted with several other persons, in the district court for Doña Ana county, at the March term, 1883. The offense charged was the larceny of certain cattle. He was tried separately, convicted, and sentenced to imprisonment for five years, and

to pay a fine of five hundred dollars. From this judgment against him he has appealed.

The errors alleged to have been committed in the court below are: 1. An abuse of discretion on the part of the court, in refusing to change the venue. The rule of law is, that the appellate court will not ordinarily entertain an appeal from the ruling of the court below on a matter that is purely in the discretion of that court. Before doing so, it must appear that the discretion has been so grossly abused as to amount to a perversion of justice.

The question of a change of venue is addressed to the sound discretion of the court, and is, perhaps, more than any other exercise of discretion, a difficult one to review. The appellate court can never have before it all the facts and circumstances as they appeared to the presiding judge in the court below, and upon which his ruling was founded. The change of venue was prayed for in this case, because of the alleged prejudice which existed among the residents of Doña Ana county against the defendant. It was supported by the affidavits of several citizens of that county. These affidavits charge, in substance, that it would be impossible to secure in that county an impartial jury. The court thought otherwise, and denied the motion.

In considering the appeal from that ruling, this court must be justly influenced by the fact that the learned judge who presided in the lower court has for many years been himself a resident and citizen of Doña Ana county. He was personally cognizant of the condition of feeling existing in that community, and was, of course, the very best judge of its possible effect upon the trial of the defendant. The ruling of the court on the question, therefore, may have been based upon much better evidence than the record here affords us. In addition to these considerations, this court will also take judicial notice that the panel of jurors selected to try causes at the district court for the third judicial district of the territory, and held at Las Cruces, were, under the law, drawn from the body of the whole district, which comprises three of the largest counties of the territory, and that therefore local prejudice in Doña Ana county, if such prejudice existed, would not necessarily prevent securing a jury from the other counties of the district. We can not say that there was any abuse of discretion, and we are consequently of the opinion that there was no error in denying the motion.

The next alleged error is: 2. An abuse of discretion, in refusing a continuance.

The motion for a continuance was made upon the affidavit of the defendant himself, and asked that the trial be postponed until the following term of the court. Various reasons are assigned for the continuance in this affidavit, but the principal ones are that witnesses were absent who could prove an *alibi* for him, and also witnesses who could prove from whom he had purchased certain cattle, with the purchase of which he was charged, knowing them to be stolen. The affidavit also alleges that the defendant was not aware of the charges against him until the second week of the term of the court at which he was tried, and too late to get his witnesses at that time.

This latter charge is denied explicitly by an affidavit of the officer who arrested him, who says that three days after the arrest he visited the defendant in jail, and there informed him of all the charges against him; that he read to him a statement of the charges, which he had fully written out.

As to the first portion of the affidavit which we have recited, alleging inability to secure the attendance of witnesses to prove an *alibi*, and of witnesses to prove how he became possessed of certain cattle alleged to have been stolen, it is quite enough to say that the record shows that, though the defendant, of all other persons in the world, was best informed on these subjects, he failed to take the stand as a witness, and testify to these facts in his own behalf. In considering the question of the alleged error for abuse of discretion in denying a continuance, the court can not shut its eyes to so important a fact, disclosed by the record. On appeal from such a ruling, the court is authorized to examine the whole record, as well subsequent to as before the ruling, in order to determine whether there was any abuse. It is also entirely proper to take into consideration the fact that the defendant did not himself take the stand as a witness, as it is only at his trial, and before the facts are passed upon by the jury, that his failure to do so shall not raise any presumption against him. After trial, and on review, the appellate court can consider it.

That the defendant should have failed to take the stand as a witness on his own behalf, under the advice of learned and zealous counsel, can not change the effect which that course must necessarily have upon the court in considering this particular question. To say that the court below grossly abused its discretion, under such a state of the record, would be in our judgment wholly unwarranted. We find no error in the ruling.

The next assignment of error is upon the refusal of the court to give the following instructions:

"1. The jury is instructed that the testimony of the witness Sierra is not of itself sufficient to warrant the conviction of the defendant in this case; and further, if the jury believes from the testimony that the defendant Kinney was not present when the crime charged in this indictment was committed, but was in El Paso, then he must be acquitted.

"2. The court instructs the jury that the testimony of the accomplice is always received without caution, and that while the jury are the sole judges of the credibility of the witness and of the weight to be given to his testimony, that it is the duty of the court to caution you of the danger of convicting upon the testimony of an accomplice alone.

"3. I instruct the jury that they will not be justified in finding the defendant guilty upon the uncorroborated testimony of the accomplice Margarito Sierra, and he must be corroborated, not only as to the circumstances of the commission of the crime, but he must be corroborated as to the defendant's connection with it, for it will be presumed that as the witness was present when the crime was committed, and participated in it, that he will tell the circumstances truly—the danger is, that after having stated the circumstances truly, that he may accuse some innocent person of the crime in order that he may derive some fancied benefit himself.

"4. In weighing the evidence of the witness Margarito Sierra, they should remember that he is a self-convicted thief; that he admits he helped to steal the cattle; that he admits he was present when they were sold, and that there were witnesses to prove his presence at the sale, and connection with the cattle, and that he was liable to prosecution therefor, and that he hoped and expected immunity from his own crimes as a reward for his testimony."

It was not error, in our opinion, for the court below to refuse to charge the first of these proposed instructions taken as a whole. The latter part of it, which requests the court to charge the jury, that if the defendant was not present when the crime was committed, but was at El Paso, which the evidence shows to be a town many miles distant from the place where the crime was committed, had it stood alone, would have been sound law.

But the first part of this instruction, which asks the court to charge that the testimony of the accomplice, Sierra, is not sufficient of itself to warrant the conviction of the defendant in the case, is not the law, in our opinion.

Counsel, in his brief, and on the argument, cited section 380 of Greenleaf on Evidence, as supporting the proposition that the jury should have been instructed that they could not find the defendant guilty upon the uncorroborated testimony of an accomplice. The part of the section cited is as follows: "It is now so generally the practice to give them said advice, that its omission would be regarded as an omission of duty on the part of the judge."

Counsel would have the court believe that this language was used in support of his proposition. Such, however, is not the fact.

The whole of the section in question, from which counsel cited the portion of a sentence only, above quoted, in our judgment, fairly expresses the law on the subject, and is as follows: "*The degree of credit* which ought to be given to the testimony of an accomplice, is a matter exlcusively within the province of the jury. It has sometimes been said, that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, just caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly contended that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement. But on the other hand, judges *in their discretion will advise* a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration." Then follows, as part of the sentence, the language which counsel cites as though the author had used it to support the proposition that a conviction could not be had upon the uncorroborated evidence of an accomplice. For a judge in his discretion to advise a jury not to convict upon the testimony of an accomplice, uncorroborated, is a very different thing from telling them that they could not convict upon such testimony.

Of course it is now and always has been the law, that the evidence of a *partnership business* is competent to go to a jury. If such evidence is allowed to go to a jury, it logically follows that they have the power to believe and act on it. It differs only from other evidence in that it necessarily comes from a corrupt source, and is to be viewed with suspicion and received by the jury with the greatest caution.

Taylor on Evidence lays the rule down in the same language used by Greenleaf in the section quoted by us. He evidently borrowed it from that author. In the rule as laid down by Taylor, there is, however, this additional proposition: "The jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement."

Phillips on Evidence lays down the rule to be: "Since accomplices are competent witnesses, it appears to follow that if their testimony is

believed by the jury, a prisoner may be legally convicted upon it, though it be unconfirmed by any other evidence:" 1 Phill. Ev. 110, and notes.

In the exercise of a sound discretion, the judge will doubtless, in many cases, strongly advise the jury against convicting on such evidence, but the law does not require him to do so, and he is to be governed in the exercise of his discretion by the facts in each particular case.

In the case mostly relied upon by counsel for appellant, but for another purpose, as we will see later, Chief Justice Gray begins the opinion of the court in the following language: "It has always been held that a jury might, if they saw fit, convict on the uncorroborated testimony of an accomplice. Lord Hale, Lord Holt, and Lord Mansfield treated the question of his credibility as one wholly for the determination of the jury, without any precise rule as to the weight to be given to his testimony:" Commonwealth v. Holmes, 127 Mass. 424.

We are therefore clearly of the opinion that the court properly refused the first of these proposed instructions. It was not error for the court to refuse the second instruction asked for, the instructions given by the court having covered it.

From the suspicious, and as we have observed necessarily corrupt, character of the evidence of an accomplice, courts have uniformly instructed juries specially in regard to the mode in which they are to treat it. These instructions vary in the language in which they have been couched, but in effect are: that the jury shall receive such testimony with great caution, scrutinize it with much care, and act on it after careful consideration of its source. In the case at bar, the court below complied with this rule. On this subject the court charged the jury: "It is a well-settled principle of the law of evidence that the testimony of an accomplice should be received by the jury with great caution, and while you alone are to determine the weight and credibility of the testimony, it is my duty to inform you that in determining the credibility of the testimony of this accomplice it will be proper for you to consider the fact that he is an accomplice. Also, you should consider the question whether the accomplice had any interest in giving his testimony that might influence him in giving false testimony." This instruction, as we have stated, fully complied with the duty of the court in regard to this question, as we have seen from the numerous authorities cited and considered. The fourth instruction asked for we have already fully disposed of by our opinion in regard to the first, and the court properly refused to charge it.

We come now to the final assignment of error, which is the giving of the following instruction by the court: "There is also testimony which, if true, corroborates in some material points the testimony of this accomplice." This instruction the counsel insists was error, for the reason that there was no evidence to corroborate the accomplice Sierra, which convicted the defendant of the crime. The case already cited, of Commonwealth v. Holmes, *supra*, is cited as authority on this subject. That case, which was most elaborately examined by the supreme court of Massachusetts, decides, and we think correctly, that to corroborate the evidence of an accomplice does not mean simply to corrobarate his story in a general way, as to the fact of the crime itself, but that he must be corroborated by evidence tending to show that the defendant took part in the commission of the crime.

The case was cited by the counsel to show that the evidence which was

introduced in that case to corroborate the accomplice was similar to what was relied on by the territory in the case at bar; that the supreme court of Massachusetts reversed the judgment in the former case for error in admitting the evidence objected to; and that this court will do so in this cause because of the similarity of evidence introduced in both cases.

In the Massachusetts case the defendant Holmes was indicted for burning the barn and shed of John C. Munson, in the night-time of September 11, 1876. An accomplice, Charles Sumer, who had himself been tried and convicted of the same offense, was examined as a witness for the prosecution. He testified, among other things, that on the evening of September 2, 1876, being Saturday, he left his father's house, walked to the village of Housetown, about two miles off, arrived there at eight o'clock, attended a lecture which closed at nine o'clock, went out of the hall, walked with William Moore, and two girls whom they found in the street, and that he and Moore separated a little after ten o'clock, and that he (Sumer) walked alone towards his father's house, and as he approached Munson's barn on his way home, he saw a man gather up some straw which lay there, strike a match, and set the straw on fire. That he approached, and saw the defendant, who said, "You have caught me." That he, the witness, put the lighted straw out. That the defendant then told him he would set the barn on fire on the next Saturday, and for him, the witness, to keep still and be prepared to show where he was on that evening, and that after the fire witness should give it out that witness burned the barn, and that he would make it all right with witness. That witness then went home, where he arrived about twelve o'clock at night, and was let in by his father. That during the following week defendant gave witness four ten-dollar bills.

To corroborate the evidence of this accomplice, the prosecution called Uriah Sumer, his father, who testified that his son did come home at twelve o'clock on the night in question, and that he let him in. The defendant objected to the admission of this evidence as immaterial, incompetent, and not admissible to corroborate young Sumer, and as not tending to corroborate him in any material point. But the judge admitted the evidence, and defendant excepted. Under like objection and exception the prosecution was admitted, as corroborative of the evidence of the accomplice, to prove that during the week preceding as well as the week after the fire, the accomplice was seen with one or more ten-dollar bills.

In reversing the judgment in the case, on the ground that the evidence cited was erroneously admitted, as corroborating the accomplice, the supreme court said: "The whereabouts of the witness, when not in defendant's company, on the evening of September 2d, was wholly immaterial. The possession of the bank bills before and after the fire, even if it tended to show that he had been hired to commit the crime, had no tendency to prove that the defendant was the person who so hired him. None of this testimony had the slightest tendency to prove any facts connecting the defendant with the crime charged." We think the court was clearly right in the view of the law expressed.

In the case at bar, the testimony which, it is claimed, corroborated the evidence of the accomplice Sierra, was that of Joseph Hull. Hull testified that he lived at Rincon, and knew the defendant, knowing who also lived at that place. He further testified as follows:

Q. You say you are quite positive you saw Kinney the day before the

cattle were brought in? (Referring to the stolen cattle.) A. Yes, sir. Q. That is, you got up in the morning and found the cattle in the corral? A. Yes, sir. Q. And the night before you saw Kinney at Rincon? A. Yes, sir.

This evidence, standing alone, does not tend to corroborate the evidence of the accomplice Sierra, as to the defendant's complicity in the larceny. The fact that Kinney lived where the witness saw him, and in the vicinity of the place where the stolen cattle were corralled, according to the evidence of the accomplice, ought not, of itself, to affect the question of his guilt or innocence, for the reason that seeing him in the vicinity of his own home would be seeing him where it was usual and proper for him to be.

But in view of the defense in this case, the evidence in question assumes a totally different aspect. The defendant chose to call several witnesses to prove that he was not at Rincon, where he lived, and where the stolen cattle were taken to, at the time when the accomplice testified he was there and took part in the larceny, but that he was at El Paso, many miles away. This was his defense to the charge, and what he relied upon to establish his innocence. In view of this defense, was it not most important and material evidence to prove that he was in fact not at El Paso, as his witnesses testified, but at Rincon, where the offense was committed? We think that the evidence, in view of the defense interposed, was material, and did tend to prove his complicity in the crime. This being so, it follows that any evidence tending to corroborate the accomplice in this regard was competent and material.

The answer of the counsel to the proposition that Hull's evidence was not material, because seeing defendant in the vicinity of his home was not to be taken against him, as that was where he would be naturally, loses all its force, when, as the record shows, he destroyed the presumption arising from that evidence in favor of the defendant by attempting to prove that he was not there, but somewhere else.

We therefore find that the accomplice was corroborated by this evidence of Hull as to a material point, and that the instructions of the presiding judge in the court below were sustained by the evidence.

The judgment is affirmed.

CHAVES *v.* PEREA, Adm'r, etc.

Filed January, 1884.

THE PROBATE COURT HAVING ONLY AN INFERIOR AND LIMITED JURISDICTION conferred by express provisions of statutes, jurisdiction must appear affirmatively upon its record; it can not be persumed.

THE PROBATE COURT HAS NO JURISDICTION TO PASS UPON A CLAIM against the estate of an intestate, presented to it for allowance, unless the administrator of such estate be present in court while the evidence is being taken and the claim passed upon, or has had an opportunity to be present and to be heard by having a citation to appear served on him. Unless such requirements have been complied with, an appeal from the judgment of the probate court allowing or rejecting a claim must be dismissed.

AN APPEAL TO THE DISTRICT COURT FROM A JUDGMENT OF THE PROBATE COURT can not be perfected unless the proper affidavit of non-vexation and delay is made and filed.

APPEAL from a judgment of the district court for Bernalillo county, entered in favor of the defendant. The opinion states the facts.

Fiske & Warren, for the appellant.

C. C. McComas, and *Catron & Thornton*, for the appellee.

BRISTOL, J. This case originated in the probate court of Bernalillo county in the second judicial district. It was appealed therefrom to the district court of that county, where the appeal was dismissed for irregularity; and it is here on appeal from such final determination thereof in the court below. The proceeding was instituted in the probate court for the allowance of a claim or account against the estate of Salvador Armijo, deceased, in favor of Chaves, the plaintiff below and appellant here. The account is as follows:

ALBUQUERQUE, N. M., June 9, 1879.

The estate of Salvador Armijo to J. Francisco Chaves, Dr.

1877.			
March 19.	To 572 sheep @ $1.75		$1,001 00
Feb. 22.	" 100 ewes @ $1.75		175 00
	" 100 wethers @ $1.25		125 00
1879.			
April 1.	" To two years' legal services @ $250 per annum, as per contract		500 00
1878.			
Oct. 10.	" One house		30 00
1879.			
May 13.	" One house taken		150 00
	" One house taken, Salvador Gonzales		30 00
			$2,011 00

It seems from the record that this account in the first instance had been presented to the defendant below Jesus Ma. Perea, who was the administrator of the estate of the deceased Armijo, who had refused to allow or pay the same. The account thereupon was presented to the probate court, at a regular term thereof, on July 7, 1879. That court made an order embracing this and other claims against the estate, to the effect that "they not having been approved by the administrator, proof shall be introduced to substantiate such claims at a regular term." The record of the probate court further shows that thereafter, at a regular term held September 22, 1879, this account was called up for hearing by the plaintiff, and after hearing arguments on his behalf, the claim was disallowed and the entire account rejected. It does not appear from the record that any evidence was offered by plaintiff or received by the court, but instead thereof, the case was disposed of in the absence of the administrator on arguments for the plaintiff.

The record not only fails to show the appearance of the administrator, but is also silent as to whether he had ever been cited to appear, so as to confer jurisdiction to entertain the case. The probate court having only an inferior and limited jurisdiction, conferred by express provisions of statute, jurisdiction must appear affirmatively upon its record; it can not be presumed.

The proceeding was in no sense a suit against the administrator to recover judgment for the amount of the claim. It was simply an application to the probate court to admit or allow the claim as authority, perhaps, to the administrator to pay it, and to exempt him from personal liability if he did pay it.

A suit, no doubt, could have been instituted in the district court to recover judgment thereon, wherein all issues of fact could have been litigated and settled whether the probate court had passed upon the question of allowing the claim or not, there being no statute requiring such allowance as a condition precedent to bringing an action.

For the purpose of the proceeding involved in the case at bar, however, the probate court *had exclusive original jurisdiction*, and while an appeal would lie from a final determination thereof to the chancery side of the district court, yet the latter court could not take jurisdiction except for the purpose of dismissal, unless the inferior court had acquired jurisdiction.

The provision of our statutes under which the probate court was authorized to act in the premises, is as follows:

"It shall be the duty of the probate judge to admit all claims against the estate *if properly sustained by legal evidence; provided*, the administrator be present at court to settle the said claims if admitted."

Several legal propositions are sustained under this statute: 1. Money demands upon unpaid accounts against the estates of intestates must be allowed, if at all, upon legal evidence sustaining the same; 2. Such evidence must be taken and the claim passed upon at a regular session of the probate court; and, 3. The administrator of the estate against whom the claim is made must either be present in court while the evidence is being taken and the claim passed upon, or at least he must have had an opportunity to be present and to be heard, by having a citation to appear served on him.

In no other way could the probate court have acquired jurisdiction to act in the premises. Our crude and inefficient administration laws do not prescribe the practice to be pursued in this as in a multitude of other cases that may arise; yet it is obvious, from the very nature of the proceeding and the right to be passed upon, that the administrator should have an opportunity to be present in person or by counsel.

Probate courts under the laws of this territory only have jurisdiction over the *personal* estates of intestates. The legal title to any such personal estate is vested in the administrator in the nature of a trust for the settlement of the estate. Hence it follows that all proceedings, whether by suit to recover judgment, or a proceeding for the allowance of claims, which have for their object the payment thereof out of such personal estate, should be instituted against the administrator, and in such a manner as will give him his day in court, he being the only person through whom a defense can be interposed.

The administrator in this case not having been present at the time appellant's claim was passed upon by the probate court and rejected, nor having been cited to appear, that court acquired no jurisdiction, and its determination of the case is void and of no effect whatever. And if an appeal had been regularly taken to the district court, there would have been nothing to do except to dismiss the entire proceeding for want of jurisdiction. This proceeding could not be pleaded in bar of another; and unless cut off by some statute of limitation, there is nothing to prevent a proceeding *de novo* in the regular way for the same purpose.

That irregularities should occur in the proceedings of probate courts and in the acts of administrators is not at all surprising under the present condition of the law. No state or territory, it may be presumed, anywhere within the jurisdiction of the United States, has such a lame and

inefficient code of administration laws as that which obtains in New Mexico. Judges of probate are elected to office and invested with complicated powers and duties touching the probate of wills, letters of administration, accounts against estates, accounts of executors and administrators, and hearing and determining rights in regard to the same; administrators also are appointed and charged with the exercise of various powers and duties respecting the settlement of estates. But there are scarcely any laws upon our statute book prescribing the details of the duties of either, or the specific modes in which they may be performed. That valuable estates should melt away and mysteriously disappear—fictitious claims allowed, honest debts left unpaid—and beneficiaries never receive what they are entitled to, in numerous instances, under our crude system of administering estates, is rather to be expected than wondered at. All this may happen without imputing any intentional fraud to these officials. It is the fault, mainly, of an imperfect system. The appeal was dismissed by the court below on the ground that the proper affidavit was not made. This is the only matter that is assigned as error.

The point raised simply involves a construction of statutes. The first statute in regard to appeals from the probate to the district court came from the Kearney code, and is as follows: "Appeals from the judgment of the probate judge shall be allowed to the district court, in the same manner, and subject to the same restrictions, as in case of appeals from the district to the supreme court:" Comp. Laws, 122, sec. 4; also, Prince's Stat. 76, sec. 4.

The statute in regard to appeals from the district to the supreme court is as follows:

"Sec. 3. No such appeal shall be allowed unless, first, the appeal be taken at the same term at which the judgment or decision appealed from was rendered; and second, unless the appellant or his agent shall, during the same term, file in the court his affidavit, stating that such appeal is not taken for the purpose of vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

"Sec. 4. Upon the appeal being made, the circuit court shall make an order allowing the same; such allowance shall stay the execution in the following cases, and no others: First, when the appellant shall be executor or administrator, and the action be by or against him as such; second, when the appellant, or some responsible person for him, together with two sufficient securities to be approved by the court during the same term at which the judgment or decision appealed from was rendered, enter into a recognizance to the adverse party in a sum sufficient to secure the debt, damages, and costs, etc. * * *

"Sec. 6. * * * The appellant shall file in the office of the superior court, at least ten days before the first day of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the case," etc.: Comp. Laws, 106, secs. 3, 4, 6; also, Prince's Stat. 68, secs. 3, 4, 6.

This statute also is taken from the Kearney code. Both statutes are among the very first enactments of the territorial legislature, and are still in force. But in regard to appeals from the probate courts, several material changes have been made in the law from time to time, but ultimately they were all placed upon the statute book and re-enacted as one

law. Thus in 1853 an act was passed as follows: "All appeals from inferior tribunals to the probate or district courts shall be tried anew in said courts on their merits as if no trial had been had below:" Comp. Laws, 206, sec. 14; and Prince's Stat. 166, sec. 14.

In 1859 a general act in regard to the jurisdiction and duties of justices of the peace was passed, in which was inserted a provision as follows: "Appeals from the probate courts shall be taken hereafter in the same manner as from justices of the peace, at the term when the order or judgment appealed from shall have been rendered; and the bond shall be approved by the probate judge:" Comp. Laws, 184, sec. 5.

There are several provisions in regard to appeals from justices' courts, but the only ones having any bearing on this case are as follows:

"Sec. 81. Any person aggrieved by any judgment rendered by any justice (alcalde) may appeal, by himself, his agent or attorney, to the district court of the county where the same was rendered; provided, however, that no appeal shall be allowed unless the party appealing shall file a bond to the adverse party in a sum sufficient to secure such judgment and costs, with one or more sureties, to be approved by the justice (alcalde).

"Sec. 82. Upon an appeal being made according to the foregoing section, the justice (alcalde) shall allow the same, and make an entry of such allowance on his docket, and all further proceedings on the judgment shall be suspended by the allowance of the appeal.

"Sec. 83. On or before the first day of the next term of the district court for the county the justice (alcalde) shall file in the office of the clerk of said court a transcript of all the entries made in his docket relating to the case, together with all the papers relating to the suit:" Comp. Laws, 102, secs. 81–83.

Also another act, as follows: "That from and after the passage of this act, all appeals from the sentences of the justices of the peace to the probate court, or to the district court, the appellant shall cause to be filed in the office of the probate court, or in the office of the district court, as the case may be, a *certified* transcript of the record and proceedings had before the justice of the peace, together with the original oath, recognizance, and other original papers in the cause, on or before the return day of the appeal:" Comp. Laws, 172, sec. 114.

On January 24, 1865, an act was passed, and among its provisions are the following: "That the revision of the statutes, commencing with article 1, entitled 'Acequias,' and ending with article 67, entitled 'Woods and Prairies,' with all and each of the articles and chapters inclusive, be and the same are hereby declared to be the revised statutes and laws of the territory of New Mexico, and as such shall have full force and effect in all courts thereof. The revised statutes here referred to are what are commonly known as the compiled laws of New Mexico:" Comp. Laws, 742.

This act, establishing as law the various enactments embraced within the compilation of statutes of that date, covers all the laws above recited in regard to appeals from probate courts. From this legislative *snarl* the question is presented as to how so simple a matter as an appeal from the probate to the district court must be taken. It is one of those complicated anomalies in legislation that can have but little to commend it beyond an amusing puzzle for courts and lawyers.

On behalf of the appellant it is claimed that the modes of appeal from

justices' courts and from district courts are so radically different that they can not be harmonized and applied to appeals from probate courts, and that the mode of appeal from justices of the peace is the only one that can be applied.

We can not concur in this view. There is one way only in which these various acts can be harmonized, and that is by a substantial compliance with them all. Appeals from the district courts require an affidavit of non-vexation and delay, that the appeal be taken at the same term at which the judgment or decision is rendered, that a transcript of the record be sent up, and a bond as a condition precedent to a *supersedeas*, etc.; while appeals from justices' courts require a bond as a condition precedent to an appeal.

The appeal itself operates as a *supersedeas*. Not only a transcript of the docket entries, but also the original papers must be transmitted to the appellate court, and in cases of "sentences" the transcript must be *certified* to.

No one need have any difficulty in complying with all these provisions of the law so far as they are applicable to appeals from probate courts. In the light of these views, it follows that if on an appeal from the probate at a term thereof to the district court, the proper affidavit of non-vexation and delay were made and filed, the proper bond covering the damages and costs executed and filed, the order allowing the appeal entered and a certified transcript of the record, together with the original papers in the case, were transmitted to the appellate court, the appeal would be regular.

It appearing from the record that all the conditions precedent to an appeal were not complied with, our opinion is that the appeal was irregular and properly dismissed.

Judgment below affirmed.

AXTELL, C. J., concurred.

BOARD OF COUNTY COMM'RS OF SANTA FÉ CO. *v.* NEW MEXICO & S. P. R. R. CO. THE SAME *v.* THE SAME.

Filed January, 1884.

RAILROAD EXEMPTION FROM TAXATION.—The act of February 2, 1878, providing for the general incorporation of railroads, and exempting all the property of the same from taxation of every kind until after the expiration of six years from the completion of their roads; and the act of February 12, 1878, extending such exemption to railroads already incorporated; and the act of February 15, 1878, defining when such railroads shall be deemed to be completed, should be construed as *in pari materia* and as parts of one act. So construed, such exemption applies to a railroad incorporated prior to the time the act of February 2, 1878, went into effect.

SUCH EXEMPTION OF ALL RAILROAD CORPORATIONS FROM TAXATION IS NOT VOID, as being in conflict with the act of congress of March 2, 1867, prohibiting the legislative assemblies of the several territories from granting private charters and special privileges.

AFTER THE INCORPORATION OF A RAILROAD and the completion of its lines, under the provisions of such act, the exemption from taxation therein contained is not a mere gratuity. It becomes a part of the contract between the railroad and the territory, the obligation of which the latter can not impair.

AN EXEMPTION FROM TAXATION AS TO ALL THE PROPERTY OF A RAILROAD EXEMPTS THE SAME from taxation upon its capital stock.

ERROR to the district court for Santa Fé county. The opinion states the facts.

C. H. Gildersleeve and *John H. Knaebel*, for the plaintiffs in error.

Henry L. Waldo, for the defendant in error.

BRISTOL, J. Each of the above-entitled causes was instituted in the district court for the first judicial district and county of Santa Fé by the defendant in error, the New Mexico & Southern Pacific Railroad Company, a corporation organized and existing under the laws of the territory, against the board of county commissioners of said county of Santa Fé, by filing a verified petition alleging the existence of such corporation and the construction of its several lines of railroad in said county, the time of their construction, and the several acts of the legislative assembly under which the corporation was organized, and its powers, privileges, and exemptions created; showing also that the capital stock of the plaintiff corporation had been assessed for purposes of taxation for the years 1881 and 1882, and praying for a writ of *certiorari* to said board, commanding them to produce such assessments and all records relating to the same. All of which was accordingly done, and such proceedings were had in the court below as that, after hearing the parties, judgment was entered, setting aside and vacating such assessments, and for plaintiffs' costs. The case is here on writ of error, sued out on behalf of said board of county commissioners.

The questions raised in either case are essentially the same, the only difference being that one covers the assessment for 1881, and the other that of 1882, and such difference as may have been created in the *status* of the plaintiff corporation as to taxation by the act of the legislative assembly on the subject of "revenue," approved March 1, 1882. The two cases will be considered together, and disposed of in the same opinion. The judgments below in both of the cases are evidently based upon the theory that at the date of each assessment the property or capital stock of the plaintiff corporation covered by the assessments was exempt from taxation under the law.

The plaintiffs in error claim that such capital stock was not exempt from taxation, and assign this as ground of error. The parties have filed as part of the record an agreed statement of facts, in effect as follows: That the defendant in error, on the sixth day of February, 1878, filed its articles of incorporation, and thereby became and was duly organized as a body corporate under the laws then in force; that the object for which said corporation was formed and organized was the construction, maintenance, and operation of lines of railroad and of telegraph, extending from a point in the Raton pass, on the north line of said territory, through the counties of Colfax, Mora, San Miguel, Santa Fé, Bernalillo, Valencia, and a portion of the county of Socorro, to the town of San Marcial, in the last-named county, and for no other purpose whatever; that said corporation did not enter upon the construction of any of its lines of railroad in said territory until the latter part of the year 1878; that the property at any time owned, constructed, operated, or maintained by said corporation is and has been railroad property exclusively; that the only property owned or constructed by said corporation since its organization is the lines of railroad aforesaid, together with rolling stock, depot stations, round-houses, etc., necessary to the equipment and operation of said lines of railroad and telegraph in connection therewith, except its capital stock, represented largely by the said property; that said lines of railroad and telegraph were constructed by said corporation; and that no part of such lines of railroad or telegraph was so constructed in any part of said territory for the period of six years.

The sole question to be determined is whether at the time that either of the assessments was made the property covered thereby was the property of said corporation, and was exempt from taxation under any contract between the territory and such corporation, created by statutory enactment either in express terms or by necessary implication in law. To determine this question it will be necessary to review all the legislation on the subject. The first enactment having any bearing on the questions involved is an act of congress approved March 2, 1867, containing the following provisions:

"Sec. 1. That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges; but they may by general incorporation acts permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits:" 14 Stat. at Large, 426, sec. 1.

Under the restrictive authority conferred by this act the legislative assembly of the territory passed an act, which was approved December 27, 1867, providing as follows:

"Sec. 1. Corporations for mining, manufacturing, and other industrial pursuits may be formed according to the provisions of this act, such corporations and members thereof being subject to all the conditions and liabilities herein imposed, and to none others."

The act then, in its subsequent sections, provides how such corporations shall be organized, and defines their powers, privileges, and management.

Next in order comes an act of congress, approved June 15, 1872, amending the aforesaid act of congress of March 2, 1867, and containing the following provision:

"That the first section of an act approved March second, eighteen hundred and sixty-seven, * * * so far as it relates to incorporations which have been or which may hereafter be created and organized for the business of mining, manufacturing, or other industrial pursuits, or the construction or operation of railroads, * * * and the colonization and improvement of lands in connection therewith, * * * and for all rightful subjects of legislation consistent with the constitution of the United States under the general incorporation laws of any territory of the United States, shall be construed as having authorized and authorizing the legislative assemblies of the territories of the United States by general incorporation acts to permit persons to associate together as bodies corporate for purposes above named:" 17 Stat. at Large, 390.

Under this last act of congress the legislative assembly of the territory passed an act, which was approved January 5, 1876, amending the first section of the previous act of December 27, 1867, as follows: "That the first section of an act approved December 27, 1867, entitled 'An act to create a general incorporation act,' etc., * * * shall be and hereby is amended so as to read as follows: 'Corporations for mining, manufacturing or other industrial pursuits, or the construction or operation of railroads, * * * and the colonization and improvement of lands in connection therewith, * * * may be formed according to the provisions of this act; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others.'"

Subsequently the legislative assembly of the territory passed two acts,

both of which were approved January 30, 1872, one of which provided for mortgaging and consolidating lines of railroad, and the other for the exercise of eminent domain in acquiring lands for lines of railroad; neither of which, however, has any bearing on the questions involved in this case.

Such, then, was the condition of the law under which the defendant in error was organized as a body corporate on the sixth day of February, 1878. At this date none of its property, if it had any within the territory, was exempt from taxation.

On the second day of February, 1878, four days prior to the organization of the defendant in error as a body corporate, an act of the legislative assemby was approved. This is a general incorporation act in regard to railroad companies exclusively. It provides at great length and with minute detail for the organization of such corporations, their by-laws, election of directors, and their powers and duties, the *status* of corporate stock and its transfer, their corporate powers, the exercise of eminent domain, the regulation and management of their trains, and their privileges and exemptions, etc. Section 3 of chapter 9 of this act provides as follows:

"Sec. 3. To aid and encourage the construction of railroads in this territory, all the property of every kind and description of every corporation formed under this act, shall be exempt from taxation of every kind and description until the expiration of six years from and after the completion of its road or roads."

On a subsequent day of the same session an act was passed by said legislative assembly, which was approved the twelfth day of February, 1878, which provides as follows:

"Sec. 1. That all the powers, privileges, and exemptions conferred upon corporations organized under an act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto, approved February 2, A. D. 1878, are hereby conferred upon all corporations under the laws of this territory for the purpose of constructing railroads," etc.

The said act of the second of February, 1878, contains no repealing clause, nor any provisions as to when it should go into effect; but the legislative assembly at the same session passed still another act on the subject of railroad corporations, which was approved the fifteenth day of February, 1878, and provides as follows:

"Sec. 1. That for the purposes of taxation, any railroad or railroads constructed under the provisions of an act entitled 'An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto,' approved February 2, 1878, shall be deemed and hereby declared to have reached completion, whether at the end of six years from the time of the commencement of the construction thereof the point to which construction has progressed and to which said road or roads have been put in operation is the place of destination of said road or roads, as named in the articles of incorporation of the company building or who built the same, or some point intermediate between the termini of said road or roads, as named in said articles of incorporation, and that the exemption from taxation for six years from and after the completion of said road or roads provided for in the abovementioned act, shall be understood and intended to be exemption from taxation for six years from and after the completion of said road or roads,

as such completion is defined and expressed in this act, and not otherwise. And it is hereby expressly provided, that in no event shall any line of railway, or part of any line of railway, or any part or portion of its property, real or personal, privileges, rights, or franchises, be exempt from taxation for a longer period than twelve years from and after the date of the commencement of the construction of such railway or railways.

"Sec. 2. This act shall be construed to go along with as a part of the above-mentioned act, and shall take effect and be in force from and after its passage."

Upon the approval of this act, its provisions and the provisions of the act of the second of February, 1878, at once went into effect: West Feliciana R. R. Co. v. Johnson et al., 5 How. (Miss.) 276.

There can be no doubt as to the real intention of the legislative assembly in passing these several acts of the second, twelfth, and fifteenth of February, 1878. At that time, the territory of New Mexico was the most inaccessible portion of the dominion of the United States to enterprise and commerce. Every branch of industry was languishing, as it had been for centuries, for lack of cheap and rapid transportation to the leading marts of the country. To expend millions in constructing long lines of railway to and through this remote region was a hazardous undertaking—an experiment—a venture which any but the boldest minds would readily shrink from. At that date, not a foot of railroad had been constructed anywhere within the borders of New Mexico.

It was under this condition of things that the territory, through its legislative assembly, made a bid for railroads under fair and explicit terms, and upon a consideration of great public importance. As plainly as it could be expressed by acts of the legislative assembly, the territory said to all railroad corporations then existing under the laws of the territory, or thereafter to be organized under such laws, that in consideration of the public benefits to be derived from the construction and operation of railroads within the territory, upon the completion of any such railroad by any such corporation, its corporate property therein and connected therewith shall be exempt from taxation for six years after such completion; but in no case to exceed twelve years after the commencement thereof. There was no uncertainty or ambiguity as to the intention, the object, or the terms and conditions of the proposed compact.

With this view the three several acts last aforesaid are to be construed *in pari materia* and as parts of one act; and considered together, the exemption from taxation applies as well to the defendant in error after the completion of its lines of railway as to any corporation created under the special provisions of the act of the second of February, 1878.

It is earnestly contended by one of the counsel for plaintiffs in error, that any enactment of the legislative assembly that had for its object the bestowal of this exemption from taxation on any railway corporation not organized under said act of the second of February, 1878, would be especial legislation, conferring special privileges, and therefore repugnant to the aforesaid acts of congress, and void. This view can not be maintained. Indeed, it may well be assumed, that it was the intention of the legislative assembly to avoid especial legislation, by placing all railway corporations on the same footing as to this exemption, irrespect-

ive of the laws under which they had been organized and authorized to construct and operate railways in the territory.

To confer this exemption on corporations organized under the act of the second of February, 1878, and exclude it from all existing railway corporations otherwise organized, might well be considered as conferring special and exclusive privileges by especial legislation, and in conflict with the act of congress. It is evident, therefore, that if the exemption has not been extended to the defendant in error, then no railway corporation operating lines of road in the territory under the act of February 2, 1878, can rightfully claim it, and that this exemption in such case must be considered as an absolute nullity as to all railway corporations alike.

It is further contended in behalf of the plaintiffs in error, that no contract existed between the territory and the defendant in error whereby such exemption can be sustained; that it was and is a mere gratuity, supported by no consideration, and therefore a *nudum pactum*. If this is true, if it be a gratuity merely, and no consideration as the foundation thereof has passed to the territory, then it necessarily follows that it is a *nudum pactum*, and no exemption from taxation has accrued under it. In support of the doctrine that this exemption from taxation is a mere gratuity, we are referred as authority to Tucker v. Furguson, 22 Wall. 527; West Wis. R. R. Co. v. Supervisors, 3 Otto, 595.

These cases and the one at bar are by no means parallel in principle. In the case of Tucker v. Furguson, *supra*, congress had granted lands to the state of Michigan, to be held by the state for the purpose of aiding in the construction of railroads, and to be applied under certain safeguards prescribed in the grant. The state accepted the grant upon the conditions imposed, and by an act of its legislature vested certain of the lands in a railway company, subject to management and disposal by the board of control of the state, in aid of the construction of the company's railways. Not being authorized to sell the lands, under the conditions of the grant, before the construction of the railroad, the company issued its bonds, and the lands were mortgaged to trustees, with power to sell the mortgaged lands and apply the proceeds to the payment of the bonds. In this way the money was raised, and the railroad was constructed. Upon the completion of the road but a small portion of the lands had been sold by the trustees, and but few of the bonds had been paid. In this condition of things—the residue of the bonds remaining unpaid, and the bulk of the lands remaining in the hands of the trustees and unsold—the state taxed them. It was to avoid the tax on these lands that the suit was brought, it being claimed that the lands were exempt from taxation under a statute then in force, which provided that a certain tax on the railway corporation, a specific annual tax of one per cent. on the cost of the road, and reserving a right to impose a further tax upon gross earnings, should be in lieu of all other taxes to be imposed within the state.

But it was held that the lands had been sold within the meaning of the act of congress, and that, though the state while holding the title as trustee of the United States could not tax them, she could after such title had been conveyed. It was further held, that the tax imposed by the state had reference only to the railroad itself and had no relation to the lands, which were neither necessary nor used in the exercise of the corporation's franchise or in operating its line of railroad. It was upon

this statement of facts that the ruling was made that an agreement by the state to exempt from taxation, when there is no consideration, is a promised gratuity, spontaneously made, and is a "nude pact," which may be kept, changed, or recalled at pleasure.

In West Wisconsin Railway Co. v. Supervisors, *supra*, the facts and rulings were substantially the same.

The principles of law enunciated in those cases can have no application to the case at bar, and under the particular circumstances attending it, we can not concur in the view taken by counsel for the plaintiff in error.

It is true, however, that at the time of the passage of the three several acts of the legislative assembly, in February, 1878, as aforesaid, no valid contract, as to this exemption, was created. The defendant in error had just been organized as a body corporate; but there was not, at that time, any formal acceptance of the conditions of the exemption, nor any promise to construct and operate any lines of railway. There was no provision in any of those acts for any such formal acceptance or promise, as there was in Gordon v. Appeal Tax Cases, 3 How. 133. But, as we have already intimated, these several acts were in the nature of a bid, on the part of the territory, for railroads, with a promise, on her part, to each and all railway corporations, that, on condition of their constructing and operating lines of railway within the territory, their corporate property therein should be exempt from taxation for six years after completion. It was a proposition, in effect, extended to all railroad corporations to enter into a contract with the territory for this exemption, the consideration being the advantage to be derived from cheap and rapid transit, and the acceptance of the terms being the actual construction of lines of railway.

It was on the same principle as a proposed option on the part of the territory. There was nothing to bind the mere option. At any time before acceptance and compliance with its terms it might have been withdrawn; but as soon as accepted and the consideration had passed, it would become a completed contract. In the case at bar, the actual construction of its lines of railway, by the defendant in error, is the consideration on which this contract for exemption is founded. The date of such construction, instead of the date of the corporation's organization, is what must determine the date of the contract and its validity.

It is not, therefore, as contended for by counsel for plaintiffs in error, the mere organization of railway corporations under the act of the second of February, 1878, or the particular code of by-laws controlling the management of their affairs in all their details, that constitutes the paramount consideration for such exemption from taxation. It is the construction, equipment, and the operating of lines of railway in any efficient manner, whereby the public will be benefited by more convenient, cheaper, and more rapid transit for persons and property.

It is further claimed on behalf of plaintiffs in error, that the kind of property covered by these assessments is not covered by the aforesaid terms of exemption from taxation. The language of the assessment, as it was determined by the board of county commissioners on appeal, and as it stands for adjudication, is as follows: "The New Mexico & Southern Pacific Railroad Company, * * * assessed in the sum of one million dollars, which is the capital stock of said company, as appeared in the articles of incorporation filed in the office of the probate court."

While the words of the exemption are: "All the property of any kind and description of every corporation formed under this act shall be exempt from taxation of every kind and description until the expiration of six years from and after the completion of its road or roads."

All the property of a railway corporation, and all the capital stock of the same corporation, for the purposes of taxation, may considered as convertible terms. The value of one is controlled by the value of the other. Each may be viewed in the light of a representative of the other. Whatever lessens the value of one necessarily depreciates the value of the other. And a tax upon one is practically a tax upon the other.

This principle was enunciated in Gordon v. Appeal Tax Cases, 3 How. 133, *supra*. In that case the legislature by an act had continued the charters of certain banks to a certain specified time, upon condition that they would make a certain road and pay a school tax, which would have exempted their franchises, but not their property, from taxation. But in another clause of the act there was a provision, that upon any of the banks accepting of and complying with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters. This was held to be a contract, and to exempt not only their franchises from taxation, but also the stock of individual stockholders. On this point the court (page 147) said: "Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption by it, or to what does it apply? Does it exempt the respective capital stocks of the banks as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both."

In The Mayor and City Council v. The Baltimore & Ohio R. R. Co., 6 Gill, 288, the court of appeals of Maryland, in its opinion on this subject (page 295), said: "But it is said that although by the charter of the Baltimore & Ohio Railroad Company its shares of stock may be exempt from all taxation, yet that such exemption in no wise protects from taxation the specific articles of the company. If such specific property be deemed liable to the imposition of taxes, no sufficient reason can be assigned why the franchise should not be subject to a like imposition. It is as much an ingredient in the shares of stock and component part of their value as is any portion of the corporate property of the company; and if under such an express legislative exemption as that now before us the one be exempt from taxation, so also is the other. The design contemplated by the legislature in the insertion of this clause of exemption in the act of assembly was to confer a certain substantial, not a nominal, benefit on the stockholders, and to induce capitalists to risk their money in a novel and hazardous enterprise. To impute to the legislature in the case before us an intention to exempt the shares of stock from taxation, and at the same time to reserve the right to tax anything that constituted it a stock and gives to it its value, would be gratuitously to cast an imputation upon the legislature inconsistent with every principle of judicial courtesy." To the same effect is State v. Brannin, 23 N. J. 484, and authorities cited.

This, unquestionably, is a sound judicial interpretation of a legislative enactment of that kind, and applies with great force to the question now under consideration. At the time the assessment of 1881 was made,

the revenue act of 1876 was in force, which contained the following provision: "The capital stock and shares of all * * * corporations subject to pay tax in this territory shall be assessed and taxed in the county where the same or the principal office or place of business thereof may be located. Such assessment shall be made against the corporation, and such corporation shall pay the tax, and may charge the same as expense, or to its stockholders, according to their respective shares."

While at the time of the assessment for 1882 the revenue act of the first of March, 1882, was in force, which contains the following provisions: "The property of every * * * corporation must be assessed in the county where the property is situated, and in the name of the * * * corporation. Such * * * corporation shall pay tax, and may charge the same to its * * * stockholders, according to their respective shares. The owner or holder of stock in any * * * corporation, the entire capital or property of which is assessed, shall not be assessed individually for such stock."

Under the revenue law of 1876, the assessment of the defendant in error for 1881 could not have been made, since under the terms of that act it was not subject to pay tax. And upon another ground, neither the assessment for that year under the revenue law of 1876, nor for the next succeeding year, under the revenue law of 1882, can be upheld, for the reason that prior to either assessment the lines of railway of the defendant in error had been completed. The consideration had been received by the territory; the terms of the compact had been complied with, and in law accepted by the contracting parties, and the territory, if so inclined, was inhibited from enacting any law impairing its obligation.

For the territory now to attempt to evade the obligations of this compact is neither wise nor prudent as a measure of public policy. No state can afford to impair its good faith and credit in this way. That "honesty is the best policy" applies with even greater force to states than to individuals.

This six years' limitation as to all lines of railway now constructed will soon expire. By that time the revenue that will be derived from corporate property in railways, and from the advanced values of every other kind of property indirectly caused by the advent of railways, will have reached a magnitude which otherwise would not have been attained for a century.

Under these circumstances, to claim that this exemption is a mere gratuity, that no consideration has been received by the territory, is but the idlest cavil. It may be said that these powerful corporations after acquiring power are often oppressive and extortionate. But these are evils which must be overcome, if at all, by some other and more potent means than by attempting to impair the obligations of fair and reasonable compacts legally entered into by and with them.

In the light of these views, we have no hesitancy in saying that to sustain the tax exemption involved in these cases is but the dictates of sound law as well as of common honesty.

Both judgments affirmed.

BELL, J., concurred.

TERRITORY OF NEW MEXICO *v.* LOPEZ ET AL.

Filed January, 1884.

ORDERS OF THE LOWER COURT OVERRULING A MOTION FOR A CHANGE OF VENUE and for a continuance will not be reversed unless the record discloses an abuse of discretion.

AN OBJECTION TO A JUROR ON THE GROUND OF GENERAL OR ABSOLUTE DISQUALIFICATION, under the statute, differs from an objection on the ground of bias merely. The latter is addressed to the sound discretion of the trial judge; while under the former, if sustained by the evidence, the rejection of the juror becomes mandatory by an arbitrary rule of law.

ONE NOT THE HEAD OF A FAMILY IS NOT QUALIFIED TO ACT AS A JUROR.—As to what constitutes a head of a family, *quære*. But one of two equal partners living together in the same house, and under a contract with their employees by which they were to board and lodge them at their house, and all partners and employees were to eat at the same table, is not such head of a family within the meaning of the statute.

AFTER THE JURY HAVE BEEN INSTRUCTED AND HAVE RETIRED to consider their verdict, in a prosecution for a felony, the court can not, at their request, give them further instructions in the absence of the defendant. If such were done, it would be presumed that the irregularity *per se* constituted error.

INSTRUCTIONS TO A JURY MUST BE IN WRITING, and the materiality of a fact will be presumed from the fact that the court below deemed it proper to give an instruction thereon.

INSTRUCTION TO A JURY IN A PROSECUTION FOR A FELONY, that they must determine a certain fact "according to the evidence, and just as they would any fact in their own private affairs," is erroneous, as tending to mislead the jury to infer therefrom that they might determine every question submitted to them by the same rule. The jury should have been instructed that they should be convinced or satisfied from the evidence, to the exclusion of every reasonable doubt, that such fact had been established.

APPEAL from a judgment of the district court for Colfax county, convicting the defendants of cattle-stealing. The opinion states the facts.

William Breeden, attorney general, for the territory.

Catron, Thornton & Clancy, for the appellants.

BRISTOL, J. The defendants below, Crecencio Lopez and Manuel Casias, who are appellants here, were jointly indicted for cattle-stealing in the district court for the first judicial district and county of Colfax, and convicted and sentenced to five years imprisonment in the territorial prison. A large number of errors are assigned on behalf of the appellants, only a few of which do we deem it necessary to notice. Two of these errors are, that the court below abused its discretion in severally overruling motions for a change of venue and for a continuance.

Upon a careful examination of the whole record, including the affidavits on which such motions were made and the evidence disclosed on the trial, and especially the evidence of the defendants themselves, we can not conceive how the defendants could have acquired any advantage by a change of venue or a continuance, except the possible opportunity that might arise for them to escape, or for the evidence to be suppressed by the death or absence of witnesses. Under the circumstances, there was no abuse of discretion in overruling the motions for a change of venue and for a continuance.

Another error assigned is, that the court below erred in overruling a challenge to the juror, John Carico, on the trial thereof; the ground of the challenge being that he was not the head of a family. Our statute specifies as one of the necessary qualifications of every juror, grand or petit, that he must be the head of a family. If not the head of a family

he is absolutely disqualified as a juror; and if challenged on that ground, and on the trial thereof it is conclusively shown by the evidence that he is not the head of a family, it would be error on the part of the court to allow the juror to remain on the trial panel, however worthy he may be in character and in other qualifications required by law. As to this assignment of error the record discloses the following facts: "That one John Carico was called as a juror in said cause, who also being duly sworn the truth to speak as to his qualifications as a juror in said cause, did then and there, under oath, say to the court that he was not the head of a family; that he was not a married man; that he had no children; that he and his partner kept a mess and house at which he, his partner, and employees, ate and lived; that he, his partner, and their employees were all adults, and that no other persons ate or lived with them. Therefore the said defendants, through their attorneys, challenged and objected to said Carico as a juror in said cause, for the reason that he was not a qualified juror according to law to try said cause, he not being the head of a family; but the court then and there rendered its judgment and decision overruling said challenge and objection, and directed and ordered said Carico to be sworn as a juror to try said cause."

As presented by the record, it would seem that no evidence was taken *after* the challenge had been interposed, but that the court disposed of the same on the evidence received in the previous examination of this juror as to his general qualifications. Our statutes do not specifically prescribe the manner in which a challenge to an individual petit juror shall be tried. But they do not provide that the necessary qualifications of grand and petit juries shall be the same; and they further provide how a challenge to one individual grand juror shall be tried, when the ground of challenge is that he is a minor, or that he is an alien, or that he is insane, or that he is the prosecutor upon a charge against the defendant, or that he is a witness on the part of the prosecution, or that such a state of mind exists on his part in reference to the case or either party which satisfies the court, in the exercise of a sound discretion, that he can not act impartially and without prejudice to the substantive rights of the party challenging: Comp. Laws, 1865, p. 502. As to the trial of each of the foregoing causes of challenge to any grand juror, the statute provides as follows: "The challenge * * * must be entered upon the minutes and tried by the court; provided, that no person of the grand or petit jury shall be challenged after he has been sworn:" Id.

The uniform practice of the courts has been to try all challenges to individual jurors, whether grand or petit, in the manner here pointed out. To be technically correct, therefore, on the trial of any such challenge, the challenge should be interposed first, and the evidence introduced afterwards. On this point, Mr. Bishop, in his work on criminal procedure, 3d ed., vol. 1, sec. 934, says: "A formal challenge to the juror or jurors, specifying the objections, is in some of our states required; in others the examination on the *voir dire* precedes the challenge."

Be this as it may, there can be no doubt that the juror Carico was disqualified, it appearing conclusively from the evidence that he was not the head of a family. Objection to a juror on the ground of general or absolute disqualification under the statute must be considered in a different light from an objection on the ground of bias merely. The latter is addressed to the sound discretion of the trial judge, while by the former,

if sustained by the evidence, the rejection of the juror becomes mandatory under an arbitrary rule of law.

This court is not disposed to favor this particular ground of challenge by any very strict construction of what constitutes the head of a family. But the term must be understood and applied in its ordinary acceptation, and the most liberal interpretation that could be given necessarily requires that the head of a family must be in a position to exercise some degree of authority or control over the conduct and means of support of a person or persons who live with him, and who look to him for guidance and support.

Even the relations of parents and son may be such as to place the son at the head of the family. This relation would subsist if his parents lived with him and looked to and depended on him for their support. But the relation of two equal partners, living together in the same house, and under a contract with their employees, as a part of the consideration, that they should board and lodge them at their house, and all, partners and employees, should eat at the same table, does not, in and of itself, constitute the family relation within the meaning of the statute. Such relation must consist of some tie closer in its moral obligations, and of greater permanence, than merely boarding employees during the limited term of their service; and as to two equal partners, living and messing together as a matter of convenience and economy, perhaps, in their business relations, neither could be considered the head of the others in the sense of the *family* relation.

It is also assigned as error that, after the jury had been charged by the court, and had retired to deliberate, they returned and received verbal instructions from the court, in the absence of the defendants and their attorneys. The record relating to this ground of error is as follows: "The jury, * * * having heard the evidence and the instructions of the court that were given in writing, retired to their room * * * to deliberate on their verdict. * * * That said jury, not having agreed upon a verdict in said cause, * * * they were brought by the sheriff into court *in the absence of the defendants and their attorneys*, and in the absence of the attorney of the territory, when the judge of the court stated to them, *verbally*, in substance, and not in writing, in answer to an inquiry by one or more of said jurors, *as to where those men were driving those cattle, that the jury must determine that fact according to the evidence, and just as they would determine any fact in their own private affairs.*"

The defendants were being tried for grand larceny, which, under our law, is a felony. The doctrine seems to be well settled, that after the jury have been instructed and have retired to consider of their verdict, in all trials for felony, it would be irregular and improper for the court to receive the jury, or to have any communication with them, touching the case submitted to them, in the absence of the defendant. In all such cases, the presumption of law is, that the irregularity *per se* constitutes error. On this subject, Mr. Bishop says: "It is a principle pervading the entire law of procedure in criminal causes, that after indictment found, nothing shall be done in the cause in the absence of the prisoner." 1 Bishop's Cr. Proc., sec. 682.

To this principle, as a rule of law, there are no exceptions other than in the lower class of misdemeanors, where a fine only, and no corporal punishment, may be imposed, and in a few instances, of orders within

the discretion of the presiding judge, such as an order on a motion for a continuance. And even such motion, if made on behalf of the prosecution, can not be entertained, except on notice to the prisoner or his counsel: Bishop's Cr. Proc., secs. 684, 685.

In regard to felonies, Mr. Bishop further says: "In felonies, it is not in the province of the prisoner, either by himself or by his counsel, to waive the right to be personally present during the trial:" Bishop's Cr. Proc., sec. 686.

This is strong language, but it is unquestionably the law. Giving instructions to the jury is as much a part of the trial as is the taking of testimony or receiving the verdict. The charge to the jury is often the most important incident in the trial, in its influence upon the minds of the jury in finding a verdict. If, at any time during the progress of the trial, it can be to the interest of the prisoner with his counsel to be present in open court, it is while the presiding judge is instructing the jury as to any rule of law to be observed by them in arriving at a verdict.

In the case of Prine v. The Commonwealth, 18 Pa. St. 168, the record disclosed the facts that the prisoners were tried and convicted of burglary, but at the time of the rendition of the verdict the prisoners' counsel were present, and the prisoners *absent*. Defendants' counsel thereupon waived the presence of the prisoners, and had the jury polled, when they severally answered that they found the defendants guilty. On writ of error the appellate court held, that "it is undoubtedly error to try a person for felony in his absence, even with his consent. * * * No precedent can be found in which his presence is not a postulate *of every part of the record*. * * * These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. * * * It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial *is inherent and inalienable*."

After the jury have been charged by the court, and they have retired to deliberate, it is always proper for them to ask the bailiff in charge to conduct them before the court for further instructions. But in all such cases the proper practice would be to send for the prisoner and his counsel, and as soon as they come into court to have the names of the jurors called, and if all are found to be present, the court will then receive any communication they have to make, and instruct them accordingly.

Mr. Bishop more elaborately puts it thus: "After the jury have retired to deliberate on their verdict, there may be further communication between them and the court at the desire of either. If at the court's, an officer is sent for them, and it takes place in open court; the judge has no right to visit them for the purpose in their room, or otherwise communicate with them in private. If at the jury's, they are conducted for the purpose into open court. The counsel and the parties should be notified, *and their presence is a right or necessity the same as during the prior parts of the trial*. The instructions desired, on the one side or the other, and required by the circumstances, will then be given:" 1 Bishop's Cr. Proc., 3d ed., sec. 1000.

If the court, on an occasion of this kind, deems it proper to give the jury any further instruction or advice as to how they should determine any question of fact, or any rule of law to be observed by them in arriving at a verdict, such instruction, under our statute, must be in

writing, and should properly enunciate the law on the subject. If there be a failure in either of these legal propositions it would be error.

The inquiry of the jury, "as to where those men were driving those cattle," may or may not have been material, but this court may well assume that it was material from the fact that the court below deemed it proper to give an instruction thereon.

In saying to them, however, "that the jury must determine that fact according to the evidence, and just as they would determine any fact in their own private affairs," was not a proper instruction as to how they should determine any question of fact in the case. This instruction was well calculated to mislead the jury, as they might infer therefrom that they were at liberty to determine every question submitted to them by the same rule.

The only proper instruction under the law that can be given to the jury as a guide in determining any question of fact necessary to a conviction is, that they should be convinced or satisfied from the evidence, to the exclusion of every reasonable doubt, that such fact has been established. The court may, however, and in the higher grades of felonies it is often its duty to, go further and explain what constitutes a reasonable doubt.

This rule of law should be applied, not only as a general proposition in determining the defendant's guilt, but also to the establishment of each and every element or fact constituting the crime charged. It is always unsafe to attempt any substitute for such an instruction: 1 Bishop's Cr. Proc., 1st ed., secs. 818, 819. The instruction to the jury that they should determine a question of fact, "just as they would determine any fact in their own private affairs," was therefore a violation of this rule of law, and was erroneous. The instruction was also objectionable on the ground of its not being in writing.

In the case of Territory v. Perea, 1 N. M. 627, this court said that "the statute requiring instructions to a trial jury to be in writing is not directory merely, but mandatory in its terms. In states where similar statutes have been enacted, their respective superior courts have uniformly held that oral instructions, in whole or in part, are error, and sufficient cause for setting aside the judgment and ordering a new trial. The adjudications on this subject present an array of precedents that can not well be ignored. * * * We are of the opinion that the only proper mode in giving instructions as a charge to a trial jury, and particularly in regard to the higher grades of crime denominated felonies, is for the district court to give in writing all that it deems necessary or even proper to say to the jury in its charge:" *Vide*, 45 Mo. 64; 6 Ind. 399; 19 Ill. 82; 1 Col. 611; 43 Cal. 29; 37 Ind. 294; 45 Id. 650.

Judgment below reversed, and cause remanded for trial *de novo*.

BELL, J., concurred.

Denver & Rio Grande Railway Company *v.* Harris.

Filed January, 1884.

In an Action against a Corporation Founded on the Unlawful or Tortious Acts of its Agents or servants, the fact whether the acts complained of were done by such agents on their own account exclusively, or on behalf of the corporation and within the scope of their employment, need not ordinarily be established by the plaintiff by proof of what occurred at some meeting of the directors of the corporation, but by proof of what the agents and servants had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and if the corporation accepted such acts and used the fruits thereof, proof thereof might be given to establish the corporate liability.

Corporations are Liable for Every Wrong, Trespass, and Tort Committed by their Agents and employees within the scope of their employment, to the same extent as individuals under like circumstances. The doctrine of *ultra vires*, as formerly understood, does not have any application to such cases.

A Railroad Corporation is Liable for the Acts of Violence or the Torts of an Armed Body of men, formed of its servants and employees, in taking forcible possession of another railroad by its authority. Such acts of its agents, as well as their declarations in respect thereto, are admissible in evidence, as tending to prove an authorization by the corporation; and if the latter accepted and received into its possession and assumed control of the railroad so seized, and operated the same, such facts would be strong circumstantial evidence that the agents, in taking such possession, were acting within the scope of their employment and under the direction of their principal.

Failure of the Trial Court to Note the Modifications Made by Him in an instruction as asked for in the manner required by statute is an irregularity, but not such an error as to warrant a reversal.

Error to the district court for Santa Fé county. The opinion states the facts.

William Breeden, for the plaintiff in error.

C. H. Gildersleeve and *John H. Knaebel*, for defendant in error.

Bristol, J. This case is here on writ of error to the district court for the first judicial district and county of Santa Fé. Harris, the plaintiff below, brought an action of trespass against the Denver & Rio Grande Railway Company, a corporation under the laws of the state of Colorado, to recover damages in the sum of ten thousand dollars for bodily injuries inflicted by the agents and employees of the defendant corporation while in and about the employment of their principal, and recovered judgment in the sum of nine thousand dollars.

As to the merits of the case, the whole controversy turns upon the question whether the injuries were inflicted by the agents or employees of the defendant corporation or other persons acting on their own behalf exclusively, or acting within the scope of their employment by such corporation. A corporation being an artificial body created by law, all its acts necessarily must be performed by its agents and servants. And when a corporation is sued in an action founded on the unlawful or tortious acts of the agents or servants, the fact whether the acts complained of were done on their own account exclusively or on behalf of the corporation, within the line of their employment, is not ordinarily to be established by the plaintiff by proof of what occurred in some meeting of the directors of the corporation—the evidence of which is under the control of such directors—but by proof of what the agents and servants of the corporation had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and especially if attained, and the corporation accepted

the same and used the fruits thereof as its own, proof thereof might be received to establish the corporate liability.

The old common-law doctrine, that "a corporation can not be aiding to a trespass" nor "give a warrant to do a trespass without writing," or that "it could authorize no agent to do no act and give no assent but by deed," was long since exploded. The doctrine, as now understood and applied by the courts, is that corporations are liable for every wrong, every trespass, and every tort committed by their agents and employees within the scope of their employment as such, and to the same extent as individuals under like circumstances; and the doctrine of *ultra vires*, as formerly understood and applied, does not, under the modern decisions, have any application to such cases: Mechanics' Bank v. State Bank, 10 Wall. 645; National Bank v. Graham, 10 Otto, 702; The State v. The Morris & Essex R. R. Co., 23 N. J. L. 368, 369. The doctrine of *ultra vires*, as formerly understood and applied by the courts to corporations, was that such institutions were endowed with a species of infallibility. That they in their corporate character could not do or sanction any act by and through their agents or servants which they were not authorized to do by their respective charters conferring corporate powers. That because they were not authorized to do wrongful and tortious acts, they could therefore do no wrong.

But it was soon ascertained that these institutions, notwithstanding they had no legal authority to do wrong, yet often assumed powers *ultra vires* to do, and actually did commit, all sorts of trespasses and unlawful and wrongful acts through wholly irresponsible servants and employees, often causing the greatest losses and damages to private individuals and their property; and the courts, to protect society, were finally impelled, *ex necessitate*, to place the responsibility of corporations on a more enlightened and reasonable basis.

The doctrine of *ultra vires*, as now interpreted by the courts and applied to corporations, signifies merely such acts and doings of any corporation which, though it may have the power to perform, or to adopt and sanction through its agents or servants, yet it has no legal authority to do under its charter of corporate powers; in the same sense precisely that every act performed by a natural person, which the law either in express terms or by necessary implication does not sanction nor confer on him any right to do, would be illegal and might be termed *ultra vires*.

In the well-considered case of The State v. The Morris & Essex Railroad Co., *supra*, in which this whole subject is ably reviewed and the modern doctrine clearly expressed, the court by its chief justice used the following language: "But it is said, that although a corporation may omit to perform acts made obligatory upon it by law and thus be liable for non-feasance, yet from its very nature it can not use force, and therefore can not commit any act involving force, and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is this very agreement by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable

civiliter for all torts committed by its servants or agents by authority of the corporation, express or implied. * * *

"The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal *nor a vote of the corporation constituting the agency or authorizing the act.* * * *

"It is further objected that a corporation aggregate can not be liable to indictment for a crime because the commission of the criminal act is not warranted by their corporate powers. This agreement, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney in his argument in the Chestnut Hill Turnpike Co. v. Britter, 6 Binn. 12. According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice. * * *

"It is said again that the individuals who concur in making the order or in doing the work are individually responsible. And so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been to look to the principal rather than to the mere agent; and in the case of corporations it is the clear dictate of sound law not only, but of public policy, to look rather to the corporation at whose instance and for whose benefit the wrong is perpetrated than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who in a great majority of cases would be alike unknown and irresponsible."

The authority of the agents and servants of the corporation, and the approval and acceptance of their work and its fruits by their principal, may be proved by the acts and conduct of the corporation in relation thereto, whether the same are manifested by it collectively or through its officers, agents, tenants, etc.: Angell & Ames on Corp., 9th ed., sec. 186.

In Magil v. Kauffman, 6 Binn., the supreme court of Pennsylvania held that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting business relative to the corporation, as well as evidence of what passed at the meeting of the congregation when assembled on business in relation thereto, were admissible to show the possession of the corporation of land and the extent of its claim of its boundaries.

We cite this authority in answer to the assumption of counsel for plaintiff in error, that the acts and declarations of the agents of the defendant corporation on the trial below ought not to have been received in evidence to establish its liability for the acts of its agents, and to show that it was implicated in taking possession of the railroad in question and holding the same.

Under the modern, and as it would seem controlling, adjudications on

the subject, there can be no doubt, as a legal proposition, that if the defendant corporation (plaintiff in error here) in any manner had formed the purpose of seizing, through its agents and employees, the Denver & Rio Grande Railway while in the peaceable possession of the Atchison, Topeka & Santa Fé Railway Co., and seizing the same by force if necessary, and either directed, commanded, or counseled the same or assented thereto, then it followed as a matter of law that the acts of its agents or employees in taking possession in pursuance thereof were the acts of the corporation. And if in taking such possession under such circumstances its agents or employees committed acts of violence amounting to trespasses or torts for which an action would lie for damages, the corporation, as well as its agents and employees engaged in the same, would be liable to respond in damages to the injured parties. And as proper circumstantial evidence tending to prove the connection of the corporation with the acts of its agents in taking possession, such acts of its agents, as well as their declarations in respect thereto, and the object thereof, may be received. And if the corporation accepted and received into its possession, and assumed control of the railroad so seized, and commenced and for a time continued to use and operate the same as its own, it would be a very strong circumstance indeed tending to establish the fact that its agents and employees in taking possession were acting within the scope of their employment, and under the direction of their principal.

The record discloses the fact that there was evidence on the trial in the lower court to the effect that about the tenth or twelfth of June, 1879, the Atchison, Topeka & Santa Fé Railway Co. was in peaceable possession, by its agents and employees, of a certain railroad in the state of Colorado running from Alamosa to the city of Pueblo in that state. That at or about that date, and while the Atchison, Topeka & Santa Fé Railway Co. were so in possession of said railroad, the plaintiff in error, the Denver & Rio Grande Railway Co., by an armed force of several hundred men acting as its agents and employees, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employees of said Atchison, Topeka & Santa Fé Railway Co. having charge of said railroad, and forcibly drove them from the same, and took forcible possession thereof. That there was a demonstration of armed men all along the line of the railroad seized, and while this was being done, and the seizure was being made, the defendant in error, who was an employee of the Atchison, Topeka & Santa Fe Railway Co., on said line of railroad, and while on the track of the road, and on a hand-car thereon, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured. That immediately upon the seizure of the railroad, as aforesaid, the plaintiff in error accepted it, and at once entered into possession thereof, and commenced and for some time continued to use and operate the same as its own.

But notwithstanding this strong circumstantial evidence, it is contended, on behalf of the plaintiff in error, that inasmuch as there is no direct proof that the identical men who did the shooting had any specific orders or directions from the corporate authorities to act in the premises, we ought to assume that no such orders or directions existed, and that those particular men were acting entirely on their own behalf and independently of the corporation. This would be too much like an assumption that skirmishers in battle, because somewhat detached from the main body of troops, did not belong to the army, but were fighting

independently on their own account, and without orders from the officer in command. All this might be possible, but the strong presumption would be the other way. The fact that these men committed the violent assault with deadly weapons at the time and place, and in the manner and under the circumstances, detailed in the evidence, gives rise to a very strong presumption that they were a part of the armed force employed to seize the railroad.

These facts and circumstances, together with the declarations of the agents and officials of the plaintiff in error, under whom this armed force acted and from whom they received their directions, were competent to go to the jury as evidence tending to establish the corporation's liability. If the acts of trespass complained of were the acts of the agents, employees, or other persons on their own account, and were in no way authorized or sanctioned by the corporation, it was within the actual knowledge of some of its officers or agents, and could have been easily proved. No attempt of this kind having been made, the strong presumption arises that these armed men, including those who did the shooting, were acting in concert, within the line of their employment by the corporation, for the attainment of a specific object in its behalf.

The question as to which of these railway companies was legally entitled to the line of railroad in controversy between them does not arise in this case. Even if the Denver & Rio Grande Railway Company had been legally entitled to the possession, it would not have justified the manner of seizure. The excessive violence committed in either event would have constituted a trespass for which an action for damages would lie.

We hold, therefore, that there was sufficient evidence submitted to the jury which, if true—and it was for the jury to determine its credibility—justified a verdict for the plaintiff.

A long list of specific instructions, founded mainly on the ancient doctrine that a corporation was incapacitated from doing or sanctioning any act of its servants not authorized by its charter of corporate authority, thus exempting it from all liability for the wrongful acts of its employees, though directed by its principal officers and managers, were asked to be given to the jury on behalf of plaintiff in error, and which were refused by the court, except two, one of which was given as demanded, and the other given with a part erased. To the ruling of the court on each one of which, except the one given, the defendant below excepted.

All the unconditional refusals to charge as demanded were proper, and constituted no error. The instruction given by the court as demanded by the defendant corporation was as follows: "Agents or managers of the affairs of a railroad corporation, such as the defendant, can not be *legally* employed by such company to shoot a person, nor are the officers, agents, or managers of such company, in the usual course of their employment as such officer, agent, or manager, authorized to employ any one to shoot another person." This instruction was given in full, as demanded on behalf of the defendant corporation. There was no exception to this instruction on behalf of the plaintiff below, and we quote merely to show that it was more liberal to the defendant corporation than just. While it was true as a legal proposition, as far as it went, yet it was well calculated to mislead the jury. Having been given as an independent instruction, the jury might have inferred from its phraseology that if the company could not *legally* authorize its agents to committ the trespass it would not

be liable. The instruction, to be proper, ought to have contained the qualifying words that notwithstanding the company could not *legally* authorize or sanction the wrongful act, yet if, as a matter of fact, it actually did not only authorize but sanction the same, it would be liable.

The other instruction that was, as aforesaid, partly given and partly refused, is as follows: "Before a railroad company can be held liable for the willful act of any employee or agent in shooting a person, or causing a person to be shot, it must appear from the evidence, to the satisfaction of the jury, that such employee or agent had been employed by the company, under authority of its board of directors, to do such acts, or that it in some way ratified the said act; failing in such proofs in this case, the jury should find for the defendant." The latter clause of this instruction was erased, evidently by the trial judge, and marked in the margin by him, so that it stands upon the record thus: "Given, except as to part lined out."

This instruction was excepted to on behalf of the plaintiff in error, on the ground that the entire instruction was not given. But the part that was given was open to the criticism of being liable to improperly mislead the jury, since they might have inferred therefrom that to render the corporation liable for the trespass committed by its agents or employees it must have been directed or sanctioned at some meeting of the board of directors, which, as we have seen from the authorities, does not follow as a necessary prerequisite to establish such liability, since the same may be implied or inferred from the acts of officials and agents of the corporation, and the attendant circumstances, without any formal meeting of the board of directors to consider the matter.

The plaintiff in error can not be injured or prejudiced by this instruction, as it is more in his favor than the law would seem to justify. But the erasure in this instruction is an irregularity under our statute, which provides as follows: "If the court refuse a written instruction as demanded, but gives the same with a modification, which the court may do, such modification shall not be by *interlineation or erasure*, but shall be well defined, and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded:" Prince's Stat. 127, sec. 24. The erasure, in this instruction, by the judge, was clearly a violation of the statute. But as the statute on the subject may properly be considered as directory merely, and not mandatory, and as the erasure can not be considered as prejudicial to the plaintiff in error, it is not such an irregularity as will justify a reversal.

No substantial error appearing from an examination of the record, it is ordered that the judgment below be affirmed.

SUPREME COURT OF OREGON.

COOLIDGE ET AL. *v.* FORWARD ET AL.

Filed October, 1883.

A SUIT IN EQUITY FOR THE PURPOSE OF DETERMINING AN ADVERSE CLAIM, estate, or interest in real property, under section 500 of the code of civil procedure, can not be brought by a person not in possession. Such section has no effect upon the ordinary jurisdiction of courts of equity as to cases not within the scope of its operation. Its purpose is to enlarge, not to impair, such jurisdiction.

EQUITY WILL NOT, AT THE INSTANCE OF AN ALLEGED GRANTEE HAVING MERELY A CONSTRUCTIVE POSSESSION, enjoin a sheriff's sale of the real property conveyed under a subsequent execution against the grantor, where the validity of the conveyance to such grantee, and his title depending thereon, are fairly questioned.

APPEAL from a judgment of the circuit court for Marion county, entered in favor of the plaintiffs. The opinion states the facts.

N. B. Knight and *John Kelsay*, for the appellants.

J. A. Stratton, *Tilmon Ford*, and *J. J. Shaw*, for the respondents.

WATSON, C. J. This was a suit to enjoin a sheriff's sale of real property situated in Marion county, and alleged to belong to the respondents, upon an execution against the property of a third party named Jennings Smith, issued upon a judgment recovered against Smith by the appellant Heneky in the circuit court for said county. The grounds upon which the relief by injunction is claimed are that the sale, if permitted, will cloud the title of the respondents to the property and produce irreparable injury.

The complaint states title in Smith on October 12, 1881, a conveyance on that day by him and wife to the respondents for the consideration of twelve thousand dollars, by them paid to said Smith, and they "have ever since been and now are the owners in fee of said premises, and said deed was duly recorded in the records of deeds of said county on the fourteenth day of October, 1881." It also states the recovery of Heneky's judgment against Smith for the "sum of four thousand dollars damages, and costs in the additional sum of two hundred and four dollars and five cents, in said circuit court on March 1, 1882," in an action then pending in said court, the issuance of the execution thereon to the appellant Forward, sheriff of said county, its levy upon said property and the advertisement thereof for sale, and that said sheriff threatens to, and unless restrained will, proceed to sell said property according to such advertisement. The case comes here on appeal from the judgment of the circuit court, entered upon its decision overruling a general demurrer filed by the appellant to the complaint.

No possession of the property by the respondents, either by "themselves or by their tenant," is alleged in the complaint. This omission is fatal to the suit being considered as having been brought for the purpose of determining an "adverse claim, estate, or interest," under section 500 of the code of civil procedure. The language of this imports that actual possession was intended, and such has been the uniform construction placed upon similar provisions to be found in the codes of many of the other states: Rico v. Spence, 21 Cal. 504; Collins v. Collins, 19 Ohio St. 468; Curtis v. Sutter, 15 Cal. 259; Wals v. Grosvenor, 31 Wis. 681; Stark v. Starrs, 6 Wall. 402; Teal v. Collins, 9 Or. 89.

But the adoption of such statutory provisions as section 500 has never been supposed to have any effect upon this ordinary chancery jurisdic-

tion, as to cases not within the scope of their operation. Their purpose is to enlarge, not to impair, the ordinary jurisdiction. We have therefore to determine whether the suit is sustainable upon common-law principles, in view of the facts alleged in the complaint. We shall assume that constructive possession, which is all the complaint shows in this case, is sufficient, so far as possession is concerned, to enable a plaintiff to maintain such a suit at common law, and independently of any positive legislation. For although he may not have actual possession, if the defendant has not, nor has interfered in any manner with the possession, how could the plaintiff procure the trial of his title in a court of law? Mitchell and Wife v. Etter et al., 22 Ark. 178; Apperson & Co. v. Ford et al., 23 Id. 746, *per* Fairchild, J. In the case before us the respondents rely upon title alone as giving them the right to the aid of equity to prevent a cloud being cast. If they establish their title, and satisfy the court that the proceeding they seek to have enjoined will, if permitted to go on, result in a cloud upon that title, the case presented in the complaint will be made out.

The complaint shows upon its face that their title is disputed by the appellants, for the latter have levied upon and threaten to sell the property as the property of Jennings Smith, the judgment debtor, under execution issued upon the judgment against him. There is no allegation that the appellants are acting in bad faith, or without reasonable grounds, in attempting to satisfy the Heneky judgment by an execution sale of the property as still belonging to the judgment debtor; and only the ordinary case is presented of a judgment creditor affirming that a conveyance by his debtor prior to the rendition of his judgment was fraudulent, and seeking to obtain satisfaction of his debt out of such property through regular legal process.

Will equity interfere in such a case? Mr. High, in his valuable work on injunctions, lays down the broad doctrine, that a sale of lands under execution which would confer no title upon the purchaser, and whose only effect would be to cloud the title of others, will be enjoined, and cites many authorities as sustaining the proposition: 1 High on Inj., sec. 372. It would seem to result as a logical conclusion from the admission of the jurisdiction to enjoin in such cases, that equity must have the power to inquire into and determine the facts constituting the foundation of such jurisdiction, *i. e.*, whether the impending sale against which the injunction is asked would or would not confer any title on the purchaser if permitted to take place? That equity would grant the relief upon an admitted state of facts of this nature, can not be doubted. For it would be clearly unjustifiable and against conscience to thus acquire the means of annoyance and injury to another without any possibility of legitimate benefit to one's self. It would amount to fraud: 1 Story's Eq. Jur. 700. But will equity assume to try the question of title in such cases when fairly disputed?

Not one of the cases cited by Mr. High, which we have been able to examine, supports the affirmative of this question, except where the equity jurisdiction has been aided by statutory provisions similar to our own. It must be admitted, however, that the reference to these authorities indicates no such distinction between them.

If the two leading cases included in the reference, Pettit v. Shepherd, 5 Paige, 493, and Pixley v. Huggins, 15 Cal. 127, both of which appear to have been decided without reference to particular statutes, are closely

examined, it will be seen that both were tried on their merits, as cases properly in equity, without objection by any party entitled to a trial at law, and that in the former the objection to the jurisdiction raised for the first time at the final hearing was overruled distinctly on the ground that it came too late in the progress of the case, while in the latter the point never was raised or considered at all. And as the execution creditor may himself bring a suit in equity in the first instance to determine the title of a supposed fraudulent grantee of his debtor, there would seem to be no inconsistency in his submitting to the equity jurisdiction in a suit brought against him to enjoin the sale of property upon his execution, and presenting his case there for a final determination upon the merits; and, should he see fit to adopt this course, there can be no reason why he should not be held bound by his election. But such is not the case here. The appellants have not submitted to the equity jurisdiction, nor waived their right to a trial at law.

In Abbott v. Allen, 2 Johns. Ch. 519, Chancellor Kent refused relief, by injunction, to a purchaser of lands in undisturbed possession, sought on the ground of defect of title, against the payment of a bond given for the unpaid purchase money, or proceedings on a mortgage given to secure the same, there being no allegation of fraud in the sale, nor any eviction. In the course of his opinion in the case, the following views are expressed: "The only plausible argument against the injunction is that as the plaintiff has covenants to secure his title, the interference of this court is necessary to prevent circuity of action, and that the plaintiff ought not to be compelled to pay the purchase money, when by a suit on his covenants he might almost concurrently recover it back again. This argument would apply to every case of material and independent covenants, and would prove too much; but the proper answer here is, that to sustain the injunction would be assuming the fact of a failure of title before eviction or trial at law, and which this court, as not possessing any direct jurisdiction over legal titles, is not bound or authorized to assume. This court may perhaps try title to land when it arises incidentally, but it is understood not to be within its province when the case depends on a single legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference."

In Tucker v. Kensington, 47 N. H. 267, the court enjoined the sale of a debtor's exempt homestead on the ground that if suffered to take place it would give the purchaser an apparent title or claim upon the property injurious to the true owner, and which, at the same time, it would be against conscience for the purchaser to hold. In further illustration of their views upon the subject, the court say:

"In many cases equity would decline to interfere, but leave the parties to their remedies at law. This would ordinarily be the case where the creditor has levied his execution upon land of his debtor, which had been previously conveyed by him, but which the creditor proposed to impeach as fraudulent. If there the creditor acted in good faith, having reason to believe that the previous conveyance was fraudulent and void, he could not be regarded as holding the title thus acquired by the levy against equity and good conscience, and the court would not probably take jurisdiction and undertake to administer th s summary remedy, but leave it to be settled at law. If, however, it is apparent that the charge of fraud is merely colorable and groundless, and not in good faith, a

court of equity might in its discretion interfere and remove a title of that character."

In Winche's Appeal, 61 Pa. St. 424, it was held that equity would not interfere by injunction, in ordinary cases, to restrain a judgment creditor from selling on execution whatever interest his debtor might have in real property claimed by a third party. To the same effect is Sutherland v. Harker, 83 N. C. 200. Speaking of this class of cases, Mr. Bump says: "In general, however, relief may be had at law as well as in equity, and the determination of the question of fraud can not be withdrawn from the forum which the creditor selects:" Bump on Fraudulent Conveyances, 518.

It is apparent that the case at bar depends as completely "on a simple legal title, * * * brought up directly by the bill," as that of Abbott v. Allen, 2 Johns. Ch. 519, before alluded to. The rule of non-interference by courts of equity, in such cases, seems very well settled upon the authorities, and the reason for this is plain. The determination of legal titles never pertained to the chancery jurisdiction at common law. It is only where the jurisdiction has been aided by positive statutory enactment that courts of equity entertain suits involving ordinary legal questions of disputed title, that have been positively settled by a trial at law. It is not difficult to see how the entire jurisdiction over the settlement of controversies about legal titles might, in this indirect manner, be transferred from the proper legal forum to the courts of equity, if every claimant of the legal title might summon every rival claimant before the latter tribunals, and have his title adjudicated upon under the pretext of removing a cloud from his own. At common law, then, a party can not, by simply alleging title in himself, compel a hostile claimant to litigate the issue between them as to title in a court of equity. He must show some other ground of equity jurisdiction—something in the acquirement or retention and use of the rival which renders it contrary to equity and good conscience to longer hold or assert it.

But where the question is simply which of the contesting parties has the superior legal title, equity will not interfere. And such, in fact, is the question which this case presents. Either the respondents obtained the title through their conveyance from Smith of October 12, 1881, or the appellants now have it levied upon under the execution issued on Heneky's judgment against Smith. Where is the title? is the controlling inquiry, for its determination alone will demonstrate whether or not any cloud exists as respondents allege.

When the purchaser at the sheriff's sale, if one shall occur, shall have retained the title or claim so acquired so long, or make such use of it as to embarrass or injure the respondents in respect to their ownership of the property in litigation, without affording them any opportunity to test the validity of his claims in proceedings at law, then no doubt they may successfully invoke the aid of the courts of equity to adjudicate upon such claims as a cloud upon their title, even under their common-law jurisdiction. But to obtain relief upon any other conditions, they must bring themselves within the operation of the statute.

That the sheriff's deed upon such sale would constitute a cloud upon the title of the respondents, if the title should prove to be in them, we can hardly doubt. This is the doctrine of Pixley v. Huggins, 15 Cal. 127, which not only appears to be entirely sound, but to be very generally recognized as correct. In Moore v. Cord, 14 Wis. 231, however,

a somewhat different view seems to have prevailed. It is there supposed that the whole record must be looked at together, and the deed of a prior purchaser, regular upon its face and duly recorded, would render the invalidity of a subsequent deed apparent, and prevent its being considered as a cloud on the title of the prior purchaser. But the record in such a case would only show a *prima facie* title in the prior purchaser. It would not be conclusive in his favor. Facts *dehors* the record, but still capable of proof, might exist which would show the first conveyance void, and the subsequent one valid. This is not like the case of a conveyance or other instrument, void on its face, and which no quantity or character of external proof could render valid and effectual.

The case at bar serves well to illustrate this distinction. If the conveyance from Smith and wife to the respondents was fraudulent as to the Heneky judgment, a purchaser at a sheriff's sale thereunder would obtain the full legal title. The record of his sheriff's deed would be notice of his title from the time of his levy of the execution upon the property purchased at the sale. What prudent man would purchase the property from the respondents at its full value under such circumstances? How could they themselves ever feel secure in holding or disposing of the property with such a cloud hanging over it? But we think the rule laid down in Pixley v. Huggins, that every deed from the same source, and regular upon the face of the proceedings from which it springs, should be deemed a cloud on the title of the true owner, is the correct one in principle, and that it is fairly sustained by the weight of judicial authority. But for reasons already given, the decree of the circuit court must be reversed and the suit dismissed; and it is so ordered.

STATE OF OREGON *v.* CANNON.

Filed January 7, 1884.

AFTER JUDGMENT HAS BEEN RENDERED AGAINST A PRISONER AND HE HAS BEEN COMMITTED to jail thereunder, the court has no power, even during the same term, to revise such judgment and increase the sentence imposed.

APPEAL from a judgment of the circuit court for Marion county, convicting the defendant of an assault. The opinion states the facts.

N. B. Knight, for the appellant.

W. H. Holmes, district attorney, for the respondent.

LORD, J. The only question to be determined in this case is, Could the court legally impose the judgment and sentence under which the defendant is now imprisoned? The record discloses that the defendant was indicted for an assault with a dangerous weapon, to which he had entered a plea of not guilty; that subsequently, and by consent of the court, he was permitted to withdraw that plea, and enter the plea of guilty of an assault, upon which the court rendered judgment against the defendant that he pay a fine of fifty dollars and expenses of the action, and that he be committed to the custody of the sheriff of said county until said fine be paid; that in pursuance of said judgment, the defendant was taken into custody by the sheriff and committed to the county jail; that thereafter, but on the same day, upon an order of said court, the defendant was brought from said jail into said court, when the

court proceeded again to pass sentence and judgment against him, "that he pay a fine of two hundred dollars, and the costs and expenses of the action, and that he stand committed until said fine be paid," against the objection of said defendant that he had already been committed to jail under the judgment of said court, and that the court could not render another judgment against him upon said plea of guilty under the proceedings then before it. We are only called upon to determine this case upon the record certified to us. That record shows that the defendant was duly committed to jail by the sheriff under the first judgment of conviction, and was then undergoing punishment on account of it, when he was again brought before the court and another judgment rendered against him by virtue of the same proceedings, and under which he is now held. The fact that the last judgment was such as did not exceed the limit fixed for the crime is not material here. The question here is, Could the court revise its judgment and increase the sentence imposed, although during the same term, after its original judgment had gone into effect? It is clear upon authority that this can not be done. When a sentence had been passed upon a defendant and the judgment has gone into effect by commitment of the defendant under it, the court has done all that it had the legal power to do under the proceedings in that case: Commonwealth v. Wymouth, 2 Allen, 144; Brown v. Rice, 57 Me. 56; The People v. Duffy, 5 Barb. 205. We are therefore of the opinion that the last judgment was illegally imposed, and can not be enforced, but that the first was legal and should be executed.

SUPREME COURT OF WASHINGTON TERRITORY.

BUSBY *v.* CARPENTER.

Filed July, 1880.

THE DEFENDANT IS ENTITLED TO A JUDGMENT FOR HIS COST, in an action prosecuted in the district court for the recovery of money only, and arising on contract, when the plaintiff's recovery is for a less amount than one hundred dollars.

WHERE A WITNESS HAS TESTIFIED TO A HOSTILITY TOWARD ONE OF THE PARTIES to the action, and has been permitted to detail the grounds of his hostility, the refusal of the court to permit such party to give evidence contradicting the statements of the witness as to such hostility, is not an abuse of discretion.

ERROR to the third judicial district court. The opinion states the facts.

Burke & Rasin, for the plaintiff in error.

Jacobs, Hall & Osborne, for the defendant in error.

WINGARD, J. The plaintiff below, Ara Carpenter, brought an action against H. B. Bagley in the district court of the third judicial district, to recover one hundred and eighty odd dollars. Defendant Bagley denied the right of the plaintiff to recover anything, and set up a counter-claim and set-off, and asked judgment. The plaintiff, Carpenter, replied, and issue was completed. William Cochran, a witness for Carpenter, admitted, on cross-examination, that he bore ill-will and hostility toward Bagley; on re-examination, the witness was permitted, against objection, to detail the grounds of his hostility, and when defendant below came to present his case, he offered testimony to contradict the statements of the

witness touching his hostility to defendant below, and to show that he had testified falsely in this regard. The court, on objection, excluded this evidence. A jury rendered a verdict for fifty-five dollars, with interest at ten per cent. from July 25, 1878, and the court below, feeling bound by the decision of this court in Ebey v. Engle, 1 W. T., N. S., 72, judgment was entered on the verdict for sixty-three dollars and sixty-one cents in favor of plaintiff below, and for his costs and disbursements. The defendant below moved for a retaxation of costs, and for judgment in his favor for costs. The court overruled the motion. Two errors are assigned: 1. The court erred in rendering judgment against plaintiff in error for costs, and in refusing judgment in his favor for costs. 2. In permitting the witness Cochran to state the grounds of his ill-will and hostility toward plaintiff in error, and then denying him the right to contradict the witness on these points.

Section 17, page 333, Laws of 1873, is as follows: "Every justice of the peace shall have jurisdiction over and cognizance of the following actions and proceedings: 1. In an action arising on contract for the recovery of money only, if the sum claimed do not exceed one hundred dollars."

Hence it appears that the amount claimed, and not the amount recovered, determines the jurisdiction of the justice. But that is all it determines. Sections 511 and 514, on pages 108 and 109, Laws of 1877, are as follows:

"Sec. 511. The plaintiff shall not be entitled to costs in any action within the jurisdiction of a justice of the peace, which shall be commenced in the district court, when the recovery is for a less amount than one hundred dollars."

"Sec. 514. In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his favor for the same."

These sections plainly determine the question of costs. In this case the amount claimed in the complaint, being over one hundred dollars, entitled the defendant below to costs. The authorities are almost unanimously in favor of this construction of the statutes. As to the second error assigned, we are of opinion that, while we would not commend the practice which was followed on the trial in the district court, yet what was done then, so far as appears by the record, was only the exercise of a discretion which judges are often called upon to exercise, and which, although somewhat novel in this instance, can not be regarded as an abuse, and was, therefore, not error for which this court would reverse the judgment. The case of Ebey v. Engle, 1 W. T., N. S., 72, is overruled. Let the judgment of the court below be modified, and judgment be entered for the plaintiff below for the amount of the verdict, and let judgment be entered for the defendant below for his costs and disbursements.

HOYT, J., and GREENE, C. J., concurred.

MILLER v. AUSENIG ET AL.

Filed July, 1880.

A FINDING OF THE LOWER COURT THAT A CERTAIN CONVEYANCE OF LAND, ABSOLUTE ON ITS FACE, and a bill of sale of personal property, were intended as mortgages to secure a loan made by the grantee to the grantors, reviewed, and held to be supported by the evidence.

APPEAL from a judgment of the second district court, entered in favor of the plaintiffs. The opinion states the facts.

William Strong & Sons, for the appellant.

Robb & Fulton, for the appellees.

HOYT, J. This is an action brought by the plaintiffs against the defendant for the purpose of having a deed of certain lands, and a bill of sale of certain personal property, made by the plaintiffs to the defendant, declared to be a mortgage given for the purpose of securing to the defendant the repayment of a certain sum of money alleged to have been by him loaned to the plaintiffs, and for an accounting between the parties in relation to said alleged loan. The only point made by the counsel for the appellant in this court is as to the sufficiency of the proofs to warrant the court in finding that said deed and bill of sale were, when made, intended by the parties thereto as security for the repayment of a sum of money then loaned to the maker thereof, instead of an absolute deed and bill of sale, as they on their face purported. There is no question made as to the law applicable to the case, nor as to the claim of plaintiffs that the deed and bill of sale were each a part of the same transaction, and that upon the question of whether or not they were intended by the parties as absolute conveyances, as appeared upon their face, they must stand or fall together. The evidence in the case upon this one question of fact which we are called upon to decide is somewhat conflicting, and in some respects not entirely satisfactory to our minds; yet, when viewed in the light of the circumstances surrounding the case, we think that it sufficiently establishes the facts connected with the making of the instruments in question to enable us to apply the law of the case applicable thereto, and thereby determine the legal effect of said instruments.

At the time of the making of these instruments, the land covered by the deed in question was about to be sold by virtue of proceedings taken to foreclose a mortgage thereon given by the said plaintiffs, and it is conceded by the defendant that the only consideration which he gave for the property described in said deed and bill of sale was the payment of the amount due upon the decree in said foreclosure suit, and his agreement to allow the plaintiffs to remain in possession of the premises for one year. From which it follows, that if the theory of the defendant as to this transaction be true, then the plaintiffs, for the use of said premises for a period of something less than six months (for if the land had been sold under the foreclosure proceedings, they would have had six months or more in which to redeem, during which time they would have been entitled to possession), were willing to and did convey to him the right to redeem said premises during said period of six months or more, and also stock and other personal property, valued by them at about eight hundred dollars; and this, in the face of the fact, conceded by the defendant, that the use of said premises, with all of said personal property upon it, was only worth about three hundred dollars per year. Was such a

transaction as this is claimed by the defendant to have been, such a one as plaintiffs would have been likely to have entered into, in the light of the circumstances above set forth? We think not. While, upon the other hand, the claim of plaintiffs, that the payment of said money by defendant was in the nature of a loan to them, which they were to repay with interest, and that said deed and bill of sale were given by them to secure such repayment, was in our opinion an entirely reasonable one, when we take into consideration the further fact, which fully appears in the case, that at the time of said transaction the plaintiffs and defendant were warm personal friends.

Now, interpreting the testimony upon the one question urged upon our consideration, in the light of the surrounding circumstances as above outlined we are of the opinion that it sufficiently appears therefrom that the said transaction was not at the time intended or understood by the parties thereto as an absolute sale of said land and said personal property, but rather as a loan of said sum of money paid by defendant to redeem plaintiffs' said land, and the giving of said deed and bill of sale as security for the repayment thereof with interest thereon. And the intention of the parties being as above stated, it is conceded by counsel, and such we understand clearly to be the case, that the law would make such instruments so given as security simply mortgages, however absolute they on their faces purported to be. It is therefore our opinion that the court below was justified by the evidence in the case in holding said deed and bill of sale (though absolute on their face) to be in fact only mortgages, and as such entitled to be treated; and as this is the only question raised here, it follows that the decree of the lower court must be affirmed with costs. Let the decree of the district court be affirmed with interest, and a judgment entered here for the costs of this court in favor of said plaintiffs and against said defendant, and the cause remanded to the district court, with instructions to carry into effect the decree herein rendered in said court from which their appeal was taken.

GREENE, C. J., and WINGARD, J., concurred.

MAYNARD *v.* VALENTINE.

Filed July, 1880.

LEGISLATIVE DIVORCE—VALIDITY OF.—The territorial legislature of Oregon had power, under the organic act of congress creating the territory, to grant special divorces. The exercise of such power is not in conflict with the provision of the United States constitution prohibiting states from passing laws impairing the obligations of contracts; nor by the last clause of article 2 of the ordinance of 1787 for the government of the territory north-west of the river Ohio, providing "that no law ought ever to be made or have force in said territory that shall in any manner whatsoever interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed;" nor by article 4 of said ordinance prohibiting the territorial legislatures from interfering "with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers."

THE RIGHT OF A WIFE TO LAND CLAIMED UNDER THE OREGON DONATION LAW does not become perfect until the residence and cultivation thereon by her husband, as her husband, is complete. Such act contemplates a common residence and settlement by both husband and wife. Consequently, an act of the legislature of Oregon, d vorcing a husband, who

had located a section of land under such act, from his wife, who had never been a resident of Oregon, does not impair any of the wife's right of property in such land which the legislature was prohibited from impairing by the United States constitution.

APPEAL from a judgment of the third district court, entered in favor of the defendant. The opinion states the facts.

C. H. Hanford, for the appellant.

Wheat, Burke & Rasin, for the appellee.

GREENE, C. J. Appellant was married to David S. Maynard about forty-two years, in Vermont. She bore him two children, and in 1850 was living with him and them in Ohio. Some time in that year her husband left her and the children there, and became himself a resident of Oregon. When leaving, he promised his wife that within two years he would return for her, or send her means to come to him. He never kept this promise. In 1852, under the act of congress commonly known as the Oregon donation law, he, as a married man, settled upon and claimed six hundred and forty acres of land, lying within what is now King county in Washington territory. Afterward, and on the twenty-second of December of that year, the legislature of the territory of Oregon, by special act, declared the bonds of matrimony between David S. Maynard and the appellant dissolved. This act of the legislature has never been assented to by appellant. It was passed without notice to her, before she had ever been in Oregon, and when no cause of divorce as against her existed.

The notification pursuant to section 6 of the donation law was filed by Maynard in October, 1853. His accompanying affidavit recited the existence of his marriage relation with appellant until December 24, 1852, her death at that date, and his marriage on the fifteenth of January, 1853, of Catherine T. Brashears. Maynard's residence as a donation settler was duly completed and proved by May, 1856, and in January, 1869, donation certificate No. 436 was issued from the local land office at Olympia to him and his wife, Catherine, apportioning the east half to her and the west half to him. As to the wife's half, the commissioner of the general land office subsequently, in July, 1871, held this certificate to be erroneous, and on the supposition that appellant was dead and that her heirs were entitled, he directed that proof of her marriage should be taken, and that upon proper proof of this marriage the certificate should be amended so as to run to her heirs.

A hearing was accordingly had before the register and receiver at Olympia, at which appellant appeared in person, and David and Catherine Maynard by attorney. As a result, the certificate was, on the eighth of April, 1872, so modified as to allot the east half of the claim to appellant. Upon appeal to the commissioner of the general land office, and from him to the secretary of the interior, it was held that the special divorce act of 1852 shut appellant out from any rights in the premises, and that neither she nor Catherine Maynard could claim anything under the donation law. Conformably to this decision, the east half of the six hundred and forty acres was thrown open as public land to entry and sale, and of part of it Valentine, the appellee, became the purchaser and patentee from the government. Such are the facts as averred by the appellant in her complaint, filed in the district court. Upon them she asked a decree, that appellee holds title as trustee for her benefit, and that he be required to convey to her, and that she have her costs and general relief. Ap-

pellee filed a general demurrer, which the district court sustained. A decree was thereupon entered, dismissing the cause at plaintiff's costs. From that decree this appeal is taken. The issue made by the demurrer has been argued before us with commendable zeal and thoroughness, and we have derived great assistance from the skill and industry of counsel. Authorities cited have had our careful attention and reflection. Especially valuable have we found the observations of Mr. Bishop in his excellent work on marriage and divorce, and those of Judge Cooley in his work on constitutional limitations. The expediency of allowing legislatures, so constituted and related to the people as are those of this country, the power of divorce, has been long a mooted question. It would be an exceedingly interesting and momentous one for a constitutional convention, or a congress organizing a new territory, to debate.

We are conscious ourselves of very strong private convictions against the expediency. But in this opinion we shall endeavor to stand so far aloof from these convictions as dispassionately to arrive at the powers actually conferred upon the legislature of the territory of Oregon. Two principal questions are presented for our decision: 1. Is the legislative act of divorce valid? 2. If valid, does it operate to exclude appellant from the benefits of the donation law? For the correct decision of the first question, everything turns on the power of the legislature to divorce at all. If there was legislative power to enact any divorce, then it seems to us there was power to enact this particular one. To be sure, there are circumstances in this case tending to illustrate the subject of legislative divorces, and to lead the mind to canvass the expediency of allowing them in any instance. Our attention is invited to the fact that this divorce was accomplished by a special act of the legislature. But if a legislature be clothed with power to divorce at all, how else is it to exercise the power save by a particular act for the particular case? Shall it pass a general statute, declaring that whenever one of two married persons deserts, or becomes a drunkard, or commits adultery, or ceases to be amiable, then and thenceforth the two shall stand divorced? It is further pointed out that here was an act done which disposed of the wife's dearest interests, in her absence, without her knowledge, against her will, and without inquiry. Granting all this to be as stated, and even that no legislature could rightfully so act, yet if these circumstances do not clearly appear upon the face of the enactment, must it not be conclusively presumed that the legislature has done whatever was right and becoming in the premises—has made inquiry, has found fit facts on which to base its action, and has not exercised a discretion which belongs to it, and to it exclusively, except upon full information and for just cause? Could this court sit as a tribunal of review to investigate and redress the acts of the legislature in the exercise of its legislative discretion? Can we inquire into the fidelity of the legislative body to the trusts reposed in it by the people, and if in our opinion unfaithful, then pronounce its doings void? Certainly our courts are not constituted with any such functions. We are sent back to the original question, Was there a divorcing power seated in the legislature? It is not a question of whether it was politic or wise to have it seated there, but was it there?

This is to be determined by a reference to the powers granted to the legislature by the organic act of Oregon. These powers are not limited by virtue of any limitation operative upon congress. Congress could constitute as

it pleased the territorial government, provided the form it pleased to give was harmonious with the fundamental idea of our national life, that is to say, republican. Whether this ability of congress be derived from the clause in the constitution authorizing the making of all needful rules and regulations respecting the territory belonging to the United States, or springs under the last clause of section 8, article 1, as a logical necessity from the power to acquire and occupy territory, needs not to be discussed here. The power existed and the power was plenary. Congress might have chosen not to parcel out into three separate and clear-cut departments, the legislative, executive, and judicial functions. It might have imposed on the legislature much business ordinarily done by a court, or it might have devolved all legislation upon the governor or judiciary. It saw fit, however, to distribute the governmental business into executive, legislative, and judicial departments. This it did, doubtless, in analogy to the forms of the constitution prevailing throughout the states of the Union. The mere distribution has significance in every inquiry as to what the legislature may constitutionally do. Under such a distribution, the judiciary can not take upon itself the functions of the legislature, nor can the legislature do that which properly belongs to a court. But does it logically follow that a fact, such, for example, as the dissolution of a marriage, which might be effected as the conclusion of the action of a court of justice, can not lawfully be brought about immediately by the legislature? We would not be understood to confound the provinces of court and legislature. A distinction exists between the two bodies, and it is a radical distinction. It does not seem to us to arise from dissimilarity of modes of procedure, nor yet from dissimilarity of results attained. Legislators and judges both deal with men and things as socially and politically related. Neither can act well without understanding, deliberation, and judgment.

If inquiry be necessary to inform the understanding, then there must be inquiry also. Inquiry may be made and all proceedings conducted under the same forms, and the same end may be reached in one body as might be in the other. And yet, all this will not change a court to a legislature, nor metamorphose a legislature into a court. It is said that a legislature may be arbitrary; but so may a court. So, too, both legislatures and courts may be mistaken about facts. But every good piece of legislation, as well as every sound judicial decision, is a piece of good judgment naturally resulting from fair deliberation applied to trustworthy facts. The true distinction between a legislature and a court is not to be found in subject-matter, processes, or results. Legislation and adjudication might be confided to the same body, and yet the distinction would remain intact. It could not be destroyed without destruction of one or the other function. For it consists in diversity of the deep-seated organic relations which court and legislature respectively bear to the central sovereignty which speaks and acts through them. The sovereign power, through its legislative organ, speaks spontaneously, and imposes on that organ no obligation to reply to any petition. It speaks through its courts upon petition only, and obliges its courts to answer every petition. The voice of the court is explanatory and assertive of that of the legislature; the voice of the legislature is determinative of that of the court. Legislatures declare about persons and things in general, and in particular what the sovereign will is; courts declare what, according to that will, the parties before them are bound or

free to do or suffer. In fine, the legislature gives, the court applies, the law. The sovereign's will is sovereign will to which, when expressed, all must conform. If the sovereign has a will, and wishes spontaneously to announce it, there is no organ but the law-giving body through which to do it.

One might inconsiderately and pertly say that the state has no business to have any will about what are called the private contracts and relations of individuals within it; or if it has a will, no business to utter it until appealed to by a party privately interested, and then not until due notice to all parties privately concerned. Private sovereignty as to private affairs is, however, an idea that does not consist with the idea of political association; speaking with accuracy, a sovereign commonwealth may be truly said to have an interest in every act, every contract, and every relation of every individual that composes it. Itself is a party, by its sufferance or promotion, to every act, every contract, and every relation which exists under the allowance or direction of its laws. Being such a party, it may truly be said to have engaged to allow or promote everything its laws allow or promote. But its engagements with individuals are all subject to its supreme engagement with them all, whereby both it and they are to seek the welfare of the community as a whole. This subjection of every private affair to the general good is imparted into every contract, and involved in the very notion of allegiance. The state or commonwealth has an interest, not only in the institution of marriage contracts which bind those within its jurisdiction, no matter under what jurisdiction those contracts may have been originally formed: its interest is a paramount interest. Paramount, not merely in the sense of being highest in dignity, but in the sense of including, duly weighed and proportioned, all private interests whatsoever to make up the aggregate and resultant which itself is. Because paramount, it must be controlling. State will may be very urgent and decided that a particular marriage be dissolved even against the will of the private parties to it.

Suppose, in England, a nobleman of high rank, heir presumptive to the crown, had for a wife a Messalina, would any one, however much opposed to the policy of promiscuous and frequent legislative divorce, say that such was not a case in which the nation, through its legislature, as a legislature, could spontaneously utter its will about that marriage? *Salus populi suprema lex.* What the welfare of the people demands, whether it consume property, obliterate contracts, or destroy life, it is perfectly competent for a legislature of unbounded powers to do. But of course there is a difference between legislatures with defined and legislatures with undefined powers, and the difference is one of range of power. A legislature with undefined powers has all legislative powers. It can lay down the laws in every direction, molding all persons and things, and each particular person and thing, conclusively to what it says; determining absolutely and finally every question by its fiat. Its voice is the voice of the governing power, and the voice of the governing power is the voice of God. From that there is no appeal. Great Britain's parliament is an example of such a legislature, and British parliamentary divorces, which are indisputably legislative, are examples of such legislation. American legislatures are different, simply because limited. Higher legislation than any one of them is capable of has at one breath called them into being and circumscribed their activities.

The national and state legislatures have their bounds set by what the people have enacted in the national and state constitutions. The legislature of Oregon territory had its powers granted and restrained by the act of congress creating it. That act granted to the legislature, with certain exceptions, a legislative power extending to "*all rightful subjects of legislation* not inconsistent with the constitution and laws of the United States:" 9 Stat. 325, sec. 16. Aside from the special circumstances of this case, which have been already alluded to and disposed of, we understand it to be conceded in argument that if granting a divorce was acting upon a rightful subject of legislation, and not inconsistent with the constitution and laws of the United States, then it was a legitimate exercise of power under the organic act.

We will first discover, if we can, whether it was a rightful subject of legislation within the sense that must be accorded to that phrase, and afterwards proceed to inquire whether it was inconsistent with the constitution and laws of the United States. The language of the organic act, declaring that the legislative power shall extend to all rightful subjects of legislation, implies that there are some subjects of legislation that are not rightful. What are rightful and what are not, congress has not undertaken to define. Are we, therefore, to understand that to us, as a court, is referred for discussion and determination the fundamental political question what subjects, in a distributive and complex form of government like ours, it is expedient that a limited territorial legislature should be permitted to act upon, and what it should not be permitted to touch? Or are we to understand that by the phrase "rightful subjects of legislation" are meant subjects already sufficiently defined by the general consent and practice of the people who in congress have mentioned them? We think the latter. That which the words "rightful subjects of legislation" stood for, in the mind of the people at the time they were speaking them, is the meaning that belongs to them in this statute, and is the meaning we must regard. To find it out, we have recourse to the most solemn and authoritative utterances current among that people, namely, their written constitutions, statutes, and adjudications. From these we gather that the people of the United States, at the date of the organic act, thought and still think individual marriages to be rightful subjects of legislation, and legislative divorces valid unless there be some express constitutional provision to the contrary. This seems to us conclusively to establish the proposition that the territorial legislature in passing this special act of divorce was acting upon a subject which, within the sense of the organic act, was a rightful subject of legislation.

Thus far we have considered the phrase "rightful subjects of legislation" as if the word "legislation" stood in the statute unqualified. In fact, according to the tenor of the act, "legislation not inconsistent with the constitution and laws of the United States," is the only range of legislation to rightful subjects whereof the legislative power is extended. We come, therefore, to inquire whether the divorce act was inconsistent with any provision of the constitution or laws of the United States. An inconsistency is suggested with only one clause of the constitution; it is the clause forbidding any state to pass any law impairing the obligations of contracts: Const., art. 1, sec. 10. Adhering to the analogy between the state governments and territorial governments laid down in the case of The Panama, 1 W. T. 518, 525, we are prepared to

hold, that whatever it would be inconsistent with the constitution of the United States for a state legislature to do, it would also be inconsistent for a territorial legislature, under an organic act like that of Oregon, to do. If the marriage contract between Maynard and appellant contained obligations such as the constitution prohibits any state, by law, to impair, and the contract could not be set aside without impairment of those obligations, then it was one that the legislature of Oregon never had power to annul. But we are of opinion that the contract of marriage was not within the purview of the constitutional clause. Not but that we believe a marriage to be a contract: it certainly is a very important contract. It not only most intimately affects the married persons in their private affairs, but it changes their social and political *status*. It brings them into new relationships to society and to the state—relationships which wise law-givers have oftentimes recognized with favor and distinction. It is so peculiar in its office and effects that ordinarily, when contracts are talked of, no reference is understood to be made to the contract of marriage. It is so unique that if all contracts possible were to be classified scientifically into varieties, species, genera, classes, etc., it would stand alone in the most comprehensive subdivision to which it should be assigned.

Ever since the adoption of the federal constitution the general current of legal opinion in this country, as evidenced by law-writers, legislative enactments, and judicial decisions, is opposed to the idea that the provision against impairing the obligations of contracts had any bearing upon marriage. It is not necessary to cite from the numerous text-writers. Their opinions upon this point are well-nigh unanimous. The legislatures of the various states have, from the date of the constitution, continued to pass divorce acts unconscious of restraint. The state courts have upheld such acts, and under state statutes, creating causes of divorce, have granted divorces upon grounds which, at the time of marriage, were not good in law. In Butler v. Pennsylvania, 10 How. 402, 416, the supreme court of the United States, through Daniel, J., say: "The contracts designed to be protected by the tenth section of the first article [of the federal constitution] are contracts by which perfect rights, certain, definite, fixed, private rights of property, are vested." According to this definition, property rights which are not still inchoate or imperfect, and which became vested by marriage, and only such rights, could not be constitutionally divested by dissolution of marriage. Such rights no divorce act avails or professes to divest. The act divorcing Maynard from appellant did not profess to divest any such rights, nor did it accomplish any such divestiture. If the rights existed, it would not be necessary to maintain for the future the marriage, in order to maintain the rights. Such rights are freely separated from such a contract as that of marriage, and may be preserved without preserving any future marital relations between the parties. It is therefore untenable that the act professing to snap the marriage tie is void because impairing the obligations of a contract.

But appellant argues, that if the act be not void for inconsistency with this constitutional provision, it is for inconsistency with two clauses of the ordinance for the government of the territory south-west of the river Ohio, commonly called the ordinance of 1787. By the fourteenth section of the organic act, all the provisions of that ordinance were extended over Oregon, so that any inconsistency with those provisions would be,

doubtless, an inconsistency with the laws of the United States. The last clause of article 2 of the ordinance declares, "that no law ought ever to be made or have force in said territory that shall in any manner whatsoever interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed."

This is the first clause on which appellant bases his argument. We take it that the language of the article is intended, like that of the constitutional provision we have been considering, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements. We see no reason why the phrase "private contracts or engagements" here occurring should have more compass given it than the word "contracts" in the constitution. Perhaps some restrictive force should be allowed to the word "private." If so, then it may be worth while to notice that contracts relating simply to property or service can be privately made, and privately rescinded, varied, or released. They are left perfectly within the control of the private parties concerned. Not so among us with the contract of marriage. In that, as soon as formed, the state asserts its interest as controlling, and permits no rescission, variation, or release save by its own express consent. But whatever office be assigned to the word "private," we are clear that the clause under consideration was not intended to apply to the contract of marriage. The act by which Maynard and his wife were divorced is, therefore, not obnoxious to the charge of inconsistency with that clause.

In the fourth article of the ordinance it is provided that the territorial legislatures "shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers." Appellant contends that the act of the Oregon legislature divorcing appellant is inconsistent with this provision also, but we are unable to perceive how the divorce could interfere with the primary disposal of the soil of Oregon, or with any congressional regulations for securing title to purchasers. The act does not stand in the way of congress securing title as it pleases in appellant of any land which she may, by money, service, or residence, *bona fide* purchase. It does not propose to dispose of the soil, nor qualify a disposition already made. All it does, at the most, is so to change the relations of two parties between themselves that they are no longer husband and wife. It no more interferes with the disposal of the soil than a public act providing for the granting of divorces by the judiciary would. Whether the divorce was effected by court or by legislature, the primary disposee of the soil, recognizing the fact and freely acting with it in view, might be unwilling to bestow upon her, who is no longer a wife, land that he was minded not to give her particularly, but to whoever actually and lawfully filled the wife's place. This brings us to the verge of the second question proposed at the outset. Its solution depends on the applicability of the provisions, already noticed, of the federal constitution and the ordinance of 1787, touching the inviolability of contracts.

The question is this: Had the appellant, as Maynard's wife, at the time of the divorce act, any perfect right of property to the land in controversy vested in her which the operation of that act must not be suffered to impair? She asserts that such a right was then hers, under the provisions of section 4 of the donation law. But by that section the donation of "six hundred and forty acres, one half to himself and the other

half to his wife, to be held by her in her own right," is given to that married man only who "*shall have resided upon and cultivated the same for four consecutive years*, and *shall* otherwise conform to the provisions of this act." It needs but little consideration of the terms of such grant to perceive that the right of the wife does not become perfect nor vest under them until the residence and cultivation by her husband, as her husband, is complete. Her husband's title is imperfect and inchoate till then, and how can hers be more? The statute, moreover, contemplates, we think, a common residence and settlement by both husband and wife. "In all cases," it reads, "*when such married persons have complied* with the provisions of this act, *so as to entitle them to the grant* as above provided, whether under the late provisional government of Oregon or since, and *either* shall have died before patent issues, the *survivor* and children, or heirs of the deceased, shall be entitled," etc. In the argument before us, the wife claims that her domicile never was in Oregon. If this be granted, it is difficult to see how, within the spirit of this generous law —a law intended to foster and reward actual and conjoint settlement—she can proceed to claim even an incipient right to land under that law. Probably the law should not be held to compel wives to accept a gift. If they can refuse, what is so decisive proof of intent to refuse as a refusal to be considered partaker of the husband's domicile? Doubtless double donations were offered to promote double settlement. The aim was to plant and endow families in Oregon. Upon the whole case we are of opinion that the judgment of the district court must be affirmed.

HOYT, J., concurred.

STEAMER CITY OF PANAMA *v.* PHELPS ET AL.

Filed July, 1880.

OPPOSING APPEALS IN A CASE IN ADMIRALTY DO NOT CREATE TWO CAUSES in the appellate court. After one party has perfected his appeal, an appeal by the opposite party may be perfected by serving and filing in the court below his notice of appeal.

APPEAL from a judgment of the third district court. The opinion states the facts.

McNaught Brothers, for the appellant.

Dennison & Bingham, for the appellees.

GREENE, J. This is a petition for a rehearing. The considerations urged by respondents why this cause should be reheard have been passed upon by this court in arriving at the opinion already filed, determining the appeals.

To what we have there said we will add but this: Opposing appeals in admiralty do not create two causes in this appellate court. How many soever appeals are taken, there is but one case for hearing in review. Whichever party procures the appeals and secures that they be sent up, must see that they contain all that tends to supersede the jurisdiction of the court below, and all that is necessary to enable this court to adjudicate the matters disputed. If in this case two transcripts had been brought up, one by claimants, another by libelants, each would, if perfect, have been a precise duplicate of the other, even including the proceedings of the opposing party in taking his appeal. Admiralty practice requires no such superfluity as duplicate transcripts.

The appeals which were filed in this court are not the personal property of the party who procured them to be brought here, but are the record of this court, upon which it decrees rights in favor of whatever party is entitled. Where one party to an admiralty cause appeals, and the other party thereupon appeals also, and the former party perfects his appeals by filing bond, etc., we are of opinion that both appeals go up together without any necessity of the latter party doing anything more than to serve and have filed in the court below his motion of appeal. The libelants' motion of appeal in this case seems to us neither to have any substantial defect in itself, nor to be defective for want of service or filing. If allowance of appeal was necessary below, it was allowed on application of the claimant, and the jurisdiction of this inferior court for all purposes and as to all parties thereupon superseded. This cause has been proceeded with throughout in this court by the respondents on the understanding and admission, avowed by them in open court in briefs and on argument, that the libelants had an appeal here. Now, after an opinion has been announced, increasing the damages decreed against respondents by the district court, it is too late for respondents to object to any irregularity or any matter that might have been waived. No greater defect than such irregularity or subject of waiver appears to us to attend libelants' appeal.

Let the petition be denied.

The chief justice concurred.

SUPREME COURT OF CALIFORNIA.

McCUTCHEON, Adm'r, etc., *v.* WESTON ET AL.

Department Two. Filed February 8, 1884.

A COMPLAINT IN AN ACTION ON AN UNDERTAKING GIVEN UNDER SECTION 540 of the code of civil procedure, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that the same was given to prevent a levy.

THE COMPLAINT IN AN ACTION BY THE ADMINISTRATOR OF THE JUDGMENT CREDITOR TO ENFORCE SUCH UNDERTAKING, which is conditioned for the payment to the plaintiff of any judgment recovered by him in the attachment suit, sufficiently alleges the recovery of the same and the representative capacity of the plaintiff, when it is averred "that judgment was recovered, entered, and docketed," and that on a day certain "letters of administration upon the estate of said judgment creditor were issued by the superior court of Alameda county to this plaintiff, who duly qualified as the administrator, and entered upon the discharge of his duties as such; and ever has been and now is such administrator.

AN ACTION ON SUCH UNDERTAKING MAY BE SUSTAINED although judgment was only recovered against one of the two defendants in the attachment suit.

APPEAL from a judgment of the superior court for Alameda county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

R. A. Redman, for the appellants.

McKee and *McFadden*, for the respondent.

MYRICK, J. Action on an undertaking given under section 540, code of civil procedure. The averments of the complaint and the provisions of the undertaking are similar to those in McNamara v. Hammerslag, 1 West Coast Rep. 560. On the authority of that case, and Preston v. Hood, Id. 135, we hold that the points taken by the appellant relating thereto are not sustained. The plaintiff, in pleading the recovery of the judgment in the attachment suit, avers that the plaintiff in that action "recovered judgment against the defendant therein, H. Leslie, which was rendered in said action for the sum of," etc., "which judgment was entered and docketed," etc. The plaintiff sued as administrator of the plaintiff in the attachment suit. In pleading his capacity, he avers "that on the twentieth day of July, 1880, letters of administration upon the estate of said Robert McCutcheon, deceased, were issued by the supreme court of the said county of Alameda to this plaintiff, who duly qualified as the administrator of said estate, and entered upon the discharge of his duties as such administrator; that plaintiff is now and has been continuously ever since the said twentieth day of July, 1880, the administrator of the estate of said Robert McCutcheon, deceased."

The complaint was not demurred to by reason of any alleged defect in either of these two particulars, nor because it did not state facts sufficient to constitute a cause of action; though there was a demurrer on other grounds. The appellant presents the point in this court for the first time, that the complaint is insufficient in each of the two particulars above noted to sustain the judgment. We think the point is not well taken. This is not an action on a judgment, but is on an undertaking. The undertaking reads: "If the plaintiff shall recover judgment in said action we will pay," etc.; the allegation in the complaint is that judgment was recovered, entered, and docketed. We think this sufficient. We

think the allegation as to representative capacity is sufficient to sustain a judgment, there having been no demurrer on that ground.

The point that judgment was recovered against one of the defendants only in the attachment suit, is not well taken. The action was against two, and the undertaking was to pay "if the plaintiff shall recover judgment in said action." Why judgment was recovered against one only, we are not informed; but the court had power to render such judgment, and it was rendered in that action.

The judgment and order are affirmed.

THORNTON and SHARPSTEIN, JJ., concurred.

CARNEY *v.* ARIZONA MINING CO.

In Bank. Filed February 11, 1884.

WORK ON PLACER CLAIMS.—The provisions of the United States revised statutes requiring a certain amount of work to be performed or improvements made during each year on each mining claim located after May 10, 1872, and until a patent issues therefor, apply as well to that class of claims known as placer claims as to the class known as lode or vein claims.

APPEAL from a judgment of the superior court for Sierra county, entered in favor of the plaintiff. The facts are stated in the opinion of department two: 10 Pac. C. L. J. 572.

P. Vanclief, for the appellant.

Davidson & Cross, for respondent.

The COURT. When this cause was before department two of this court, 10 Pac. C. L. J. 572, it was held that that provision of the revised statutes of the United States requiring a certain amount of work to be performed or improvements made during each year on each mining claim located after the tenth day of May, 1872, and until a patent issues therefor, applies as well to that class of claims known as placer claims as to the class known as lode or vein claims. We are satisfied of the correctness of that construction of the statute. And that it is the view taken by the supreme court of the United States is evident from the recent decision by that court in the cases entitled Jackson v. Roby, and Roby v. Jackson, October term, 1883, as well as from the opinion in Smelting Co. v. Kenys, 104 U. S. 636.

Judgment reversed, and cause remanded with instructions to render judgment for defendant as to the lands within its location.

SCHWARTZ *v.* PALM ET AL.

Department One. Filed February 12, 1884.

A DECREE OF FORECLOSURE SHOULD DIRECT A SALE OF THE PARTICULAR ESTATE or interest of the mortgagor in the mortgaged premises, as the same has been described in the mortgage. If such decree directs the sale of any greater or less estate than that so described, it is erroneous and should be corrected on motion.

A DECREE OF FORECLOSURE WHICH DIRECTS THE SALE OF ALL the interest which the mortgagor had in the premises described in the mortgage on the date when the same was given, is erroneous when the mortgage described the estate mortgaged as an "undivided fourth interest, being all the interest which the mortgagor owns."

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiff, and from an order refusing the defendants' motion to modify the same. The opinion states the facts.

George Cadwalader and *W. B. Treadwell*, for the appellants.

Young & Young, and *F. S. Sprague*, for the respondent.

MCKEE, J. Action by a mortgagee against a mortgagor, and a subsequent purchaser from him of the mortgaged premises, to foreclose a mortgage given to secure payment of a promissory note. Default, judgment, and a decree of foreclosure were entered in the case. From the decree and order denying a motion to amend it, the subsequent purchaser has appealed upon the ground that the decree exceeds the relief demanded by the plaintiff in his complaint: C. C. P., sec. 580. A decree of foreclosure should direct a sale of the particular estate or interest of the mortgagor in the mortgaged premises, as the same has been described in the mortgage, because it is that, and only that, which has been mortgaged as security for the payment of the mortgage debt. If such a decree directs the sale of any greater or less estate or interest than that described in the complaint and mortgage, it is erroneous, Chase v. Christiansen, 41 Cal. 256, and should be corrected on motion.

In this case the mortgaged premises was described in the complaint and mortgage as: "The one undivided fourth interest, being all the interest which the mortgagor owns in two certain tracts of land in Yolo county, state of California, described as * * * swamp land surveys numbers 283 and 284 of swamp and overflowed lands in Yolo county, bounded," etc.; and the plaintiffs asked that "the usual decree be made for the sale of said premises described in said mortgage."

The decree ordered a sale of the mortgaged premises as hereinafter described; but after describing the same as in the complaint and mortgage, it added the following: "Including herein *all* the interest which the mortgagor had in each and both of said tracts of land on the twenty-sixth day of July, 1878, when said mortgage was given." In that particular the decree went beyond the relief to which the plaintiff was entitled. The mortgage was only upon an undivided one-fourth interest in the two tracts. It may be that the mortgagor had a greater interest, although he said he had not. If he had, he did not mortgage it, and it passed to the subsequent purchaser unaffected by the mortgage. At all events, the court could not, by its decree, subject to sale a greater interest than was in fact mortgaged. The motion made by the defendant Carrol, to correct the decree, should have been sustained.

Order reversed and cause remanded, with direction to the court below to modify its decree as requested; and when so corrected, the decree will be affirmed.

MCKINSTRY and ROSS, JJ., concurred.

PETERSON *v.* WEISSBEIN BROS. & CO. ET AL.

Department One. Filed February 12, 1884.

A COURT OF EQUITY WILL NOT SET ASIDE A JUDGMENT OF A COURT OF LAW, and subsequent proceedings thereunder, for the reason that the complaint in the action in which such judgment was rendered was filed on a legal holiday, when there is nothing in the record to indicate that the debt for which such action was brought was not justly due, especially when the party seeking equitable relief negligently omitted to avail himself of such defense in the action at law.

ORDER OF A JUSTICE OF THE PEACE DENYING A MOTION TO SET ASIDE AN EXECUTION SALE OF LAND will be presumed to be correct unless the contrary appears. The party aggrieved by such order could have the action of the justice's court reviewed by the superior court on appeal from the judgment.

APPEAL from a judgment of the superior court for Nevada county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

A. Burrows, for the appellants.

A. J. Ridge, for the respondent.

Ross, J. The object of this suit, in which the plaintiff was successful in the court below, was to obtain a decree annulling a certain judgment rendered by a justice of the peace and a certain sale of real property made under an execution issued upon the judgment. The complaint in substance charges that the defendant Weissbein Brothers & Company, a B. & B. corporation, is, and was at the times mentioned in the complaint, a corporation organized and existing under the laws of the state, and as such, on the ninth of September, 1882, placed in the hands of a certain justice of the peace a certain promissory note executed by the plaintiff herein for ninety-eight dollars and ninety-five cents, payable sixty days after its date to one Walker or order, and which note was indorsed by Walker. That the justice of the peace, on said ninth of September, filed the note as a complaint, and in his docket entered the cause of Weissbein Brothers & Company, a B. & B. corporation, plaintiff, against A. G. Peterson, defendant, and thereupon issued a summons in the action, which was served upon the defendant therein—plaintiff here—and at the same time there was also served upon the defendant therein—plaintiff here—another or *alias* summons, which was issued in the action by the justice of the peace on the nineteenth day of September, 1882. The complaint in the present action further charges that the plaintiff here, defendant in the action before the justice of the peace, failed to answer the complaint therein, and on the twenty-sixth day of September the justice of the peace rendered and entered a judgment in the action in favor of the plaintiff and against the defendant therein for the sum of one hundred and sixteen dollars and ninety cents, on which judgment an execution was, on the next day, issued and placed in the hands of the constable of the township, who levied it upon the land, which is alleged in the complaint in this action to have consisted of two separate and distinct tracts, and to have then and since been the property of the present plaintiff.

The complaint further charges, that after notice the constable sold the land at public auction to the plaintiff in the action—the defendant corporation here—for the sum of one hundred and twenty-eight dollars and forty cents, and that thereafter, and on the twenty-first of October, 1882,

the constable executed to the defendant Goldberg a certificate of sale for the land, which was duly recorded in the recorder's office of the county where the land is situate, and which, it is alleged, "still remains of record, and is a cloud upon the plaintiff's title, and if not removed would involve him in litigation, and might cause the loss of his said property." It is also charged in the complaint that the ninth of September, 1882, was a legal holiday; and further, that the constable levied upon and advertised the land for sale as separate and distinct parcels, but nevertheless sold the same in one body, for which reason plaintiff here moved the justice of the peace to set aside the sale, but his motion in that behalf was denied. The findings of the court below are in substantial conformity to the facts alleged in the complaint. The judgment decrees null and void the judgment entered in the justice's court, and the execution sale thereunder, and quiets the plaintiff's title to the property as against the defendants to this action, and all persons claiming under them, and perpetually estops defendants and all persons claiming under them from setting up any title or claim thereto. With respect to the judgment given in the justice's court, the sole point relied upon by the plaintiff here is that the complaint on which that judgment was rendered was filed on a legal holiday, and that therefore there was in contemplation of law no filing, and, as a legal consequence, that all subsequent proceedings in the action were utterly void and of no effect.

There is in the complaint no averment, nor is there anything in the record to indicate, that the debt for which judgment was given in the justice's court was not justly due from the defendant to the plaintiff in that action. It is not pretended that the judgment there was obtained by means of any fraud or surprise, nor that the present plaintiff had any defense to that action upon the merits. It is only claimed that the judgment there given was void, because the complaint in the action was filed on a day that had been by the governor of the state declared a legal holiday, of which, however, the court below finds the justice of the peace and the plaintiff in the case were in fact ignorant. The case, in truth, is one in which a party asks a court of equity to relieve him of a judgment rendered by a court of law for a debt which he does not deny, but impliedly, at least, admits owing; and which judgment was rendered in an action in which he had ample opportunity to make the point he now relies on, but of which he negligently omitted to avail himself. Under such circumstances, it is clear that a court of equity should withhold relief: Gregory v. Ford, 14 Cal. 138, and cases there cited. As respects the sale of the land in one parcel, it appears, as has already been said, that the plaintiff here made a motion in the justice's court to have the sale set aside on the ground that the property was not separately sold, which motion was denied; but why, does not appear. Nothing to the contrary appearing, the presumption is that the motion was properly denied. If aggrieved, he could have had the action of the justice's court reviewed by the superior court on appeal from the judgment: C. C. P., sec. 980.

Judgment reversed and cause remanded.

McKinstry and McKee, JJ., concurred.

SMITH v. COOLEY.

Department One. Filed February 12, 1884.

A GRANT OF AN UNDIVIDED ONE-THIRD INTEREST IN A PIECE OF MINING GROUND, together with the water rights, reservoirs, and tail-races belonging to the same, expressly conditioned that such grant should convey no other rights to the grantee except a mining right, does not make the grantee a coparcener, joint tenant, or tenant in common with the grantor. It simply conveys to him a right to enter upon and occupy the land for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. Such right is not capable of partition.

APPEAL from a judgment of the superior court for El Dorado county, entered in favor of the defendant, in an action for the partition of certain mining ground. The opinion states the facts.

Charles F. Irwin, for the appellant.

George G. Blanchard, for the respondent.

McKEE, J. Plaintiff in the action, out of which this case arises, being the owner in fee of a tract of land in El Dorado county known and described as the north-west quarter of the north-east quarter of section 9, in township 10 north, range 9 east, Mount Diablo base and meridian, on the twenty-sixth of July, 1875, granted to the defendant an interest therein by the following description, namely: "An undivided third interest in a certain piece of mining ground situated in White Oak township, county of El Dorado, state of California, on the north-west quarter of the north-east quarter of section 9, township 10 north, range 9 east, Mount Diablo base and meridian," (said "marginal ground" being also more particularly described by metes and bounds), "together with the water rights, reservoirs, and tail-race belonging to the same; and it is expressly conditioned that this instrument conveys no other rights, except a mining right on the premises above, to the said party of the second part, his heirs or assigns." After the execution and delivery of the grant, plaintiff and defendant, for about four years, worked the "ground" in partnership, on the basis of two thirds to the plaintiff and one third to the defendant, but after the expiration of the four years plaintiff gave notice to the defendant that he would not be responsible for any expenses incurred in working the ground, and the defendant has since continued to work it for himself. Under these circumstances, plaintiff commenced the action in hand for a partition.

Partition may be had of real property, held and occupied by several persons as coparceners, joint tenants, or tenants in common, according to their respective rights and interests in it, whether the estate which they own therein be an estate of inheritance, or for life or lives, or for years: C. C. P., sec. 752. But in the land itself, described in the deed under which defendant derives his right, the defendant was not a coparcener, joint tenant, or tenant in common. The deed only vested in him a particular estate, *i. e.*, the right of taking from the land any minerals or ores in place in it, to the extent of the interest in them granted to him.

A "mining right" upon a specific piece of ground is a right to enter upon and occupy the ground for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication, the grant of

such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment: Clark v. Duval, 15 Cal. 85; Cave v. Craft, 53 Id. 135. In addition to that implication, the grant, in this instance, conveyed an interest "in the water rights, reservoirs, and tail-race" on the mining ground. But it did not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant or tenant in common with the grantor. It conveyed only a particular estate, or incorporeal hereditament, in land of which the grantor held the general estate.

This particular estate, or incorporeal hereditament, is what is known in law as a servitude "in gross," or a personal servitude imposed upon land for the benefit of the person or persons owning the right, irrespective of the ownership of the land. The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the profits which may be derived from its rents, or from quarrying and digging it for ores, or from harvesting its fruits, crops, and vintages, etc.: C. C., secs. 802–806. As an incorporeal hereditament it is subject to the general rules which govern the enjoyment of real property, and to the laws of descent, devolution, and transfer by act of law, according to the freehold or chattel interest acquired in it; but it is not in its nature capable of partition, because a division of the right would enlarge the original grant beyond the intention of the grantor, and likewise prove a greater charge than was originally intended to the owner of the soil: Bacon's Abr. 359; and because, so long as the minerals and ores, which are the subject of the servitude, are in place, unworked and unsevered from the soil, they are incapable of allotment according to the quality and quantity relatively considered: C. C. P., sec. 764.

Hughes v. Devlin, 23 Cal. 501, is not in conflict with this conclusion. The land sought to be partitioned in that case was a "mining claim," which the court held was the subject of partition, the same as other real property. But why? Because, as was said in Merritt v. Judd, 14 Id. 59, "our courts have given mining claims the recognition of legal estates of freehold; and as to all practical purposes, if we except some doctrine of abandonment, not, perhaps, applicable to such estates, they unquestionably are."

The working of a mine under a bare "mining right" has been uniformly considered by courts of equity as a species of trade. Hence the legal relation existing between two or more persons interested in such a right is that of a qualified partnership; and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it: C. C., sec. 684, c. 4, tit. 10; Rich v. Davis, 6 Cal. 164; Duryea v. Burt, 28 Id. 569; Settembre v. Putnam, 30 Id. 490.

Judgment affirmed.

McKinstry and Ross, JJ., concurred.

VANDERFORD *v.* FOSTER.

Department One. Filed February 12, 1884.

A NONSUIT MAY BE GRANTED AFTER THE EVIDENCE ON BOTH SIDES HAS BEEN HEARD, in a case where, if the motion for the same had been denied and a verdict found for the plaintiff, it would have been set aside as not supported by the evidence. Such practice, however, should be rarely resorted to, especially where the plaintiff has introduced evidence in support of all the averments of his complaint, and the materiality of establishing a further fact only appeared after the defendant had made out his affirmative defense.

APPEAL from a judgment of the superior court for Tehama county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. This was an action to recover possession of certain wheat, the alleged property of the plaintiff, by virtue of a sale from one Mitchell. The defendant admitted the taking, but justified as sheriff under a writ of attachment issued in an action against Mitchell. On the trial the plaintiff introduced evidence to sustain the allegations of her complaint, after which the defendant moved for a nonsuit, which was denied. The defendant then introduced his evidence, showing that there had been no continued and actual change of possession of the wheat, and at its conclusion moved the court for a judgment of nonsuit, which was granted. The further facts appear in the opinion.

J. F. Ellison and *C. R. Barry*, for the appellant.

Chipman & Garter, for the respondent.

The COURT. In Geary v. Simmons, 39 Cal. 224, it was held, a court is justified in granting a nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for the plaintiff, it would have been set aside as not supported by the evidence. If the case before us had gone to the jury upon the evidence in the transcript, it would have been the duty of the court to set aside a verdict in favor of plaintiff, on motion. It came within the rule laid down in Geary v. Simmons, *supra*.

We think it proper to say, however, that the practice of moving for nonsuit after the defendant's evidence is in should rarely be resorted to. Especially is this so when, as in the case at bar, the plaintiff introduced evidence to sustain all the averments of the complaint as against a mere trespasser, and the materiality of establishing an immediate delivery and actual and continual change of possession only appeared after the defendant had made out his affirmative defense that he was sheriff, and took the property under process, etc.

Judgment and order affirmed.

HAMILTON ET AL. *v.* TUTT ET AL.

Department One. Filed February 12, 1884.

A WRIT OF MANDATE MAY BE ISSUED by the superior court to compel a justice of the peace to issue an execution in favor of a judgment creditor who is entitled to the same. The issuance of such execution by the justice calls for the exercise of a ministerial function only, and is a duty especially enjoined upon him by law, resulting from his office.

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. This was a proceeding for a writ of mandate to compel the defendant Tutt, as justice of the peace, to issue an execution in favor of the plaintiffs under a judgment recovered by them in an action determined by such justice, entitled Hamilton v. Levy. The further facts appear in the opinion.

Ball & Craig and *B. A. Hudson*, for the appellants.

R. Clark, for the respondents.

Ross, J. We see no ground for saying that the judgment of the justice's court in the action of Hamilton v. Levy and Anderson was void. That was an action for the recovery of one hundred dollars damages alleged to have been occasioned by the trespassing of certain sheep of the defendants upon land of the plaintiff in the action. In response to a summons, the defendants to the action appeared and answered the complaint, a trial was had before a jury, which rendered a verdict for the plaintiff, on which the court entered judgment in favor of the plaintiff against the defendants. On the appeal subsequently taken from the judgment by the defendants, a bond sufficient under the statute to stay execution was not given. The plaintiff to the suit was therefore legally entitled to an execution to enforce the payment of the amount adjudged him. The issuance of such an execution on the part of the justice of the peace called only for the exercise of a ministerial function, and being one specially enjoined upon him by the law, as a duty resulting from his office, and he having refused to issue the writ, and the petitioner having no plain, speedy, and adequate remedy for such refusal in the ordinary course of law, the superior court rightly awarded him a writ of mandate.

Judgment and order affirmed.

MCKEE and MCKINSTRY, JJ., concurred.

PEOPLE v. MAJORS.

Department One. Filed February 12, 1884.

NO APPEAL LIES, IN A PROSECUTION FOR MURDER, FROM AN ORDER denying a motion in arrest of judgment, or from a judgment entered upon a plea of former conviction.

WHEN TWO PERSONS ARE MURDERED IN THE EXECUTION OF A CONSPIRACY, entered into for the purpose of robbing one of them, the act of each conspirator in furtherance of such design is the act of each and every of the others, and each is guilty of the murder of each of the murdered men, and liable to prosecution therefor.

APPEAL from a judgment of the superior court for Santa Clara county, entered against the defendant upon a plea of former conviction, and from an order denying his motion in arrest of judgment, and from an order refusing him a new trial. The opinion states the facts.

J. B. Lamar, for the appellant.

J. H. Campbell, district attorney, for the respondent.

Ross, J. To an information filed August 27, 1883, charging the defendant with the murder of one Archibald McIntyre, in Santa Clara county, on the eleventh of March, 1883, defendant, without a plea of not guilty, pleaded a former judgment of conviction of the same offense. Upon the plea so interposed a trial was had, and a verdict rendered for the people. Defendant then moved in arrest of judgment, and also made a motion for a new trial, both of which motions were denied by the court, and thereupon judgment was given against him on the plea. He appeals from the judgment, from the order denying his motion in arrest of judgment, and also from the order refusing him a new trial.

It is clear that there is no authority for the appeal from the judgment, nor for that from the order denying the motion in arrest of judgment. Sections 1237 and 1259 of the penal code read:

"Sec. 1237. An appeal may be taken by the defendant: 1. From a final judgment of conviction. 2. From an order denying a motion for a new trial. 3. From an order made after judgment, affecting the substantial rights of the party."

"Sec. 1259. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment."

Such orders and rulings made prior to the judgment, and involving the merits, or which may have affected the judgment, from which an appeal is not in terms given, can only be reviewed on appeal from the final judgment of conviction: People v. Clarke, 42 Cal. 622. Section 1237 does not give an appeal from an order denying a motion in arrest of judgment. The appeal from the order is therefore without authority, and must be dismissed. So, too, with respect to the appeal from the judgment upon the plea of former conviction. It is obvious that such a judgment is not "a final judgment of conviction." It only determines that the defendant has not been previously convicted of the offense of which he now stands charged, leaving the question of his conviction or acquittal open, to be determined after a trial. The appeal from the order denying defendant's motion for a new trial of the issue raised by his plea of former conviction remains to be considered.

On the trial of that issue it was made to appear in evidence that the defendant was a defendant to an information filed in the same court on

the thirtieth of March, 1883, charging Joseph Jewell, John Showers, and Lloyd L. Majors with the murder of one William P. Renowden in the county of Santa Clara on the eleventh of March, 1883. That under that information defendant was duly convicted and adjudged guilty of murder in the first degree, and sentenced to life imprisonment in the state prison. That the facts established by the evidence given on that trial, and upon which defendant was convicted, were: "That said Lloyd L. Majors counseled and advised one Joseph Jewell to rob one William P. Renowden, living near Lexington in the said county of Santa Clara, on the eleventh day of March, 1883. That on said day said Jewell repaired to said Renowden's home, taking with him one John Showers. That said Jewell and Showers unexpectedly found at the house of said Renowden one Archibald McIntyre, who was then residing with said Renowden. That in the attempt to carry out the design of robbery, both said Renowden and said McIntyre were then and there, at the same point of time, to wit, about half-past six P. M. of the eleventh day of March, 1883, killed by said Jewell and Showers. That said Majors was not present; neither did he personally participate in the said act of killing said Renowden and McIntyre, or either of them, except counseling and advising said Jewell to commit said robbery as aforesaid." And it was further made to appear in evidence in the court below, that the facts above recited "are to be adduced and proven in support of the information now pending, to which the said Lloyd L. Majors has pleaded a former conviction, should the same be put in issue by a plea of not guilty."

The proposition of appellant's counsel is, that as Renowden and McIntyre were killed at the same place and at the same point of time, by Jewell and Showers in the attempt to rob Renowden, the killing "was, on the part of Jewell and Showers, one physical act, one mental effort," and therefore a conviction for the murder of Renowden bars a prosecution for the murder of McIntyre. For the purposes of this case we need only say that we do not find counsel's premise supported by the facts disclosed by the record. Because Renowden and McIntyre were killed by Jewell and Showers at the same place and at the same point of time, it by no means follows that their death was caused by "one physical act, one mental effort." As is well said by the district attorney, Showers may have brained one with a shotgun, in the house, while Jewell shot the other with a pistol through the heart, in the yard. Both were murdered in the execution of a conspiracy entered into for the purpose of robbing one of them. The act of each conspirator in furtherance of that design was the act of each and every of the others. Each was guilty of the murder of each of the murdered men, and of course subject to prosecution therefor. We think this very clear.

Appeal from the judgment and from the order denying the motion in arrest of judgment dismissed, and order denying the defendant's motion for a new trial affirmed.

McKinstry and McKee, JJ., concurred.

WEBB *v.* CLARK.

Department One. Filed February 12, 1884.

TITLE TO REAL ESTATE CAN NOT BE OBTAINED BY ADVERSE POSSESSION, under section 325 of the code of civil procedure, unless the adverse holder has paid the taxes levied and assessed upon such land during the time of his occupancy.

APPEAL from a judgment of the superior court for Tehama county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Braynard & Ashurst, for the appellant.

Jerome Banks, for the respondent.

The COURT. Ejectment, wherein plaintiff established in himself a right of entry to the land in dispute at the commencement of the action, and defendant attempted to bar the right by proof of five years' adverse possession from the time of his entry on the land in 1876. But as a witness on his own behalf, he testified that he had not, at any time during his occupancy of the land, paid the taxes which had been levied and assessed upon it, as required by section 325 of the code of civil procedure, to establish adverse possession, yet there was a verdict in his favor, which the court below, on motion for a new trial, refused to set aside. This was error: C. P. R. R. Co. v. Shackelford, 11 Pac. C. L. J. 164.

Judgment and order reversed, and cause remanded.

LAWRENCE ET AL. *v.* GETCHELL.

Department One. Filed February 12, 1884.

A DEFENDANT IS ENTITLED, AS OF COURSE, TO A JUDGMENT FOR HIS COSTS and disbursements incurred in the trial of an action brought to determine the plaintiffs' title to certain land, and to enjoin the defendant from trespassing upon the same and from asserting any title thereto, when the court finds that there is no cause of action against the defendant.

APPEAL from a judgment of the superior court for Nevada county, entered in favor of the plaintiffs, and from an order denying the defendant's motion to modify the same. The opinion states the facts.

Cross & Simonds, for the appellant.

W. D. Long and *J. M. Walling*, for the respondents.

MCKEE, J. This was an action to determine the title of the plaintiffs to certain parcels of land described in the complaint, and to enjoin the defendant from trespassing upon the same, and from asserting any title thereto. The court found that the plaintiffs were owners of only a portion of the land, and that they were not entitled to any relief. Upon this finding a temporary injunction, which had been issued in the case, was dissolved, and judgment was entered in favor of the defendant "for costs and disbursements incurred on account of the injunction, taxed at seventeen dollars and eighty cents, "and also in favor of the plaintiffs against the defendant" for their costs and disbursements incurred in the trial of the issue of title to the real property described in the pleadings

in the case, taxed at four hundred and sixty-seven dollars and twenty-five cents."

The defendant moved to modify the decision and judgment, by striking out the said judgments, and inserting, in lieu thereof, the following: "That the defendant is entitled to judgment for his costs and disbursements incurred in this action." This the court refused to do, and we think the refusal was error; for as the action involved the title of the plaintiffs to the land described in the pleadings, and the court decided that the plaintiffs had no cause of action against the defendant, the defendant was entitled, of course, to judgment for his costs and disbursements incurred in the trial of the action: C. C. P., secs. 1024, 1022, subd. 5.

Order reversed, and cause remanded; and the court is directed to modify its decision and judgment as requested.

McKinstry and Ross, JJ., concurred.

Coglan *v.* Beard.

Department One. Filed February 12, 1884.

In an Action to Contest the Right of a Defendant to an Office to which he has been declared elected, if the evidence satisfied the court that the ballots from certain precincts had not been tampered with, it should adopt the result of such ballots as recounted, and not as returned by the officers of the election.

In Such an Action the Returns should be Received as Prima Facie True, and the ballots are not better evidence to overcome the returns, unless the contestant shall affirmatively prove that the ballots remained in the same condition as they were when delivered to the proper custody by the judges of election.

Findings must be of the Ultimate Facts Put in Issue by the pleadings, and not argumentative.

Appeal from a judgment of the superior court for Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

John T. Carey and *William H. Beatly*, for the appellant.

S. S. Holl, Jones & Martin, W. C. Van Fleet, and *W. A. Anderson*, for the respondent.

McKinstry, J. This was an action under the provisions of the code of civil procedure to contest the right of defendant to the office of county clerk of Sacramento, to which he was declared elected by the board of supervisors. From a judgment in favor of plaintiff the defendant has appealed.

Any elector may contest the right of a person declared elected to an office, "for malconduct on the part of the board of judges, or any member thereof:" C. C. P., sec. 1111, subd. 1. And in his written statement or complaint the contestant is required to set forth specifically "the particular grounds of such contest:" C. C. P., sec. 1115.

In the case at bar the ground of contest alleged in the plaintiff's statement or complaint is, that, in the several election precincts, the boards of election "were guilty of malconduct, committed as follows: That said board of election counted and tallied ballots for the said M. R. Beard for the office of county clerk, upon which the said Beard's name did not appear, and that said board failed, neglected, and refused to count and tally ballots for C. M. Coglan for the office of county clerk,

upon which the name of said Coglan did appear." The averments of the complaint are specifically denied.

The ballots supposed to have been cast by the voters were recounted in the presence of the court. In nearly every precinct the recount resulted in a gain to the contestant and a loss to the defendant. The results reached by the recount as to two of the precincts were rejected by the court below, the learned judge saying in the findings: "While there is not sufficient evidence *to satisfy my mind* that the ballots have been tampered with or fraudulently manipulated in any way, still from the circumstance of the package having been opened, and a very considerable variance being found between the returns and the actual count of the ballots, I think it *unsafe* to adopt the recount, and *therefore* in this precinct I take the returns."

The packages of ballots which the court below considered it "unsafe" to treat as not having been tampered with or "fraudulently manipulated"—although the evidence was not sufficient to satisfy the mind of the judge that there had been such tampering or fraud—had been in the same custody as the packages assumed to have been sent from the other precincts. As to some of these, the names of the election officers were not written across the seals fastening the packages, nor were the packages clearly identified. The packages were placed in a vault in the hall of records, of which the clerk retained the keys in his possession. The janitor of the court-house, his assistant, and several members of the board of supervisors each had a key to the room in which was the vault. The locks on the doors of the vault were ordinary tumbler locks, which could be unlocked by any person having a key to match the locks.

If the evidence on the part of the contestant satisfied the mind of the judge that the ballots from the two precincts had not been tampered with, he should have adopted the result of the recount and not the returns from those two precincts. The action of the court below could be justified only because the evidence failed to overcome the presumption created by the returns—failed to satisfy the court that the ballots had not been tampered with. But if the evidence failed to prove that the ballots claimed to have been cast in two of the precincts had not been changed, how did the court reach the conclusion that the ballots from other precincts had remained unaltered—it appearing that those who had tampered with some might have tampered with all?

It is evident, however, the court did not base its rejection of the recount as to the two precincts upon the failure of contestant to establish affirmatively that the ballots had not been tampered with, but that they were rejected out of abundant caution, because it was "safer," the judge saying, "There is not sufficient evidence to satisfy my mind that the ballots had been tampered with, or fraudulently manipulated in any way."

Thus the court below in effect held, that as the ballots had been in charge of the county clerk, the presumption was that they had not been changed, and it was for the defendant to prove that fraud had been committed with reference to them. This idea appears throughout the findings. Thus the court finds that the package containing the ballots supposed to have been cast in precinct 4, Sacramento city, "was brought into court intact," and that the package supposed to contain the ballots cast at precinct 4½, Sacramento city, "was *likewise in good order*." And again: "From all the other precincts in the county the ballots are returned *in*

good shape—not in every case complying strictly with the law, but there is not evidence indicating, in my mind, any tampering with the ballots."

The court below erred in assuming that the burden of proof was upon the defendant to prove that the ballots had been disturbed or fraudulently interfered with. Mr. Justice Cooley says: "The returns of the canvassing boards are *prima facie* evidence in the courts. * * * If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed, with a view to their safe preservation, as the best evidence of the election, it would seem that they should not be received as evidence at all, or if received, it should be left for the jury to determine, upon all the circumstances of the case, whether they constitute more reliable evidence than the inspector's certificate, which is usually prepared immediately on the close of the election, and upon actual count of the ballots as then made by the officers whose duty it is to do so:" Const. Lim. 625.

McCreary, in his work on Contested Elections, p. 209, lays down the rule: "Before the ballot-boxes should be allowed in evidence to overturn the official count and return, it should appear affirmatively that they have been safely kept by the proper custodian of the law; that they have not been exposed to the public or handled by unauthorized persons, and that no opportunity has been given for tampering with them. If this is believed to be a rule founded upon a presumption that a fraud or crime has been committed, the answer is, that the rule does no more than make choice between two presumptions of law, which in this instance come in conflict and can not both prevail."

In People v. Livingston, 79 N. Y. 290, the court of appeals held the trial court erred in charging the jury that, to justify the rejection of the ballots as proof, it must appear affirmatively, by direct evidence or from circumstances, that the ballot-boxes had been interfered with and fraud committed, Church, C. J., saying: "The error is in putting upon the party against whom the ballot-boxes are introduced the *onus* of proving that they had in fact been tampered with. * * * The burden was upon the relator to satisfy the jury that the boxes had remained inviolate; the returns are the primary evidence of the result of the election. * * * The returns may be impeached for fraud or mistake, but in attempting to remedy one evil, we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are necessary to change the result, the ballots themselves can not be identified—they have no ear-marks. * * * Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. * * * If the boxes have been rigorously preserved, the ballots are the best and highest evidence, but if not, they are not only the weakest, but the most dangerous evidence. The jury *might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud had been committed.*"

It is perfectly manifest that the court below failed to find directly upon the issue made by the pleadings—were the election boards guilty of malconduct in counting ballots for defendant which were not cast for him, and in failing to count ballots for plaintiff on which his name appeared? The fourth finding commences: "There was *no malconduct nor misconduct* upon the part of any of the officers who conducted such election, and no intentional miscalling or improper tallying or counting

of the ballots cast for the office of county clerk, but such errors as were made resulted from mistakes and oversight, and are indicated by the following statements of the votes cast in each precinct," etc. Subsequently comes a statement of the returns from each precinct, and of the results arrrived at by a recount of the ballots claimed to have been cast in each precinct.

The court found there was no "malconduct nor misconduct." If this was a finding on the issue the judgment should have been for defendant. But the court failed to find whether the election board in any precinct did or did not miscount the ballots. The findings at most suggest the *argument* that the election boards must have made mistakes *because* the recount showed that the boards must have made mistakes.

But, as appears from the findings themselves, the results reached by the recount may not have been correct. And this because the findings show that, in inquiring whether the ballots had been preserved inviolate, the court below lost sight of the rule applicable to actions of this character, that the returns are to be received as true *prima facie*, and the ballots are not better evidence to overcome the returns, unless the contestant shall affirmatively prove that the ballots remain in the same condition as they were when delivered to the proper custody, by the judges of election. It is not our function to express any opinion as to the *fact;* we say that the court below erred in applying the rule as to the burden of proof.

In Coveny v. Hale, 49 Cal. 552, was laid down the rule, followed ever since, that the findings must be either of the ultimate facts, or of such probative facts as that the court is enabled to say that the ultimate facts necessarily result therefrom. In the cause before us the court below failed to find the ultimate facts alleged and put in issue by the pleadings. And the argumentative finding does not support the judgment, since the conclusion that the election boards must have made mistakes because the result of the recount did not accord with the returns of the boards, is a *non sequitur*. We can not decide that the results reached through the recount are correct, inasmuch as the court erred in assuming that the ballots had been undisturbed, because it was not satisfied from the evidence that actual fraud had been committed.

Judgment reversed and cause remanded for a new trial.

Ross and McKee, JJ., concurred.

LYTLE CREEK WATER CO. *v.* PERDEW.

Department One. Filed February 12, 1884.

ANY RIGHTS ACQUIRED BY A SETTLER ON PUBLIC LANDS BORDERING UPON A STREAM, the waters of which had been previously appropriated, are taken subject to such appropriation.

WHEN THERE IS NOTHING IN THE RECORD TO INDICATE THAT WHEN ALL THE WATERS of a certain stream were appropriated any of the lands by or through which such stream flowed had passed into private ownership, it will be presumed that such lands were public lands of the United States.

IN AN ACTION BY AN APPROPRIATOR OF THE WATER OF A CERTAIN STREAM TO RESTRAIN A DEFENDANT FROM DIVERTING the same, when the court finds that the plaintiff has a separate title to the use of all the water for a certain length of time out of a longer period, and that other appropriators had a right to the use thereof, but fails to find as to the order in which the persons interested in the appropriation used it, or as to the times when the periods during which the plaintiff would be entitled to the exclusive use would recur, no decree fixing the rights of the plaintiff or prohibiting the defendant from interfering therewith, can be entered, unless the other persons entitled to the use of such water are made parties to the action.

APPEAL from a judgment of the superior court for San Bernardino county, entered in favor of the defendants, in an action to restrain them from diverting certain waters. The opinion states the facts.

Bryon Waters, for the appellant.

Satterwhite & Curtis, for the respondents.

MCKINSTRY, J. The complaint alleges that plaintiff is the owner of "all the flow" of Lytle creek. The court below found that before the end of 1856 all the waters of Lytle creek had been appropriated by several persons, each acting separately and claiming to appropriate a portion of the waters, and the waters thus appropriated by the various persons who appropriated the same, and those claiming to be their successors, were used "by turns separately and consecutively, each upon his separate land for a certain length of time, measured by hours and minutes, under the regulations of the board of water commissioners of this [San Bernardino] county, prescribing how often and the length of time each should be entitled to use the same, varying in time according to the extent of interest each held in the water so appropriated," etc. "Such separate interests in the water were held by the individuals separately, and sold, transferred, or abandoned by them respectively at their will." That plaintiff was the owner, through mesne conveyances and transfers of interests, of a portion of the waters of Lytle creek, appropriated as aforesaid, "equal in amount to the use of all the waters of said creek one hundred and thirty-two hours and nineteen minutes out of each and every three hundred and seventy-two hours." That defendant, A. G. Perdew, in 1867, "settled upon a tract of government land, near said Lytle creek, and within the flow of the same," and "diverted and appropriated from said Lytle creek," etc.

No question as to the use of the waters of a stream by *riparian proprietors* is presented by this record. There is nothing in the pleadings or findings to indicate that when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the waters of Lytle creek acquired by prior appropriation were confirmed by the act of congress of 1866: 14 U. S. Stats. 218. The court found that

the settlement on government land by defendant (conceding that his tract touched the creek) was made after the act of 1866 took effect. Any rights which he might acquire, therefore, from the government would be subject to the previously confirmed appropriations of the water.

The plaintiff and the other persons claiming rights in the waters of the creek derived from the original proprietors were not tenants in common. The convention *inter sese* of the owners of the use of all the water appropriated, by or under which the water was used for recurring periods of time by each, did not make them tenants in common. Plaintiff had a separate title to the use of all the water one hundred and thirty-two hours and nineteen minutes of every three hundred and seventy-two hours.

It is manifest that, in the absence of finding or evidence as to the order in which the persons interested in the appropriation of water used it, or as to the times when the periods during which the plaintiff would be entitled to the exclusive use of all the water would recur, no decree could be entered fixing the rights of plaintiff, or prohibiting the defendant from interfering with plaintiff's rights.

It is equally manifest that no decree determining the rights of plaintiff, or protecting them against the acts of defendant, could be entered, which would not prejudice the other owners deriving from the prior appropriators. Suppose, for example, the court had decreed that plaintiff would be entitled to the exclusive use of all the waters of the creek for a period of one hundred and thirty-two hours and nineteen minutes, commencing at twelve o'clock M. of the first day of October, 1883, and to an exclusive use of the waters for a like period, commencing two hundred and thirty-nine hours and forty-one minutes after the expiration of the first period (and so on), such decree would not conclude the rights of the other owners of the use, and the result might be that the defendant would only be enjoined for periods to which others than plaintiff would be entitled to the use of all the waters. Hence it was the duty of the court to order the other persons interested in the use of the waters to be brought in as necessary parties to the controversy: C. C. P., sec. 389.

Judgment reversed and cause remanded, with direction to the court below to order that all persons claiming or owning rights to the use of any of the waters of Lytle creek be made parties to the action.

McKEE and ROSS, JJ., concurred.

SANDERS, Adm'r, etc., *v.* SIMCICH, Ex'r, etc., ET AL.

Department One. Filed February 12, 1884.

WHERE ONLY PART OF THE ISSUES RAISED BY THE PLEADINGS are submitted to the jury, in a proceeding to set aside the probate of a will, the refusal of the court to hear testimony and make findings as to the remaining issues is error.

WHERE AN UNMARRIED PERSON HAS MADE A WILL, AND AFTERWARDS MARRIES, the marriage, whether followed by the birth of issue or not, operates by presumption of law, in case of the survival of the wife or children, as a revocation of the will, unless some specific provision has been made by the will itself, or by marriage contract for the wife, or by some settlement or provision for any surviving children. Such presumption of revocation depends upon the question of survivorship, and does not admit of evidence to the contrary unless provision has been made for the wife or children surviving.

PRESUMPTION AND PROOF OF SURVIVORSHIP.—Where both the husband and wife perished in the same calamity, the survivorship of the wife is not conclusively presumed, in a proceeding brought by her administrator to set aside the probate of her husband's will, from the fact that the order of the probate court granting the letters of administration recites that such deceased was the "the surviving wife" of the testator. A finding that the wife survived her husband, based entirely upon such recital, is unsupported by the evidence; and a refusal of the court to admit evidence on the question of survivorship is error.

APPEAL from an order of the superior court for Amador county, entered in favor of the defendant. The opinion states the facts.

Charles R. Gray and *D. B. Spagnoli*, for the appellant.

Eagon & Armstrong and *A. Caminetti*, for the respondents.

McKEE, J. This case arises out of a proceeding brought by the administrator of the estate of Catterina Jelletich, deceased, against the executor of the estate of Nicholas Jelletich, deceased, to set aside the probate of a lost or destroyed will made by the said Nicholas in his life-time. At the hearing, certain special issues were framed and submitted to a jury that returned a special verdict substantially as follows: 1. That the said Nicholas Jelletich made the will in controversy; 2. That it had not been revoked; 3. That it had been admitted to probate upon sufficient proof; 4. That Catterina Jelletich, the wife of the said Nicholas, survived her husband; and, 5. That the husband had, in his life-time, made provision for her by a marriage contract. This verdict was filed and entered on the minutes of the court, pursuant to section 625, code of civil procedure.

There were other issues, however, raised by the pleadings, which had not been submitted to the jury, and upon them plaintiff's counsel asked the court to hear proofs upon which to prepare additional findings; but the request was denied, and upon the special verdict alone the court refused to revoke the probate of the will, and gave judgment accordingly. The refusal to take testimony and to make findings upon the other questions at issue was erroneous. Besides, the judgment and order denying the motion for a new trial are erroneous, because the special verdict does not support the judgment, and the evidence does not sustain the verdict.

The first finding by the jury is immaterial; the second and third are findings of law. It is admitted that the fifth finding is not sustained by the evidence; and the record shows that the court erred in its rulings as to the only evidence upon which the fourth finding is based; and that the finding itself is not sustained by the evidence.

It appears by the record that on June 20, 1878, Nicholas Jelletich made his will. At that time he was a widower, about forty-three years

of age. By the will he devised all his property, except a sum of money, to his then only son, John Jelletich, a boy fourteen years old. Soon after making his will he left Amador county, where he resided, and went to Austria. There he married, and in October, 1878, returned to Amador county, with his wife, Catterina Jelletich, who afterwards bore him two children. It does not appear that at the time of the marriage, or at any time thereafter, he made any provision for his wife by a marriage contract, and the will of June, 1878, contained no mention of her name nor any provision for her or her children. He and his wife with the two children resided in Amador county until October 26, 1881. On that night his dwelling was burned, and he, his wife, and the two children perished in the fire.

The petitioner claims, and the jury found, that in that calamity the wife survived her husband. As a surviving wife, for whom no provision had been made by her husband in his life-time, and of whom no mention was made in his will to show that he did not intend to make any provision for her, the will, made before her marriage with him, was revoked by operation of law, C. C., sec. 1299, and the court should have instructed the jury to that effect.

It is the policy of the law that wife and children must be provided for. Therefore the civil code declares that where an unmarried person has made a will, and afterwards marries, the marriage, whether followed by the birth of issue or not, operates, in case of the survival of wife or children, if any, as a revocation of the will, unless some specific provision has been made, by the will itself or by a marriage contract, for the surviving wife, or by some settlement or provision for any surviving children of the marriage: C. C., secs. 1298, 1299. The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will; and does not admit of evidence to the contrary, unless provision has been made according to law for wife and children who have survived him: Id.

The presumption of revocation, however, depends upon the question of survivorship. Survival of the children is not claimed; but the paramount question at issue was the survival or the wife. If the wife survived, under the conditions referred to, the will was revoked by law; and as to her, the husband died intestate. If the husband survived, his will was valid and probatable. To prove survivorship of the wife, the petitioner gave in evidence the order of the probate court granting him letters of administration of the estate of Catterina Jelletich, deceased. That order was as follows: "It is ordered, that letters of administration of the estate of the said Catterina Gelletich, known under the name of Cattarina Jelletich, deceased, the surviving wife of Nicholas Jelletich, deceased, be issued to the said petitioner, W. Boon Sanders, the public administrator of said Amador county, upon his taking the oath according to law. Dated October 30, 1882."

In rebuttal the defendant offered to introduce evidence upon the question at issue, but without requiring him to state what his evidence was, the petitioner objected to the introduction of any evidence upon the question, and the court sustained the objection. There was therefore no other evidence before the jury of the survival of the wife than the order of the probate court. And the ruling of the court in excluding any other evidence is sought to be maintained on the ground that the recital

in the order that the deceased Catterina was "the surviving wife of Nicholas Jelletich, deceased," is conclusive, and estops the defendant from denying the fact.

But the order only adjudged the right of the petitioner to letters of administration upon the estate of Catterina Jelletich, deceased. That adjudication, being made by a court that had jurisdiction of the estate, real or personal, of which the decedent died seised, would be, undoubtedly, in any question thereafter involving the question of administration, at least *prima facie* evidence of the essential facts upon which it was made, namely, the domicile and estate, death and intestacy, of the decedent. But it would not be evidence that the decedent survived any other person to whom she may have borne in her life-time some domestic relation; because that was not a fact essential to the jurisdiction of the court, nor a question at issue in the proceedings for letters of administration. In that proceeding the question was not raised, tried, or determined. It was raised for the first time in this proceeding—a proceeding entirely different from the one in which the order was made; and the question was provable, not by an order made in a proceeding in which it was not raised, but by evidence *aliunde:* Garwood v. Garwood, 29 Cal. 515; Ferrea v. Chabot, 11 Pac. C. L. J. 514.

As this order was the only evidence before the jury, upon which, by the rulings of the court, their verdict was founded, there was no evidence to sustain the finding; and it is against law. For "when two persons perish in the same calamity, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to certain rules, one of which is: If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived:" C. C. P., sec. 1963, sub. 4, par. 40.

Order reversed and cause remanded for a new trial.

McKinstry and Ross, JJ., concurred.

FABER *v.* CATHRIN.

Department One. Filed February 12, 1884.

DAMAGE BY TRESPASSING SHEEP.—A complaint in an action brought under the act of March 7, 1878, which alleges that the plaintiff was at stated times the owner and in possession of a certain piece of land; that at such time the defendant was the owner, in the possession, and chargeable with the care of certain sheep, which then entered and trespassed upon such land and injured the grain, grass, and hay thereon, to the plaintiff's damage, is sufficient; and if such averments are true, the defendant is liable.

ALLOWING THE PLAINTIFF IN SUCH ACTION TO TESTIFY THAT BY REASON OF THE DAMAGE done by such sheep she was compelled to feed her own stock with hay, is not error, when such fact was first drawn out by the defendant on cross-examination.

APPEAL from a judgment of the superior court for El Dorado county, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Charles F. Irwin, for the appellant.

George G. Blanchard, for the respondent.

Ross, J. This action was brought under the act of the legislature, approved March 7, 1878, and entitled "An act concerning trespassing of animals upon private lands in certain counties in the state of California:" Stats. 1877–8, p. 176. The act is made applicable to the township in which is situated the land of the plaintiff, and its first and second sections are as follows:

"Sec. 1. It is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal.

"Sec. 2. The owner of or person who is in the lawful possession of any land trespassed upon, in violation of this act, is entitled to recover by action, in a court of competent jurisdiction, from the owner of or person in the possession of or person charged with the care of the trespassing animal or animals, all damage sustained by reason of such trespass, together with costs of suit."

The complaint charges that at certain stated times the plaintiff was the owner and in the possession of a certain piece of land; that at those times the defendant was the owner, in the possession, and chargeable with the care of certain sheep, which sheep then entered and trespassed upon the land of the plaintiff, and injured and destroyed the grain, hay, and grass thereon being and growing, to the plaintiff's damage in the sum of one thousand dollars. If the averments made by the plaintiff were true, the law quoted made the defendant liable to her. And that the averments were true, except as to the amount of damage sustained by the plaintiff, was found by a jury upon evidence sufficient to sustain the verdict. The fact that the damage done to the plaintiff by defendant's sheep had made it necessary for the plaintiff to feed her own stock with hay, was first brought out by defendant on the cross-examination of one of the plaintiff's witnesses. Besides, there was no attempt on the part of the plaintiff to show the value of the hay so fed to her stock, and the testimony could only have gone towards showing the extent of the injury done by defendant's sheep to the plaintiff's hay and grain.

In view of the evidence in the case, there was no error on the part of the court in refusing the instructions requested by the defendant

Judgment and order affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

GILLMORE *v.* AMERICAN CENTRAL INS. CO.

Department One. Filed February 13, 1884.

FINAL JUDGMENT, WHAT IS.—While proceedings are pending for a review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case, between the parties, is not ended; and until litigation on the merits is ended, there is no finality to the judgment in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it.

A JUDGMENT ENTERED FOR THE PLAINTIFF IN ONE ACTION, in pursuance of a stipulation which authorized the entry of the same upon a final judgment for the plaintiff in another action, is premature, if entered pending a motion by the defendant in the latter action for a new trial, although entered more than one year after a judgment in the latter action, from which no appeal was taken.

A MOTION FOR A JUDGMENT, PURSUANT TO A STIPULATION, can not be considered a trial on the merits. If a party to such stipulation is entitled to judgment, it is upon the stipulation which has been entered as an order of the court, and not upon a trial of the cause. A motion for a new trial in such case is irregular, and should be dismissed.

APPEAL from a judgment of the superior court for Los Angeles county in favor of the plaintiff, and from an order denying the defendant's motion to vacate the same. The opinion states the facts.

Gray & Haven, *Van Ness*, *Gardner*, and *Stephenson*, for the appellant.

Brunson & Wells, for the respondent.

McKEE, J. Pending two actions in the seventeenth judicial district court of Los Angeles county—one of which was entitled "Lucy Gillmore v. The Lycoming Fire Insurance Company of Muncy, Pennsylvania," and the other, "Lucy Gillmore v. The American Central Insurance Company of St. Louis"—each of which was brought upon a policy of insurance to recover for loss by fire, the attorneys of the respective parties, in the last-named action, entered into the following stipulation, which was filed and entered upon the court minutes as an order of the court, viz.: "This cause being called regularly for trial, the parties appearing by their respective attorneys, and both parties consenting in open court that the issues in this cause are identical with those of the other action pending in this court, No. 4,799, entitled 'Lucy Gillmore v. The Lycoming Fire Insurance Company of Muncy, Pennsylvania,' it is stipulated and agreed that all proceedings herein shall be stayed until final judgment and decision in said action wherein the Lycoming Fire Insurance Company of Muncy, Pennsylvania, is defendant; and in case of an appeal in said last-named action, then said proceedings are stayed until the final determination of such appeal, and upon such final determination, judgment, and decision in said action wherein said The Lycoming, etc., is defendant, either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment, and of the same date, in said other action; and if such judgment shall be for the plaintiff, the amount for which the same shall be entered shall be six hundred and fifty dollars and costs; and if for the defendant, then for its costs allowed by law. An order pursuant to this stipulation shall be entered in the minutes of this court, 12th May, 1879."

The action named in the stipulation was tried and decided in favor of the plaintiff, but the defendant moved to set aside the judgment entered therein, and for a new trial. The motion was denied; and from the judgment and order denying the motion the defendant appealed. On appeal, the judgment and order were reversed and the cause remanded, with di-

rections to the court below to sustain the demurrer to the complaint in the action, with leave to the plaintiff to amend.

In obedience to the direction of the appellate court, the demurrer to the complaint was sustained; the plaintiff amended her complaint, and the cause was again tried and decided in favor of the plaintiff, and judgment was entered in her favor against the defendant on March 14, 1881. A year elapsed and no appeal from the judgment was taken. Then the attorneys for the plaintiff in this action, in which the stipulation was filed, moved the court to enter judgment in favor of the plaintiff, pursuant to the stipulation; and the court, on the seventeenth of March, 1882, rendered and entered judgment accordingly.

The present appeal is from this judgment, and also from an order denying a motion to vacate it. There is also an appeal from an order denying a motion for a new trial. It is contended that the judgment in the action of Lucy Gillmore v. The Lycoming Insurance Company of Muncy, Pennsylvania, became final, within the meaning of the stipulation, after a year had elapsed from its entry without taking an appeal from it.

But although no appeal had been taken from the judgment within statutory time, proceedings were pending, upon a motion made by the defendant in the case, to vacate the judgment and grant a new trial. That motion subjected the judgment to be reviewed, and made it liable to be set aside. The judgment was therefore not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for a new trial had been disposed of: Hill v. Sherwood, 33 Cal. 474.

While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it. As, therefore, the motion for a new trial in the Lycoming Insurance Company case was not heard and determined until more than nine months after the entry of the judgment appealed from, the judgment was prematurely entered.

If *now* no appeal has been taken from the order denying the motion for a new trial, in consequence of which the order has become absolute and the judgment final, the reversal of the judgment prematurely entered on the stipulation will not prejudice the right to move for judgment pursuant to the stipulation. A motion for judgment pursuant to stipulation can not be considered a trial on the merits. If a party to such stipulation is entitled to judgment, it is upon the stipulation which has been entered as an order of the court, and not upon a trial of the case. The motion for a new trial was therefore irregular, and should have been dismissed.

Judgment and order reversed, and cause remanded for further proceedings.

MYRICK and MCKINSTRY, JJ., concurred.

MEYER *v.* PORTER.

Department One. Filed February 13, 1884.

THE REPEAL OF A MUNICIPAL CHARTER DOES NOT IMPAIR the validity of contracts made under its provisions.

A PROVISION IN THE CITY CHARTER OF SACRAMENTO PROHIBITING ANY SUIT or actions against the city upon any bonds which had been issued under its former charter, is no defense to a proceeding by *mandamus* against the treasurer of such city to compel him to pay the interest coupons on certain bonds issued by such city under the authority of its charter granted in April, 1858, the payment of which was a duty enjoined upon such treasurer by the provisions of such charter.

IT IS NO DEFENSE TO SUCH PROCEEDING, BROUGHT BY AN INDIVIDUAL BONDHOLDER, that such coupons have never been presented to the board of trustees for audit and examination, nor the fact that there are other creditors interested in the fund provided for their payment who have not demanded payment.

SUCH COUPONS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS until the bonds to which they belong are barred.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendant. The opinion states the facts.

Rosenbaum & Sheeline and *S. C. Denson*, for the appellant.

W. A. Anderson and *McKune & George*, for the respondent.

McKEE, J. Application for a writ of mandate to compel the treasurer of the city of Sacramento to pay out of funds in the city treasury certain past due and payable coupons belonging to bonds issued by the city of Sacramento, of which the plaintiff is the owner and holder. The fund out of which payment is demanded is known as the "interest and sinking fund" of the city of Sacramento. It is admitted there was in that fund, when the coupons were presented and payment demanded, the sum of one hundred thousand dollars, yet the treasurer refused to pay, and the court below sustained him in his refusal. The coupon bonds in the hands of the petitioner were issued under a charter granted to the city in April, 1858. That charter empowered the municipal authorities to issue bonds for the past indebtedness of the former city government, and to set apart and appropriate fifty-five per cent. of the municipal revenue, when paid into the treasury, "to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act:" Stat. 1858, p. 279, secs. 34, 35.

The bonds were, therefore, issued under a law which provided for their redemption as they became due, with interest thereon, payable annually until redeemed. But the charter also provided, that "the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenue, actions, choses in action, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final:" Id., sec 1.

In 1863 the charter of 1858 was repealed and a new charter substituted. The repeal of the old charter did not impair the validity of contracts made under its provisions.

In fact, the substituted charter of 1863 contained the same provision for an "interest and sinking fund" for the payment of the annual interest of the bonds and of their redemption as that contained in the repealed charter; and it also contained an implied prohibition against suits or actions against the city upon any bonds which had been issued under the

former charter. Therefore it is contended that by both the original and substituted charters, the holders of these city bonds took and held them, with notice that no actions upon them could be maintained against the city.

But however that may be, it is no answer to a proceeding by *mandamus* against an officer of the city to compel the performance of a duty, in connection with the payment of the bonds, which the law under which they were issued has specially enjoined upon him: Meyer v. Brown, 12 Pac. C. L. J. 153. If, therefore, it was the clear legal duty of the treasurer to do the act demanded of him, performance of it can be compelled; and the only question is, Was it the duty of the treasurer to pay the coupons, when presented to him, out of the fund which he had on hand?

That fund contained one hundred thousand dollars, and the moneys had been set apart and appropriated for the purpose of the payment of the annual interest and final redemption of the bonds: Stat. 1858, p. 279; Stat. 1863, p. 426. The interest was made payable at the office of the treasurer on the first day of January of each year: Stat. 1858, p. 280, sec. 37. And says section 40 of the same statute: "It shall be the duty of the treasurer to pay the interest on said bonds, when the same falls due, out of said interest fund, as provided in this act." Thus the duty to pay is specially enjoined upon the officer. It is a special duty with regard to the bonds which is imperative upon him over and beyond the ordinary duties of his office as prescribed by other provisions of the charter, ordinances, or orders of the municipal authorities. Being a special duty, no other statute, ordinance, or order was requisite for its performance.

Nor was it necessary that the coupons should have been presented to the board of trustees and auditor for examination and audit, as ordinary accounts or claims against the city, under the provisions of sections 2, 5, 8, 9, of the act of 1863; for as the law under which they and the bonds to which they belonged were issued made it the duty of the treasurer to pay them in the manner and out of the fund provided for that purpose, no warrants were necessary to authorize their payment. Nor is the fact, if it exists, that there are other creditors interested in the fund provided for their payment who have not demanded payment, any answer to the application of the petitioner. Non-action by others having even equal rights with him, in a matter on which his right is founded, can not prejudice him in the assertion of his right nor excuse non-performance of a duty in connection with it specially enjoined by law. And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute.

Judgment reversed and cause remanded.

Ross and McKinstry, JJ., concurred.

WHITCOMB *v.* MCCLINTOCK ET AL.

Department One. Filed February 13, 1884.

ACTION FOR THE CONVERSION OF PERSONAL PROPERTY IS NOT BARRED by the statute of limitations, when the evidence fails to show when such statute commenced to run.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. This was an action to recover damages for the conversion of certain personal property by the defendants. The defense relied on was the statute of limitations. After the plaintiff had introduced his evidence the court granted a nonsuit, on the ground that the evidence did not show that the conversion had been made within three years prior to the commencement of the action. There was no evidence showing when the statute commenced to run.

L. S. Taylor, for the appellant.

Jones & Martin, for the respondents.

THE COURT. On the authority of Norton v. Zellerbach, 11 Pac. C. L. J. 356, judgment reversed and cause remanded for a new trial.

CANAVAN *v.* MUNICIPAL COURT OF APPEALS.

In Bank. Filed January 14, 1884.

NO ORDER OF TRANSFER WAS NECESSARY BY THE COUNTY COURT of the city and county of San Francisco to give the municipal court of appeals jurisdiction over actions pending in the former court.

APPEAL from a judgment of the fifteenth district court for the city and county of San Francisco, entered in favor of the plaintiff. This was a proceeding to review a judgment rendered by the municipal court of appeals against the plaintiff. The action in which such judgment was rendered was originally brought against the plaintiff in the justices' court of the city and county of San Francisco, where judgment was given against him. He appealed to the county court, and pending such appeal the action was transferred to the municipal court of appeals, where judgment was again rendered against him. No order for such transfer was ever made by the county court. He thereupon brought this proceeding for the review of the judgment of the municipal court of appeals, and after hearing, the same was set aside and vacated. From that last judgment this appeal was taken.

J. H. B. Wilkins and *D. H. Regensburger*, for the appellant.

M. C. Hassett, for the respondent.

THE COURT. Upon the authority of Davis v. The Superior Court, 11 Pac. C. L. J. 568, judgment reversed and cause remanded for further proceedings.

HALL v. RICE, Adm'r, etc., ET AL.

Department One. Filed February 15, 1884.

ORDERED, THAT THE OPINION IN HALL v. RICE, *ante*, p. 346, be modified.

AFTER the opinion in this case, reported in 1 West Coast Rep. 346, a motion for a rehearing in bank was made and denied, and the following order was made:

The COURT. Ordered that the following portion of the opinion herein be stricken out: "Otherwise the party demanding a conveyance is without remedy since he can not appeal from the order of the probate court: C. C. P., sec. 963."

ROEDING v. PORTER. HAUSMEISTER v. PORTER.

Department One. Filed February 15, 1884.

JUDGMENT REVERSED ON THE AUTHORITY OF MEYER v. PORTER, *ante*, p. 874.

APPEALS from judgments of the superior court for Sacramento county, entered in favor of the defendant. The facts in these cases were similar to those of Meyer v. Porter, *ante*, p. 874.

Rosenbaum & Sheeline and *S. C. Denson*, for the appellants.

W. A. Anderson, and *McKune & George*, for the respondent.

The COURT. Upon the authority of Meyer v. Porter, February 13, 1884, judgments reversed and causes remanded.

GREEN v. ODD FELLOWS SAVINGS AND COMMERCIAL BANK.

Department One. Filed February 15, 1884.

THE STATUTE OF LIMITATIONS DOES NOT RUN AGAINST A CAUSE OF ACTION to recover money deposited in a bank,

THE ASSIGNEE OF A SAVINGS BANK WHO ASSUMES ALL OF THE DEBTS OF THE SAME, including its liability to one of its depositors, and who credits such depositor with the amount of his deposit and pays him a dividend thereon, accruing partly before and partly subsequent to the transfer, can not set up the statute of limitations as a defense to an action to recover the amount of such deposit.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

Cadwalader and *Devlin*, for the appellant.

Catlin and *Hamburger*, for the respondent.

ROSS, J. On the first day of March, 1875, the Odd Fellows Bank of Savings was indebted to the plaintiff in the sum of three thousand dollars, for moneys at and before that time deposited with it. On the day mentioned that bank conveyed all of its property to the defendant, upon the consideration and agreement that defendant would accept, take, and receive the same, and assume and pay all the debts and liabilities of said Odd Fellows Bank of Savings, including the demand of the plaintiff. Defendant accepted the property of the Odd Fellows Bank of Savings, assumed all of its debts and liabilities, and thereupon com-

menced to carry on, and until some time in September, 1878, continued to carry on, the business of a savings and loan corporation. In March, 1875, the plaintiff assented to and ratified the transfer to the defendant, and released said Odd Fellows Bank of Savings from his demand.

On the tenth day of July thereafter the defendant credited the plaintiff with a dividend of one hundred and thirty-five dollars for and on account of the use of the aforesaid sum of three thousand dollars by defendant and by the Odd Fellows Bank of Savings, for the six months then next preceding; and on the twenty-sixth of July, 1875, defendant paid plaintiff, on account of said debt and dividend, the sum of one thousand one hundred and thirty-five dollars. That payment left due the plaintiff from defendant two thousand dollars. If that sum is to be regarded as a deposit by plaintiff with defendant, the judgment of the court below should be affirmed, regardless of any other question; for the defense here is the statute of limitations, and to an action brought to recover money deposited with any bank there is in this state no limitation: C. C. P., sec. 348; Mitchell v. Beckman, 10 Pac. C. L. J. 742.

When the defendant succeeded to the business of the Odd Fellows Bank of Savings, and accepted the conveyance of all of its property, and in consideration of that conveyance assumed all of its debts and liabilities, including the demand of the plaintiff, and credited plaintiff in its books of account with said sum of three thousand dollars as a deposit, as the court below found that it did do, we think defendant assumed towards plaintiff the precise relation that its assignor bore. And that such was the relation recognized by the defendant is shown by the further fact of the subsequent payment to plaintiff of a dividend upon the deposit, accruing partly before and in part subsequent to the transfer from the Odd Fellows Bank of Savings.

We must affirm the judgment.

Ordered accordingly.

McKinstry and McKee, JJ., concurred.

BOOK REVIEWS.

PRECEDENTS OF EQUITY PLEADINGS. By FRANKLIN FISKE HEARD. Boston: Little, Brown & Co. 1884.

In this small volume of about two hundred and fifty pages, the precedents, as the author states in the preface, "are drawn in conformity to the modern school of equity pleading. The tendency of recent legislation is to establish a system which shall retain the brevity of the common law and the intelligibility of equity pleading, while abandoning the technicality of the one and the prolixity of the other. The material facts and circumstances relied on by the party pleading, according to this system, are stated with brevity, omitting immaterial and irrelevant matters."

The author seems to have substantially followed the system now prevailing in the chancery division of the English supreme court of judicature, which is virtually the same as that pursued by good pleaders, in equitable actions, in all the American states which have adopted the reformed procedure. All of the time-honored formulas and technical phrases, which were regarded as essential features of the ancient bills and answers, are omitted. The bill is reduced to the *stating* part and the prayer for relief. In the body of the bill, or the stating part, the facts constituting the cause of action, or entitling the complainant to equitable relief, are narrated in plain, concise, and ordinary language; the statement of each important fact is made a distinct and separate paragraph, and these paragraphs are consecutively numbered. The English "supreme court of judicature act," and the legislation carrying it into effect, have produced other changes in the system of equity pleading than those of mere form and the abandonment of technical phrases. It is no longer the most important and distinctive function of a bill to probe the conscience of the defendant and extract from him evidence in the form of admissions contained in his answer. If it is desired to examine the defendant, to compel him to answer interrogatories, that is done by a special proceeding, by means of interrogatories separately exhibited or filed during the progress of the suit. For this reason the bill, in accordance with the modern system here represented, need not contain the details—often enormous in amount—of purely evidentiary matter, which were constantly inserted into the pleadings under the ancient methods. It is sufficient that all the *material* facts which entitle the complainant to the equitable relief are alleged, without stating the minor and subordi-

nate facts which are purely evidentiary, in all their fullness and minuteness. Of course there still is, and always must be, an inherent difference between the *issuable* facts which constitute the cause of action at law and the material facts which entitle the complainant to equitable relief. This difference in pleading necessarily results from the essential distinction between legal "causes of action" and remedies, and equitable rights and reliefs. The plaintiff's pleadings in legal and in equitable suits can never be made *exactly* alike. The modification in the function and nature of the bill thus described exists also to the same extent, and for the same reason, in all the states which have adopted the reformed procedure.

As an illustration of the simplicity which takes the place of the former technical phrases, the following instance will be sufficient. Instead of the old commencement, "Humbly complaining, showeth unto your honor, your orator," etc., we have, "To the judges of the circuit court of the United States for the district of ——: A. B., of ——, and a citizen of the state of ——, brings this his bill against C. D., of ——, and a citizen of the state of ——, and thereupon the plaintiff complains and says."

Besides forms of titles in suits between various classes of persons, precedents of bills are given in the most important and frequently occurring kinds of equity suits, and also of interrogatories, demurrers, pleas, answers, replications, injunctions, and decrees.

Although the author does not, so far as we have discovered, make any allusion to the reformed procedure prevailing in so many of the American states and territories, yet we see no reason why his precedents should not be useful to lawyers in the commonwealths which have adopted that system of procedure.

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ACCOUNT STATED.

1. UPON AN ACCOUNT STATED THE LAW IMPLIES A VALUABLE CONSIDERATION, and it is not necessary to inquire into the nature of items of the original account. Proof of a settlement and stated account between the parties makes out a *prima facie* case for the plaintiff. *Orr* v. *Hopkins*, 157.
2. PROMISSORY NOTE IS THE MOST SATISFACTORY EVIDENCE of a settlement between the parties thereto, and may be received in evidence in support of the common count upon an account stated. *Id.*

ACQUIESCENCE.

1. DELAY AS EVIDENCE OF ACQUIESCENCE.—How far delay may be evidence of acquiescence must depend upon the circumstances of each case. In the present case, the complainant is entitled to the benefit of the conduct of the community, and this conduct shows a constant opposition on their part to the acts of defendants during the whole period of their hydraulic mining operations, since the injury became material. Acquiescence in a certain amount of nuisance is not acquiescence in a similar nuisance which is constantly increasing in magnitude, and in its destructive effects. For the same reasons, the delay or lapse of time in bringing this suit does not constitute laches. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.

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ADMIRALTY.

1. ADMIRALTY RULE 38—"PROCEEDS OF PROPERTY" THEREUNDER.—Where a ship and cargo are saved from a common peril, after a considerable jettison of the latter, and allowed by the salvors to proceed to their destination, where the saved cargo was delivered by the master or agent to the consignees without contribution for salvage or jettison, but on the deposit by each consignee of a sum of money equal to twenty per cent. of the value of the cargo delivered to him "to cover general average," and the execution of a bond for the payment of his proportion of the "losses and expenses" consequent upon such peril, the salvage service being for the benefit of both ship and cargo, the expense thereof constituted a general average; and in a suit against the ship and cargo for salvage, the libelants may elect to treat such deposit as so far a substitute for the cargo delivered, and require the agent of the vessel, under admiralty rule 38, to bring the same into court to answer the exigency of such suit. *The Queen of the Pacific*, 109.

2. OPPOSING APPEALS IN A CASE IN ADMIRALTY DO NOT CREATE TWO CAUSES in the appellate court. After one party has perfected his appeal, an appeal by the opposite party may be perfected by serving and filing in the court below his notice of appeal. *Steamer City of Panama* v. *Phelps*, 848.

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ADVERSE POSSESSION.

1. TITLE TO REAL ESTATE CAN NOT BE OBTAINED BY ADVERSE POSSESSION, under section 325 of the code of civil procedure, unless the adverse holder has paid the taxes levied and assessed upon such land during the time of his occupancy. *Webb* v. *Clark*, 861.
2. SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A FINDING that the possession of the defendants was not adverse will not be considered by the appellate court, when such adverse possession could not have continued for a sufficient length of time prior to the commencement of the action to furnish a defense. *Emeric* v. *Alvarado*, 708.
3. ADVERSE POSSESSION.—Defendants have not acquired title by adverse possession to the two tracts of complainant's lands—one of seventy-five acres, the other of fifty acres—which have been completely buried by their mining debris. These tracts have not been "protected by a substantial inclosure," or "usually cultivated or improved," by defendants, as required by the code of civil procedure, section 325, in all cases where the adverse possession is "not founded upon a written instrument, judgment, or decree," and there has been no ouster of the complainant by defendants. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.

See WATER RIGHTS, 9, 10, 17.

AFFIDAVIT.

See APPEAL, 7, 8.

AGENT.

1. AGENT ADVERSELY INTERESTED TO PRINCIPAL.—The law will not allow a person to act as agent when he has an interest adverse to his principal; and therefore an agent of an insurance company to receive and transmit applications for insurance, when making an application therefor on his own property, directly or indirectly for his own benefit, is acting for himself, and can not be considered the agent of the insurance company. *Spare* v. *Home Mut. Ins. Co.*, 542.
2. COURTS WILL TAKE JUDICIAL NOTICE OF THE AUTHORITY OF THE MANAGING OFFICER of railway corporations, such as a superintendent, and presume that such officer has power to conduct its ordinary business transactions. *Sacalaris* v. *Eureka & Palisade R. R. Co.*, 398.
3. AN AGENT HAVING THE OVERSIGHT AND CHARGE, WITH THE POWER TO DIRECT, has a general and discretionary power within the scope of his agency. *Id.*

See CORPORATIONS, 21–23; EVIDENCE, 18, 19; NEGLIGENCE, 9; VERIFICATION, 2–4.

ALIEN.

See MINES AND MINING, 11, 12.

ALIENATION, RESTRAINT OF.

See WILLS, 7.

AMENDMENT.

1. THE POWER OF THE CIRCUIT COURT OVER AMENDMENTS TO PLEADINGS, after a remand from the supreme court, is not affected by the circumstance of an appeal having been taken; and while the supreme court may send a case back for amendment of pleadings and retrial generally, it has no power to prescribe the character of the amendments to be allowed or the mode of conducting subsequent proceedings. *Branson* v. *Oregonian Railway Co.*, 624.

See REPLEVIN, 1; SPECIFIC PERFORMANCE, 3; VARIANCE, 1, 3.

ANSWER.

See PLEADING AND PRACTICE.

APPEAL.

1. AN APPEAL LIES TO THE SUPREME COURT from a judgment of the superior court granting or denying an application for a writ of *mandamus;* and an undertaking in the sum of three hundred dollars, executed and conditioned according to the provisions of section 941 of the code of civil procedure, stays the execution of such judgment pending the appeal. *Palache* v. *Hunt*, 485.

2. APPEAL FROM AN ORDER SETTING APART A HOMESTEAD TO A WIDOW, out of the estate of her deceased husband, must be taken within sixty days after such order was made. *Estate of Burton*, 254.

3. APPEAL FROM AN ORDER DENYING A WIDOW'S APPLICATION FOR A HOMESTEAD, to be set apart to her out of the estate of her deceased husband, must be taken within sixty days after the entry of such order. *Estate of Harland*, 49.

4. NO APPEAL LIES TO THE SUPREME COURT FROM AN ORDER OF THE DISTRICT JUDGE requiring the county assessor of Esmeralda county to file in the district court a statement of taxes, as required by section 6 of the act of March 1, 1883, although such order was made by the court instead of by the judge. *Lyon Co.* v. *Esmeralda Co.*, 395.

5. NO APPEAL LIES TO THE SUPREME COURT FROM AN ORDER OF THE DISTRICT COURT setting aside a previous order vacating a judgment. The effect of such order is not to revive or reinstate the judgment. *Owen* v. *Going*, 352.

6. NO JUDGMENT ROLL IS PROVIDED FOR BY THE PROCEDURE IN CALIFORNIA UNTIL FINAL JUDGMENT has been entered, and consequently, an appeal from an interlocutory judgment in partition will not be dismissed because the entire judgment roll has not been brought up. *Emeric* v. *Alvarado*, 708.

7. AN APPEAL FROM AN ORDER DENYING A MOTION FOR A NEW TRIAL, when an interlocutory judgment has been rendered and entered in an action for partition, must be brought up by a statement, or bill of exceptions, or affidavits, as in other cases where a motion for a new trial is made and denied. *Id.*.

8. AN APPEAL TO THE DISTRICT COURT FROM A JUDGMENT OF THE PROBATE COURT can not be perfected unless the proper affidavit of non-vexation and delay is made and filed. *Chaves* v. *Perea*, 807.

9. AN UNDERTAKING ON APPEAL CAN NOT BE DISPENSED WITH IN AN APPEAL by a collector of taxes from a judgment against him, in an action to recover delinquent taxes. If such undertaking be not filed as required by statute, the appeal will be dismissed. *Crismon, Collector etc.*, v. *Bingham Canyon & Camp Floyd R. R. Co.*, 697.

10. AN APPEAL WILL BE DISMISSED WHERE NO TRANSCRIPT IS FILED in accordance with the rules and practice of the supreme court. *Estate of Curtis*, 467.

11. IN THE ABSENCE OF A BILL OF EXCEPTIONS IN THE RECORD, the appellate court will not notice alleged irregularities occurring at the trial. *Newby* v. *Rowland*, 521.

12. JUDGMENT APPEALED FROM MAY BE AFFIRMED IF THE APPELLANT fails to file any points and authorities, as required by the rules of the supreme court. *Robinson* v. *Longley*, 306.

13. ERRORS IN THE CHARGE TO THE JURY CAN NOT BE MADE AVAILABLE ON APPEAL, unless they are material, or calculated to mislead the jury, or to produce a wrong result. *Martin* v. *Hill*, 629.

14. ERRORS ASSIGNED FOR REFUSING TO GIVE CERTAIN INSTRUCTIONS ASKED FOR, and in the form of the judgment, can not be considered by the appellate court unless the transcript contain all of the instructions given and a copy of the judgment. *Tucker* v. *Parks*, 264.

15. OBJECTIONS TO A COMPLAINT OTHER THAN THAT IT DOES NOT STATE FACTS SUFFICIENT to constitute a cause of action, must be made in the court below, to entitle them to consideration in the appellate court. *Id.*

See ADMIRALTY, 2; AMENDMENTS, 1; CONTEMPT, 7; CRIMINAL LAW, 5, 6; ESTATES OF DECEASED PERSONS, 2; FINDINGS, 7; HABEAS CORPUS, 3; INJUNCTION, 6; JUDGMENT, 16, 17; JUSTICES' COURTS, 3; MORTGAGE, 12; NEW TRIAL, 1; PLEADING AND PRACTICE, 21; RECEIVERS, 1..

APPROPRIATION OF WATER.

See PARTIES, 12; WATER RIGHTS.

ARBITRATION AND AWARD.

1. AWARD OF ARBITRATORS WILL NOT BE SET ASIDE FOR THE FAILURE OF ONE of the arbitrators to inspect the subject-matter of the controversy, in company with his associates. Such inspection, if no testimony is taken, or points involved in the litigation decided, does not constitute a hearing. *Glass-Pendery Consolidated Mining Co.* v. *Meyer Mining Co.*, 290.
2. OBJECTIONS TO ALL IRREGULARITIES IN THE PROCEEDINGS OF ARBITRATORS, which are not jurisdictional, must be seasonably made, in order to render them available; and if a party to an arbitration, knowing of an irregularity in the proceedings, remains silent, and permits the investigation to proceed, in order to avail himself of all chances of an award in his favor, he can not afterwards question the validity of an award unfavorable to him. *Id.*
3. ARBITRATION PROCEEDINGS VOID FOR WANT OF JURISDICTION IS A MERE NULLITY, and the defects which make it void are incapable of being waived. *Id.*
4. FAILURE OF ONE OF SEVERAL ARBITRATORS TO BE PRESENT AT A MEETING of his associates is not a jurisdictional defect, and may be waived by the parties to the arbitration. Such waiver takes place by proceeding with the business of the meeting without interposing any objection to the absence of the said arbitrator. *Id.*
5. FAILURE OF ARBITRATORS TO EXAMINE CERTAIN BOOKS, as required by the articles of submission, is immaterial, where by stipulation of counsel a complete statement of all that such books contained was used by the arbitrators instead of the books. *Id.*
6. REFUSAL OF ARBITRATORS TO EXAMINE A WITNESS OFFERED IN BEHALF OF THE UNSUCCESSFUL PARTY will not warrant setting aside the award, unless the record shows that the facts which the witness could have testified to would have been material or pertinent. *Id.*
7. PARTIES AGAINST WHOM AN AWARD IS MADE, UNDER SEVERAL SEPARATE AND DISTINCT submissions to arbitration, are not estopped for disputing the validity of such award as to costs, which were jointly awarded against them, either by consenting to a common trial or by paying the separate sums awarded as damages. *Springer* v. *Schutz*, 349.

ARSON.

See CRIMINAL LAW, 20, 21.

ASSESSMENT.

See EMINENT DOMAIN, 3, 6; FINDINGS, 5; PLEADING AND PRACTICE, 6; TAXATION, 5, 12.

ASSESSOR.

See APPEAL, 4.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See ATTORNEYS, 1; INJUNCTIONS, 3.

ASSOCIATIONS.

See DEED, 2.

ASSUMPSIT.

See PLEADING AND PRACTICE, 13, 14.

ATTACHMENT.

1. MONEY IN THE HANDS OF ONE CORPORATION, A STOCKHOLDER IN ANOTHER corporation, the legal title to which is in the latter, is liable to garnishment at the instance of a creditor of the latter. *Hughes* v. *Oregonian R'y Co.*, 689.
2. CONSTABLE CAN NOT ATTACH AND SELL THE PROPERTY OF A THIRD PERSON, without incurring liability, notwithstanding he attaches and sells only "the right, title, and interest" of the defendant in the attachment suit. *Rankin* v. *Ekel*, 344.
3. ATTACHING CREDITOR MAY VOLUNTARILY RELEASE PROPERTY OF THE DEBTOR taken on attachment, without an order of court, and a direction by the attorney of the creditor to the sheriff to release the property attached will have such effect. *Smith* v. *Taylor*, 113.
4. A COMPLAINT IN AN ACTION ON AN UNDERTAKING GIVEN UNDER SECTION 540 of the code of civil procedure, which alleges that the same was given to release certain

property taken under attachment, is sustained by proof of an undertaking which recites that the same was given to prevent a levy. *McNamara* v. *Hammerslag*, 560; *McCutcheon* v. *Weston*, 850.

5. THE COMPLAINT IN AN ACTION BY THE ADMINISTRATOR OF THE JUDGMENT CREDITOR TO ENFORCE SUCH UNDERTAKING, which is conditioned for the payment to the plaintiff of any judgment recovered by him in the attachment suit, sufficiently alleges the recovery of the same and the representative capacity of the plaintiff, when it is averred "that judgment was recovered, entered, and docketed," and that on a day certain "letters of administration upon the estate of said judgment creditor were issued by the superior court of Alameda county to this plaintiff, who duly qualified as the administrator, and entered upon the discharge of his duties as such; and ever has been and now is such administrator. *McCutcheon* v. *Weston*, 850.

6. AN ACTION ON SUCH UNDERTAKING MAY BE SUSTAINED although judgment was only recovered against one of the two defendants in the attachment suit. *Id.*

See INJUNCTIONS, 3; LIENS, 6; SURETIES, 3–5.

ATTORNEYS.

1. ATTORNEY AT LAW IS NOT DISQUALIFIED FROM ACTING AS AN ASSIGNEE of an insolvent firm, and a clause in the assignment to him, to the effect that he shall be paid "a reasonable compensation or commission for his services," can not be construed so as to entitle him to counsel fees, and thus render the assignment fraudulent as to the assignor's creditors. *Tucker* v. *Parks*, 264.

2. WHERE ONE ATTORNEY EMPLOYS ANOTHER TO ASSIST HIM IN A CERTAIN LITIGATION, and promises to pay him a "good fee" for his services, in an action against the former to recover the same, evidence of the fee received by him is inadmissible when the amount thereof was contingent upon the success of such litigation. *Wells* v. *Adams*, 496.

3. A LITIGANT IS SUCCESSFUL, SO AS TO RENDER HIM LIABLE FOR THE FEES OF HIS ATTORNEY, which were contingent upon the success of the litigation, if he gains substantially everything of value involved in the controversy, although he fails to gain everything he asked. *Cole* v. *Richmond Mining Company of Nevada*, 378.

4. AN ATTORNEY IS ENTITLED TO THE COMPENSATION AGREED UPON under a contract with his client, by the terms of which he was to carry on several cases, and be paid such fee if he was successful in one case, and the other cases were continued to await the result thereof in the appellate court, where he wins one case, and the other cases are continued, although the reason for such continuance does not appear. *Id.*

5. When may withdraw from case (note), 80.

See ATTACHMENT, 3; CONTEMPT, 1.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See CHINESE RESTRICTION ACT, 7, 10.

BALLOTS.

See ELECTION.

BILL OF EXCEPTIONS.

See APPEAL, 7, 11; NEW TRIALS, 2.

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BOARD OF EDUCATION.

1. STATE BOARD OF EDUCATION, AFTER IT HAS PASSED A RESOLUTION prescribing a certain series of text-books, may reconsider its action and rescind such resolution at any time before the adoption of such books by the different school districts *State ex rel. Newnham* v. *State Board of Education*, 402.

BOARD OF HARBOR COMMISSIONERS.

1. THE BOARD OF STATE HARBOR COMMISSIONERS, UNDER THE STATUTE OF FEBRUARY 28, 1876, HAVE JURISDICTION OVER A WHARF ERECTED IN CHANNEL STREET, between Fourth and Fifth streets, in the city and county of San Francisco. *People* v. *Williams*, 572.

BONA FIDE PURCHASERS.

1. PURCHASER OF LAND, WHO CLAIMS PROTECTION AS A BONA FIDE PURCHASER for value and without notice, must hold the legal title, or be entitled to call for it; for if his title is merely equitable, it must yield to a legal and equitable title in an adverse party. *United States* v. *Southern Col. etc. Co.*, 11.
2. ONE WHO HAS ACQUIRED TITLE BY FRAUD MAY MAKE A VALID CONVEYANCE to a *bona fide* purchaser; but one who has never acquired the title can not convey it, nor can the title be transferred by fraudulently obtaining from the owner a deed purporting to convey it to a fictitious person, and then forging a conveyance from such fictitious person to another, however innocent the latter may be. *Id.*

See CORPORATIONS, 10, 12; WARRANT, 1.

BONDS.

1. Not to commit murder (note), 527.

See MANDAMUS, 1, 2; STATUTE OF LIMITATIONS, 13.

BOOK REVIEWS.

Browne on Domestic Relations, 638.
Colebrooke on Collateral Securities, 432.
Donovan on Trial Practice, 79.
Gray on Restraints on Alienation, 77.
Heard's Precedents of Equity Pleading, 879.
Lawson on Expert and Opinion Evidence, 174.
Spear on Law of the Federal Judiciary, 76.
Tiedman on Real Property, 319.
Warvelle on Abstracts, 78.
Wood's Collyer on Partnership, 175.

BRIDGES.

See CONSTITUTIONAL LAW, 1, 6; WATER RIGHTS, 6.

BROWNE on Domestic Relations, Review of, 638.

CANCELLATION.

1. UNITED STATES NEED NOT RETURN OR TENDER THE MONEY RECEIVED in consideration of a fraudulent patent, as a condition precedent to its right to maintain a suit to set aside such patent, where the same has been made to a fictitious patentee. *United States* v. *Southern Col. etc. Co.*, 11.

See EVIDENCE, 6; FRAUD, 3-6.

CHATTEL MORTGAGE.

1. VALIDITY OF A CHATTEL MORTGAGE CAN ONLY BE ATTACKED by one not a party thereto on the ground of fraud, in that it was given to hinder, delay, or defraud the mortgagor's creditors, and the facts determining its invalidity must be submitted to the jury. *Smith* v. *Montoya*, 152.
2. FACT THAT A CHATTEL MORTGAGE WAS GIVEN TO SECURE FUTURE ADVANCES, if done in good faith, does not render such instrument invalid as to the mortgagor's creditors. *Id.*

CHINESE RESTRICTION ACT.

1. APPLICATIONS OF CHINESE PERSONS FOR THEIR DISCHARGE FROM A RESTRAINT claimed to be illegal under the restriction act may be divided into three classes: 1. Applications for discharge on the ground of previous residence; 2. Applications for discharge founded on the production of Canton certificates; 3. Applications for discharge on the part of children brought to or sent for by their parents or guardians. The nature and effect of the evidence usually produced by the petitioners in each of these classes stated and considered. *In re Tung Yeong*, 647.

2. CONSTRUCTION TO BE GIVEN TO THE RESTRICTION ACT.—In construing the Chinese restriction act, if the provisions of the Chinese treaty and such act are irreconcilably conflicting, the court should follow the requirements of the act; but no construction should be given to such act which would violate the provisions of the treaty, if such construction can be avoided. *Id.*
3. CHINESE RESIDENT OF THE UNITED STATES AT DATE OF TREATY—RIGHT OF, TO RETURN.—A Chinese laborer who was a resident of the United States on November 17, 1880, the date of the treaty with China, and who left this country before the Chinese restriction act went into operation, has a right to return without producing a custom-house certificate; but the burden of proof is on him to show such facts by clear and satisfactory evidence. *Id.*
4. CHINESE WHO WERE NOT IN THE UNITED STATES AT THE DATE OF SUCH TREATY are not embraced within the provisions of the second article of such act. *Id.*
5. CHINESE LABORERS WHO, ALTHOUGH IN THE UNITED STATES AT THE DATE OF SUCH TREATY, left the same after such act went into practical operation, and who neglected to procure a custom-house certificate, are not entitled to return. *Id.*
6. CHINESE CHILDREN WHOSE PARENTS ARE LAWFULLY WITHIN THE UNITED STATES are not excluded therefrom by any provision of the restriction act. *Id.*
7. DETENTION OF CHINESE, WHEN UNDER AUTHORITY OF UNITED STATES—HABEAS CORPUS.—When a Chinese person is detained on board of a ship and refused the right to land, either by the authority of the ship's master or by the collector of the port, he is restrained of his liberty under or by color of the authority of the United States, and is entitled, as of common right, to sue out a writ of *habeas corpus*, that the legality of his detention and restraint may be passed upon by the court. When his body is produced in obedience to the writ the control of his person remains with the court, which may commit him to the custody of the marshal, or hold him to bail to await the decision of the court. *In re Chow Goo Pooi*, 535.
8. RIGHT OF CHINESE PASSENGER TO TRIAL BY JURY—FINDING BY THE JUSTICE.—In the investigation before the justice, judge, or commissioner, to ascertain and find out whether a Chinese person is unlawfully within the United States, there is no right to a trial by jury. Such investigation may be had on a proceeding by *habeas corpus*, and the finding of the court or judge in such proceeding, that the petitioner is a Chinese laborer, prohibited by law from landing, or from being or remaining in the United States, amounts in fact to a finding by a justice, judge, or commissioner that such person is unlawfully here, within the meaning of section 12 of the Chinese exclusion act. *Id.*
9. DETENTION OF SHIP.—The court has no power to detain the ship pending the investigations with regard to the right of her Chinese passengers to land. *Id.*
10. CUSTODY OF CHINESE PASSENGER PENDING PRESIDENT'S ACTION.—When the justice, judge, or commissioner has determined that the Chinese passenger is not entitled to be or remain in the United States, and it is impossible to remand him to the ship on which he arrived, he may be committed to the custody of the marshal, or held to bail for a reasonable time until the president's direction can be had. *Id.*
11. ORDER REMANDING CHINESE PASSENGER.—When the judge or court decides that the petitioner has no right to be or remain in the United States, an order should be made that he be remanded by the marshal to the custody from which he was taken. Upon the return of the marshal apprising the court that the vessel on which he arrived has sailed, the judge may, by a supplemental order, commit him to the custody of the marshal, to be held for a reasonable time to await the direction of the president. As to what constitutes a reasonable time, *quære*. Such direction of the president may be given by a general or special order. It may operate retrospectively as well as prospectively; but it can not revise the judgment of the justice, judge, or commissioner. He may, by a general order directed to the marshal or to the collector, direct that all persons found to be unlawfully here shall be removed, and he may instruct such officers to procure their tickets and effectuate their removal. If there be any difficulty from the want of appropriation or means at his command in fulfilling the duty imposed on him, it is for congress to remove it. *Id.*
12. PRACTICAL OPERATION OF THE CHINESE EXCLUSION ACT, with reference to the duties imposed on the United States courts, commented on. *Id.*
13. THE PRACTICAL OPERATIONS OF THE CHINESE RESTRICTION ACT STATED and commented on. *In re Tung Yeong*, 647.

CIRCUMSTANTIAL EVIDENCE.

See EVIDENCE, 47, 48.

CITIZENSHIP.
See CONSTITUTIONAL LAW, 7.

CLAIM AND DELIVERY, ACTION FOR.
See REPLEVIN.

CODE.

1. THE DIFFERENT SECTIONS OF A CHAPTER IN ANY ONE OF THE CODES MUST BE SO CONSTRUED as to reconcile all apparent conflicts, and if there are conflicting provisions in the different sections of a chapter, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter. *Emeric* v. *Alvarado*, 708.

COLEBROOKE on Collateral Securities, Review of, 432.

COMMON CARRIERS.

1. COMMON CARRIER, SUCH AS A RAILROAD, MAY BE REQUIRED TO FURNISH another carrier, such as an express company, with the accommodations and facilities necessary for carrying on the business of the latter. *Wells, Fargo & Company* v. *Oregon Railway and Navigation Company*, 33.
2. EXPRESS FACILITIES.—Whether an express company doing business over a line of railway or steamboats is entitled to the services of the pursers and conductors thereon, as its messengers, depends on circumstances; but when one express company doing business over any such line of transportation is allowed such service, the same thereby becomes an express facility as to all other express companies doing business thereon, and can not lawfully be withheld from them. *Id.*, 547.
3. DUTY OF RAILWAY COMPANY TO EXPRESS COMPANIES DOING BUSINESS ON ITS ROAD —MUST FURNISH EQUAL FACILITIES TO ALL.—The defendant was enjoined by this court to continue to furnish the plaintiff such express facilities on its road as it had been furnishing under an agreement between the parties, one provision of which is to the effect that the defendant will carry for the plaintiff, not exceeding eight thousand pounds of "freight and express matter," over the road daily, on a fast train, for the sum of one thousand dollars per month, but the plaintiff must not deliver any such "freight" or "matter" at less than a stipulated price per pound; thereafter the defendant commenced to furnish express facilities to the Northern Pacific Express Company, upon the same terms and conditions, as it alleges, that it furnished them to the plaintiff, but allowed said Northern Pacific express to deliver freight at a lower rate than the plaintiff was permitted to do, and thereupon the latter commenced to deliver freight for the same rates as said Northern Pacific; whereupon the defendant, conceiving itself aggrieved thereby, moved the court to modify the injunction so as to prevent the plaintiff from carrying any freight or express matter at the reduced rates, or to permit the defendant to increase the compensation to be paid it by the plaintiff so as to prevent the same.
   Held: 1. That the defendant has no right to discriminate between the express companies, but must furnish equal facilities to both.
   2. That although the plaintiff is in effect required by the decree to deliver this eight thousand pounds of matter, or any portion of it, at not less than the prescribed rates, still if the defendant permits the Northern Pacific to deliver any portion of the like eight thousand pounds carried for it at less than such rates, this is necessarily a permission to the plaintiff to do the same.
   3. Semble, that it is the duty of the defendant to use reasonable diligence to ascertain if either company is violating the condition upon which the facilities were granted to it, to the prejudice of the other, and if so, to exclude it from the same; and certainly where the failure to keep such condition is brought to its knowledge by the injured company, or otherwise, unless it does interfere effectively, it will be presumed, in favor of the latter, to have waived such condition as to both. *Wells, Fargo & Co.* v. *Oregon and California Railway Co.*, 246.
4. EXPRESS FACILITIES.—Ferriage on the railway ferry of the defendant, if not absolutely an express facility, to which the plaintiff is entitled, becomes so when furnished to the Northern Pacific by the defendant. *Id.*
5. EXPRESS COMPANIES ARE SUBJECT TO THE SAME LIABILITIES as other common carriers, in the absence of special contract to the contrary with the shipper, and may

be liable at the same time both as carriers and forwarders. *Overland Mail etc. Co.* v. *Carroll*, 281.

6. COMMON CARRIERS MAY LIMIT THEIR LIABILITY BY SPECIAL CONTRACT, but can not, for reasons of public policy, relieve themselves from liability for the actual value of the goods shipped, provided they have notice of such value, when loss or injury is occasioned thereto by the negligence of themselves or their employees. *Id.*
7. CLAUSE IN A CONTRACT OF SHIPMENT, THAT THE CARRIER WOULD "NOT BE HELD LIABLE for any loss or damage except as forwarders only," must be construed most strongly against the company; and while acting as a carrier in transporting goods, although relieved from liability save only as a forwarder, it must use reasonable skill, prudence, and industry in protecting and preserving such goods, and is liable for loss occasioned by not so doing. *Id.*
8. SHIPPER, BY ACCEPTING WITHOUT OBJECTION A RECEIPT GIVEN HIM BY AN EXPRESS COMPANY, with knowledge of its contents, ratifies and is bound by all the conditions thereof, except those as to which no kind of a contract would, under the circumstances, be binding upon him. *Id.*

See CONVERSION, 2; NEGLIGENCE, 4–9.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 1–3.

COMPLAINT.

See PLEADING AND PRACTICE.

CONDITIONS PRECEDENT.

See CANCELLATION, 1; CONTRACTS, 4; PLEADING AND PRACTICE, 11.

CONDITIONS SUBSEQUENT.

See CORPORATIONS, 20.

CONSIDERATION.

See ACCOUNT STATED, 1; CANCELLATION, 1; INSANE PERSONS, 2; NEGOTIABLE INSTRUMENTS, 3, 4, 6, 8, 12; PLEADING AND PRACTICE, 8; PUBLIC LANDS, 3; SPECIFIC PERFORMANCE, 2–5.

CONSIGNOR AND CONSIGNEE.

See CONVERSION, 2.

CONSPIRACY.

See CRIMINAL LAW, 7; EVIDENCE, 6.

CONSTABLE.

See ATTACHMENT, 2.

CONSTITUTIONAL LAW.

1. THE ACT OF THE LEGISLATURE OF APRIL 1, 1876, AUTHORIZING THE CITY OF OAKLAND to construct a bridge across the estuary of San Antonio, between Eighth street and East Ninth street, is not unconstitutional. *Pacific Bridge Co.* v. *Kirkham*, 769.
2. PROVISIONS OF THE CONSTITUTION REGULATING THE MANNER IN WHICH BILLS and joint resolutions which have passed the legislature shall be signed, are mandatory and not directory. *State ex rel. Cardwell* v. *Glenn*, 50.
3. EVIDENCE THAT AN ENROLLED ACT HAS BEEN CERTIFIED TO BY THOSE OFFICERS who are charged by the constitution with the duty of deciding what laws have been enacted, that it has been signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, is conclusive as to the passage of such act as enrolled, and the only evidence thereof. *Id.*
4. PROVISIONS OF THE CONSTITUTION REGULATING THE PASSAGE OF BILLS, and providing for their authentication, should be construed with reference to existing customs in legislative and parliamentary bodies. And in cases of doubt, the courts will give due consideration to the contemporary construction which has been deliberately given to such provisions by the legislative and executive departments of the government. *Id.*

5. SIGNING AN ACT OF THE LEGISLATURE BY THE ASSISTANT SECRETARY OF THE SENATE is a substantial compliance with the provision of the constitution requiring all acts and joint resolutions to be signed by the secretary of the senate. *Id.*
6. JURISDICTION UNDER A LAW OF THE UNITED STATES.—A suit arises under a law of the United States, when the controversy involved therein turns upon the existence, effect, or operation of such a law, and, therefore, a suit by a riparian owner to enjoin the construction of a bridge contiguous and injurious to his property, upon the ground that the defendant is not authorized to build the same by a certain act of congress, as it pretends and claims, arises under said act, and is within the jurisdiction of the proper circuit court. *Hughes* v. *Northern P. R'y Co.*, 21.
7. IN WHAT COURTS THE NORTHERN PACIFIC MAY SUE OR BE SUED—CITIZENSHIP OF.—*Semble*, that the Northern Pacific Railway Company, being created by an act of congress, may sue or be sued in the proper circuit court of the United States in all cases; and, *quære*, of what state, if any, is it a citizen, for the purpose of jurisdiction in such courts? *Id.*
8. THE WORD "PROPERTY," AS USED IN THE CONSTITUTIONAL GUARANTY, that "private property shall not be taken or damaged without just compensation," includes not only the corporeal thing, whether the same be chattels or land, but also the right to fully possess, use, and alienate the same. *Denver* v. *Bayer*, 505.
9. DUE-PROCESS OF LAW.—A person arrested and imprisoned for the violation of a void ordinance of a municipal corporation is imprisoned by the state without due process of law, and therefore in violation of the fourteenth amendment, and may be discharged therefrom by the writ of *habeas corpus* issued from the proper court of the United States. *In re Lee Tong*, 35.
10. Impairment of obligation of contract by foreign government (note), 527.

See DIVORCE, 1–4, 6; EMINENT DOMAIN, 8; LAUNDRY ORDINANCE; NUISANCE, 7, 10; STATUTE, 1, WATER RIGHTS, 15, 16.

CONTEMPT.

1. AN ATTORNEY IS GUILTY OF CONTEMPT FOR SENDING TO A GRAND JURY, while engaged in the discharge of its duties, an accusatory and threatening letter, for the purpose of exasperating the jurors by the aspersions upon their official conduct which it contained, or of deterring them from performing their duties by the threats of public clamor which it expressed, or of creating a distrust and want of confidence in any action which might be taken as the result of their investigation. *In re Tyler*, 337.
2. SUPERIOR COURT HAS POWER TO PUNISH FOR CONTEMPT BY SENTENCING THE PERSON GUILTY thereof to pay a fine of five hundred dollars, or be imprisoned until payment of such fine at the rate of two dollars per day for every day's imprisonment. *Id.*
3. COMMITMENT FOR CONTEMPT IS LEGAL, UNDER SECTION 473 OF THE COMPLIED LAWS, which provides for the payment of a fine of five hundred dollars by the person guilty of the contempt, with the direction that unless such fine is paid immediately the prisoner shall be imprisoned for two hundred and fifty days. *Ex parte Sweeney*, 359.
4. CONTEMPT OF COURT IS IN THE NATURE OF A CRIMINAL OFFENSE, and the proceeding for its punishment is in the nature of a criminal proceeding. *Id.*
5. FINE IMPOSED FOR A CONTEMPT IS PUNITIVE, AND INFLICTED AS PUNISHMENT in other criminal cases is inflicted. The direction for an alternative imprisonment is but a mode for the enforcement of the fine, incident to the power of the court to impose the same, and can not be regarded as a punishment for the contempt. *Id.*
6. PUNISHMENT FOR CONTEMPT.—In a proceeding for contempt between the parties to a suit for disobedience to an injunction, causing a pecuniary loss or injury to the party instituting the proceeding, the court, in imposing punishment upon the wrong-doer, may do so for the benefit of the party injured. *Wells, Fargo & Co.* v. *Oregon Railway and Navigation Co.*, 547.
7. NO APPEAL LIES TO THE SUPREME COURT FROM A JUDGMENT OF THE SUPERIOR COURT, CONVICTING A PARTY OF CONTEMPT, and imposing on him a fine exceeding three hundred dollars. *Tyler* v. *Connolly*, 779.

See FUGITIVES FROM JUSTICE, 1.

CONTINGENT FEE.

See ATTORNEYS, 2–4.

CONTINUANCE.

1. CONTINUANCE ON ACCOUNT OF THE ABSENCE OF A WITNESS SHOULD BE REFUSED, unless such attendance can be procured within a reasonable time. *People* v. *Lewis*, 131.
2. WHERE A MOTION FOR A CONTINUANCE IS MADE ON ACCOUNT OF THE ABSENCE OF A WITNESS, an offer of the adverse party to admit that such witness, if present, would swear to what was stated in the affidavit for a continuance may be allowed, at the discretion of the court, as well after the court has decided that such evidence is material as when the motion is first made. *Alden* v. *Carpenter*, 598.
3. ADMITTING THE TESTIMONY OF AN ABSENT WITNESS IN ORDER TO AVOID A CONTINUANCE is not an admission of the truth of such testimony, nor does such admission preclude the party admitting it from rebutting the same on the trial. *Id.*
4. IN REVIEWING THE RULING OF THE TRIAL COURT IN REFUSING to grant a prisoner a continuance, so that the testimony of absent witnesses might be produced to prove an *alibi*, the appellate court is authorized to examine the whole record, as well subsequent to as before such ruling, in order to determine whether there was any abuse of discretion. It may also consider the fact that the defendant did not himself take the stand as a witness, as it is only at his trial and before the facts are passed upon by the jury, that his failure to do so shall not raise any presumption against him, and under such a state of the record it will not be held that there has been an abuse of discretion. *Territory* v. *Kinney*, 801.

CONTRACTS.

1. WHERE ONE PARTY TO A CONTRACT IS PREVENTED FROM FULLY PERFORMING THE SAME by the fault of the other party, the latter can not take advantage of his own wrong to exempt himself from liability thereunder. *Smith* v. *Roe*, 502.
2. CONTRACT, BY THE TERMS OF WHICH ONE PARTY AGREES TO PAY ALL THE EXPENSES, and furnish the skill and labor necessary for obtaining a patent to certain lands from the United States, in consideration of a conveyance of a part of the land so obtained, is valid and binding in the absence of actual or constructive fraud. *Gutierrez* v. *Brinkerhoff*, 127.
3. DEFENDANT'S PREVIOUS CONSENT TO OR SUBSEQUENT RATIFICATION OF certain work done by the plaintiff can not be inferred from the fact that, at the latter's request, he gave them a statement of such work, especially when it appears that the work was originally done against his protest. *Tognini* v. *Hansen*, 146.
4. AN AGREEMENT BY THE TERMS OF WHICH ONE PARTY PROMISES TO CONVEY certain land to the other, in consideration of the latter's performing certain services, conveys no interest, legal or equitable, to such latter unless the services stipulated for are performed *Emeric* v. *Alvarado*, 708.

See ATTORNEYS, 2–4; CORPORATIONS, 1; HUSBAND AND WIFE, 2; INSANE PERSONS.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 4–6; PLEADING AND PRACTICE, 3.

CONVERSION.

1. IN AN ACTION AGAINST A SHERIFF FOR THE CONVERSION OF PROPERTY by reason of a sale under an execution against a third person, where issue is joined as to the ownership of such property at the time of sale, a finding that the plaintiff had sold the property to the execution debtor, and from the date of such purchase until the taking by the sheriff the same has remained in the debtor's possession "by virtue of such purchase," responds to the issue of ownership. *Hardwick* v. *Tyrrel*, 345.
2. WHERE GOODS ARE SHIPPED TO A CONSIGNEE IN PURSUANCE OF AN AGREEMENT BETWEEN HIM AND THE SHIPPER that the same are to be sold, and the proceeds applied to the payment of prior advances made by the former to the latter, the title to the goods and the right of possession thereof vest in the consignee upon delivery to the carrier; and an action to recover for a wrongful attachment of such goods while in the hands of the carrier should be brought by the consignee, and not by the consignor. *Wetzel* v. *Power*, 791.
3. ACTION FOR THE CONVERSION OF PERSONAL PROPERTY IS NOT BARRED by the statute of limitations, when the evidence fails to show when such statute commenced to run. *Whitcomb* v. *McClintock*, 876.

See HUSBAND AND WIFE, 3.

COPYRIGHT.

1. PRINTED COPY OF TITLE OF BOOK, ETC.—The "printed" copy of the title of a book or other article, required by section 4956 of the revised statutes, to be delivered or mailed to the librarian of congress, may be "printed" with a pen as well as type, with or without the aid of tracing-paper. *Chapman* v. *Ferry*, 105.
2. DEPOSIT OF COPIES OF WORK WITH LIBRARIAN.—The copies of a copyright work required by section 4959 of the revised statutes to be deposited with the librarian of congress within ten days after publication may be so deposited after the printing of the work, and before its formal publication. *Id.*
3. COPYRIGHT OF MAP, INFRINGEMNT OF.—It is difficult to say, in some cases, what constitutes an infringement of the copyright of a map, but where the subsequent map appears to have been substantially copied from the prior one, without alteration or revision, except in scale and color, there is clearly an infringement, which authorizes a court of equity to enjoin the sale of such infringing map and to require the publisher to account for the profits arising from the sale thereof. *Id.*

CORPORATIONS.

1. THE REPEAL OF A MUNICIPAL CHARTER DOES NOT IMPAIR the validity of contracts made under its provisions. *Meyer* v. *Porter*, 874.
2. MUNICIPAL CORPORATION, THE CHARTER OF WHICH IMPOSES, AND WHICH ASSUMES THE DUTY of exclusively controlling and regulating the distribution of water within its limits, for irrigating and other purposes, although it may not own the water so used, is liable for damages suffered by a private individual by reason of its neglect to perform such duty with reasonable care and prudence, although no right of action against the municipality is expressly given by statute. Such duty is ministerial and not judicial. *Levy* v. *Salt Lake City*, 310.
3. DISTINCTION BETWEEN THE LIABILITY OF A MUNICIPAL CORPORATION for failure to perform duties imposed on them by charter, and the liability, under such circumstances, of *quasi* corporations, such as counties and towns, stated. *Id.*
4. POWERS OF A MUNICIPAL CORPORATION.—Apart from the few faculties incident to the existence of a municipal corporation, such as the capacity to sue and be sued and have a common seal, it has no power to do any act except such as are essential to the plain purpose of its creation, or are authorized by the express provisions of its charter, or a clear or necessary implication therefrom. *In re Lee Tong*, 35.
5. WHERE THE CHARTER OF A MUNICIPAL CORPORATION REQUIRES IT TO DO A CERTAIN ACT by resolution, it may do the same by ordinance. *Los Angeles* v. *Waldron*, 335.
6. THE POWER OF CONTRACTING FOR COUNTY PRINTING IS GIVEN BY THE POLITICAL CODE, sections 3766, 4046, and 4047, to the boards of supervisors of the respective counties, and not to a county or township officer. *Times Publishing Co.* v. *County of Alameda*, 482.
7. THE PUBLICATION OF THE DELINQUENT TAX LIST OF A COUNTY IS PART OF THE COUNTY PRINTING required to be published by the tax collector, and is included in a contract made by the board of supervisors providing for the publication of "all notices required to be published by the board," and "all notices that are required to be published by any county or township officer that may be ordered by the board." *Id.*
8. WHEN A CONTRACT HAS BEEN AWARDED ACCORDING TO LAW, work required by law to be done in performance of it is in legal effect done by order of the board of supervisors who let the contract for it, and is a charge against the county, enforceable according to the terms of the contract. *Id.*
9. PRESIDENT OF A CORPORATION IS AUTHORIZED TO DONATE LAND to a county, to be used for public purposes, by virtue of a resolution of the board of trustees, empowering him to deed and convey to purchasers such land, at his discretion. *State* v. *Glenn*, 50.
10. BONA FIDE PURCHASER FROM A THIEF OF CERTIFICATES OF STOCK, standing on the books of the company in the name of one person, although owned by another, acquires no title as against the real owner, notwithstanding such certificates were regularly indorsed by the person in whose name they stood, if they were stolen without the fault or negligence of the owner. *Barstow* v. *Savage Mining Co.*, 116.
11. CERTIFICATE OF STOCK IN AN INCORPORATED COMPANY is not a negotiable instrument according to the definition of the civil code. *Id.*
12. BONA FIDE PURCHASER OF CERTIFICATES OF STOCK FROM ONE who has not the title and has no authority to sell, who relies upon the negligence of the owner for his protection, must show that such negligence was the proximate cause of his deceit. *Id.*

13. ONE WHO PURCHASES STOCK FOR ANOTHER, WITH MONEY ADVANCED BY HIMSELF, taking the title thereto in his own name, has a special property in the stock so purchased, and may hold the same as security for such advances; nor is he compelled to obey an order to sell, given him by the party for whom such purchases were made, which would necessarily result in a loss to himself. *Jones* v. *Gallagher*, 307.
14. QUESTION OF GOOD FAITH AND THE EXERCISE OF A SOUND DISCRETION on the part of the one so refusing to sell should be left to the jury. *Id.*
15. DIRECTION BY THE OWNER OF SUCH STOCK TO THE HOLDER THEREOF to sell the same and invest the proceeds in another stock, constitutes an indivisible order, and confers no authority on the holder to sell and apply such proceeds to the owner's account due him. *Id.*
16. WHETHER DAMAGES RESULTED TO SUCH OWNER BY REASON OF A REPORT TO HIM by the holder of such stock that he had sold the same at a certain date, when in fact they were not sold, but were held by him for a long time, and afterwards sold at an advanced price, is a question for the jury. *Id.*
17. JUSTICE'S COURT HAD JURISDICTION PRIOR TO THE ADOPTION OF THE PRESENT CONSTITUTION to entertain an action by one having a claim against a life insurance company, incorporated under the act of April 22, 1866, against a stockholder in such company, to recover his proportionate share of such liability, when the same is less than three hundred dollars. *Morrow* v. *Superior Court*, 114.
18. LIABILITY OF A STOCKHOLDER FOR THE DEBTS OF SUCH COMPANY IS PRIMARY, and not contingent upon the fact that the creditor has exhausted his remedies, or any part of them, against the corporation. *Id.*
19. RIGHT OF TRANSFEREE OF UNRECORDED STOCK TO VOTE AT CORPORATE ELECTION. Transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election. *People ex rel. Probert* v. *Robinson*, 47.
20. FORFEITURE OF CORPORATE RIGHTS.—The legislature may provide that a corporation shall cease to exist or forfeit a particular right or privilege, unless it does certain things within a given time, and in case of such failure the prescribed consequence will follow, of course, without the intervention of a court or any proceeding to declare or establish the same; but the provisions in the acts aforesaid, to the effect that the grants thereby made to the Northern Pacific Railway Company are made upon the condition that the road will be completed within a certain time, have no such effect, but are simply conditions subsequent without any special consequence prescribed for a breach of them, and therefore no one can complain of any such breach or take advantage of it, except the government of the United States, and it only, as declared in the act, for the purpose of securing "a speedy completion of the said road." *Hughes* v. *Northern P. R'y Co.*, 21.
21. IN AN ACTION AGAINST A CORPORATION FOUNDED ON THE UNLAWFUL OR TORTIOUS ACTS OF ITS AGENTS or servants, the fact whether the acts complained of were done by such agents on their own account exclusively, or on behalf of the corporation and within the scope of their employment, need not ordinarily be established by the plaintiff by proof of what occurred at some meeting of the directors of the corporation, but by proof of what the agents and servants had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and if the corporation accepted such acts and used the fruits thereof, proof thereof might be given to establish the corporate liability. *Denver & Rio Grande Railway Co.* v. *Harris*, 826.
22. CORPORATIONS ARE LIABLE FOR EVERY WRONG, TRESPASS, AND TORT COMMITTED BY THEIR AGENTS and employees within the scope of their employment, to the same extent as individuals under like circumstances. The doctrine of *ultra vires*, as formerly understood, does not have any application to such cases. *Id.*
23. A RAILROAD CORPORATION IS LIABLE FOR THE ACTS OF VIOLENCE OR THE TORTS OF AN ARMED BODY of men, formed of its servants and employees, in taking forcible possession of another railroad by its authority. Such acts of its agents, as well as their declarations in respect thereto, are admissible in evidence, as tending to prove an authorization by the corporation; and if the latter accepted and received into its possession and assumed control of the railroad so seized, and operated the same, such facts would be strong circumstantial evidence that the agents, in taking such possession, were acting within the scope of their employment and under the direction of their principal. *Id.*
24. Status of territorial corporations after organization of state (note), 320.

See AGENT, 2; ATTACHMENT, 1; TRUSTS, 1.

COSTS.

1. FEES FOR MILEAGE OR ATTENDANCE OF THE SUCCESSFUL PARTY'S WITNESSES CAN NOT BE TAXED, and judgment therefor entered, against the losing party, when such witnesses have not been subpœnaed in the case according to law, or sworn or examined, although present in court at the request of the successful party. *Meagher* v. *Van Zandt*, 663, 666.
2. A JUDGMENT FOR COSTS WAS VOID, UNDER THE PRACTICE ACT OF 1851, SECTION 511, and may be collaterally attacked, when the costs were not inserted by the clerk at the time of the entry of the judgment, but were inserted by him afterwards, without any order of the court; and a sale of land under an execution issued on such judgment confers no title on the purchaser. *Emeric* v. *Alvarado*, 708.
3. A DEFENDANT IS ENTITLED, AS OF COURSE, TO A JUDGMENT FOR HIS COSTS and disbursements incurred in the trial of an action brought to determine the plaintiffs' title to certain land, and to enjoin the defendant from trespassing upon the same and from asserting any title thereto, when the court finds that there is no cause of action against the defendant. *Lawrence* v. *Getchell*, 861.
4. THE DEFENDANT IS ENTITLED TO A JUDGMENT FOR HIS COSTS, in an action prosecuted in the district court for the recovery of money only, and arising on contract, when the plaintiff's recovery is for a less amount than one hundred dollars. *Busby* v. *Carpenter*, 837.

See ARBITRATION AND AWARD, 7; EMINENT DOMAIN, 1; JUDGE, 1; NEW TRIAL, 7.

COUNTER-CLAIM.

1. ITEMS OF A COUNTER-CLAIM WHICH ACCRUED AFTER THE COMMENCEMENT of the action can not be given in evidence by the defendant. *Paige* v. *Carter*, 558.
2. IN THE ABSENCE OF THE EVIDENCE INTRODUCED ON THE TRIAL, an appellate court will not reverse a judgment for the plaintiff, much less in amount than that sued for, on the ground that the jury failed to allow such proper amount of the defendant's counter-claim as the evidence warranted. *Jones* v. *Nathrop*, 279.

COUNTY PRINTING.

See CORPORATIONS, 6–8.

COUPONS.

See STATUTE OF LIMITATIONS, 13.

COVENANTS.

See LANDLORD AND TENANT, 4, 5; WATER RIGHTS, 17.

CRIMINAL LAW.

1. AN IMPRISONMENT IS LEGAL, UNDER SECTION 19 OF THE HABEAS CORPUS ACT, where the commitment, which in this territory is a certified copy of the judgment, fully shows the character of the court rendering the judgment, the names of the judge and clerk, and the date of the judgment, although such judgment does not contain the usual recitals. *In re Waldrip*, 44.
2. AFTER A PLEA OF NOT GUILTY TO AN INDICTMENT CHARGING THE DEFENDANT with a previous conviction of a like offense, the defendant is not entitled, as of right, to withdraw such plea on the trial, and plead guilty to the charge of previous conviction. *People* v. *Lewis*, 131.
3. REFUSAL TO ALLOW DEFENDANTS TO WITHDRAW THEIR PLEA OF NOT GUILTY, and to interpose instead a demurrer and a motion to set aside the information, is not an abuse of discretion. *People* v. *Shem Ah Fook*, 112.
4. DENIAL OF A MOTION TO SET ASIDE AN INFORMATION which was subscribed by the district attorney of the county, is not error, where it does not affirmatively appear from the transcript that before the filing thereof the defendants had not been legally committed by a magistrate. *Id.*
5. NO APPEAL LIES TO THE SUPREME COURT IN CRIMINAL CASES, unless the same are prosecuted by indictment or information. *Tyler* v. *Connolly*, 779.
6. NO APPEAL LIES IN A PROSECUTION FOR MURDER, FROM AN ORDER denying a motion in arrest of judgment, or from a judgment entered upon a plea of former conviction. *People* v. *Majors*, 859.

7. WHEN TWO PERSONS ARE MURDERED IN THE EXECUTION OF A CONSPIRACY, entered into for the purpose of robbing one of them, the act of each conspirator in furtherance of such design is the act of each and every of the others, and each is guilty of the murder of each of the murdered men, and liable to prosecution therefor. *Id.*

8. MURDER—INSTRUCTION AS TO IMPLICATION OF MALICE.—Where the statute provided that "malice is to be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," an instruction is sufficient to the effect that "malice is always to be implied when the circumstances of the killing show an abandoned and malignant heart." *People* v. *McDonald*, 141.

9. LANGUAGE OF SUCH STATUTE IS IN THE ALTERNATIVE, AND IS EQUIVALENT to the provision that malice shall be implied in either case, when no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, and it was proper for the court below to instruct the jury upon either ground, for the implication of which, in its judgment, there was evidence applicable. *Id.*

10. OMISSION FROM THE INSTRUCTION OF THE WORD "ALL" as given in such statute was not error. The word "all" in the connection used in the statute is a word of emphasis only, and is not in any sense essential to the completeness of the direction. *Id.*

11. INSTRUCTION AS TO DEGREES OF MURDER.—On the trial of an indictment for murder, it is the duty of the court, even without a request from the prisoner, to properly instruct the jury with respect to each and every of the degrees of that crime, within the definition of which there is any evidence whatever which can possibly bring the case; and the omission of the court so to instruct the jury concerning a particular degree of murder, even though not requested to do so by the prisoner or his counsel, where there was any evidence whatever tending to bring the case within that degree, is error requiring a new trial. *Territory of N. M.* v. *Nichols*, 688.

12. MURDER IN THE SECOND DEGREE.—The statutory definition of murder in the second degree—"the killing of a human being without authority of law, when perpetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual"—does not contemplate a homicide committed "upon a sudden impulse and great heat of passion," but a killing perpetrated by an act imminently dangerous to others, without design to effect the death of any particular person, and evincing a reckless disregard of human life—such as recklessly firing a pistol into a crowd, or casting a stone from the top of a house into a crowded street, without thought or regard of the consequences of such acts, or as to who should be injured or killed thereby. *Id.*

13. ERRONEOUS INSTRUCTION.—The evidence showed that the prisoner was playing cards with the deceased and another person at a table. The prisoner charged the deceased with cheating, and then jumped up and drew a pistol, when the deceased clinched with him, and both fell to the floor, the deceased being uppermost. One of the bystanders took prisoner's pistol away from him. The two then got up, and after getting up the prisoner stepped about four feet to where his overcoat was, drew from it another pistol, and immediately shot at and killed the deceased. Upon these facts the court instructed the jury that "if the prisoner premeditated the death of deceased, it is murder in the first degree. If he killed him upon a sudden impulse and in great heat of passion, but under circumstances which showed an abandoned mind, regardless of human life, he is guilty of murder in the second degree." *Held*, that the instruction concerning murder in the second degree was error; that the evidence pointed either to murder in the first degree, or to murder in the fourth degree, which is defined by the statute to be "the killing of another in the heat of passion without design to effect death, by a dangerous weapon." *Id.*

14. EVIDENCE IN THIS CASE HELD SUFFICENT TO SUSTAIN the judgment of conviction of murder. *People* v. *Biddlecome*, 691.

15. THE LARCENY OF A BULL, COW, STEER, OR CALF IS GRAND LARCENY, irrespective of the value of the animal stolen, under section 487 of the penal code. *People* v. *Barnes*, 772.

16. A BAIL BOND, GIVEN FOR THE RELEASE OF A PERSON HELD FOR GRAND LARCENY, is not void on the ground that no offense was alleged, and that the names of the owners of the property were not stated, when the complaint on which the prisoner was held charges him with the larcency of "two head of cattle of the value of twenty-five dollars each," the same being "the property of Page Bros." *Id.*

17. INDICTMENT FOR LARCENY SHOULD ALLEGE THE OWNERSHIP in the thing stolen as of the date when the offense was committed. *People* v. *Lewis*, 131.

18. IN A PROSECUTION FOR THE LARCENY OF PROPERTY THAT DOES NOT EASILY PASS FROM HAND TO HAND THE PRISONER'S EXCLUSIVE AND UNEXPLAINED POSSESSION of the stolen property, recently after the theft, is not only a circumstance to be considered as tending to show the prisoner's guilt, but raises such a presumption that he is the thief, that the burden of proof is taken from the prosecution and laid upon him. *Territory of Arizona* v. *Casio*, 656.

19. INFORMATION CHARGING THE DEFENDANT WITH THE CRIME OF EMBEZZLEMENT is not demurrable for describing him as a "*bailee accommodatum*," if otherwise unobjectionable. *People* v. *Flores*, 137.

20. IMMATERIAL ALLEGATION IN AN INDICTMENT CHARGING THE DEFENDANT with the crime of arson need not be proved. An allegation in such indictment that the defendant occupied the building that was burned is immaterial, and the court may charge the jury that it need not be proved. *People* v. *Lee Hung*, 45.

21. DEFINITION OF THE CRIME OF ARSON MAY BE GIVEN TO A JURY in the language of the code, and it is not error for the court to refuse to instruct them that "arson is a crime against the security of the dwelling-house as such and the possession, and not against the dwelling as property. *Id.*

See CONTEMPT; EVIDENCE, 20–31; GAMING; INDIANS, 1, 2; INSTRUCTIONS, 3, 5, 9, 11; JUDGMENT, 21; RIOT.

CUSTOMS OF MINERS.

See NUISANCE, 10.

DAMAGES.

1. COMPENSATORY DAMAGES, THE ELEMENTS OF, STATED.—A person receiving a willful injury from another is entitled to recover compensatory damages therefor, irrespective of the motive of the wrong-doer, or his own calling or condition in life. *Boyle* v. *Case*, 327.

2. PUNITIVE DAMAGES, WHEN ALLOWED in addition to compensatory damages, and what for. *Id.*

3. VIGILANCE COMMITTEE.—No plea of the public good or safety can justify a voluntary assemblage of people in inflicting a personal injury upon any individual, but in an action to recover damages therefor, the jury, in considering whether the plaintiff is entitled to punitive damages or not, may and ought to take into account the causes or motives which led the defendants to do the wrong complained of. *Id.*

4. DAMAGES WHICH ARE NOT THE USUAL AND NATURAL CONSEQUENCES of the wrongful act complained of can not be recovered unless specially pleaded. *Tucker* v. *Parks*, 264.

5. NEITHER PROBABLE PROFITS NOR PROSPECTIVE OR SPECULATIVE DAMAGES CAN BE RECOVERED in an action for the breach of a contract for the sale of milling machinery. *Jones* v. *Nathrop*, 279.

6. MEASURE OF DAMAGES IN AN ACTION FOR CUTTING TIMBER on the public lands, in case the trespass is inadvertent and not willful, is the value of the timber in the tree; but where the trespass is willful, the value of the labor put upon it by the trespasser must be added to the value in the tree, with interest thereon in either case. *United States* v. *Williams*, 100.

7. TRESPASS BY MISTAKE.—The defendant claimed to have taken up a homestead on the north-west quarter of section 22, of township 19, and while intending to cut saw-logs thereon with intent to dispose of the same, did by mistake cut said logs on the north-east quarter of said section: *Held*, that if the defendant had cut the logs on the north-west quarter, as he intended, it would have been a willful trespass, and therefore his mistake was immaterial, and he was liable to the United States for the value of said logs as a willful trespasser. *Id.*

See CONTEMPT, 6; CORPORATIONS, 16; EMINENT DOMAIN, 3, 8; REPLEVIN, 1, 4, 5; STREETS, 2.

DEBRIS, MINING.

See ADVERSE POSSESSION, 3; NUISANCE, 1, 2, 4, 7, 8, 10.

DEDICATION.

1. THE MERE OFFER OF THE STATE TO DEDICATE A PORTION OF THE HARBOR OF THE CITY AND COUNTY OF SAN FRANCISCO to such city, if the latter would deepen and

improve it in a manner prescribed by the legislature, did not constitute a dedication *per se*. In order to complete the dedication, it was necessary for the city to accept such offer and make the improvements. Until such acts were done, the state had the right to recall its offer in whole or in part, and to deal with the subject of it in the exercise of its sovereign powers. *People* v. *Williams*, 572.

2. VOLUNTARY CONVEYANCE OF LAND TO A COUNTY, BY DEED OF BARGAIN AND SALE, which recites that such conveyance is made "for the purpose of erecting thereon county buildings, to which the same is hereby dedicated, for the use and benefit of the party of the second part, its successors and assigns forever," vests as complete a title in the county, if the land is used for such purpose, as if it had obtained the same by purchase, without such words of dedication. *State* v. *Glenn*, 50.

See CORPORATIONS, 9.

DEED.

1. GRANT OF A PRIVATE RIGHT TO QUARRY ROCK ON THE GRANTOR'S LAND, with a right of way to and from the quarry for the purpose of its removal, does not give the grantee an exclusive right of possession, or a right to any possession disconnected with the purposes of the grant. Such grantee can not authorize a railroad to occupy such land for the ordinary purposes of its business, and if he does so, the grantor, as the owner in fee of the land, may maintain ejectment against it. *Snell* v. *Wasatch & Jordan Valley Railway Company*, 631.
2. ASSOCIATION, MEMBERS OF, AND INTEREST THEREIN.—Where W., by deed, conveyed certain real estate to "an association of persons," without naming all of the persons who composed that association at the date of the deed, the court will, upon issues raised thereon, inquire into and determine who composed the association at the time of the conveyance to it, and the interest which each member of the association took in the property conveyed to the association. *Pratt* v. *California Mining Company*, 87.
3. PRESUMPTIONS ARISING FROM A DEED MAY BE OVERCOME by evidence, clear and convincing, contradicting such presumptions. *Id.*
4. PARTIES, CONDUCT AND ACTION OF.—The contemparaneous and subsequent action of parties in disposing of property in which they are jointly interested, may be considered as illustrating and evincing their understanding of their rights and interests in that property at the time such interests were acquired therein. *Id.*
5. THE INSERTION OF THE NAME "THOMAS HEPTUM" IN A BOND FOR A DEED signed by Thomas Hepburn is immaterial. *Hall* v. *Rice*, 346.
6. GRANTEE IS AS NECESSARY TO A CONVEYANCE AS A GRANTOR, and it follows that a United States land patent to a fictitious grantee is absolutely null and void. *U. S.* v. *Southern Col. etc. Co.*, 11.
7. NOTICE OF THE GRANTOR'S INTENTION TO RESCIND THE CONVEYANCE and demand a return of the property conveyed, on account of fraud in obtaining such conveyance, is not necessary where the grantee is a fictitious person. *Id.*

See BONA FIDE PURCHASERS, 2; ESTOPPEL, 1; FINDINGS, 9; FRAUD, 1; MORTGAGE, 2–4; TRUSTS, 2.

DEFAULT.

1. GRANTEES OF A DEFENDANT IN THE SUBJECT-MATTER OF AN ACTION ARE HIS "LEGAL REPRESENTATIVES," as that phrase is used in section 473 of the code of civil procedure, and as such are entitled to represent him and defend said action in his name. *Plummer* v. *Brown*, 255.
2. SUCH LEGAL REPRESENTATIVES OF A DEFENDANT ARE ENTITLED TO RELIEF from a default taken against their grantor, upon such terms as appear just to the court. *Id.*
3. THE TAKING OF A DEFAULT AGAINST THE DEFENDANT UPON FAILURE TO PLEAD IS A PRIVILEGE of the plaintiff, and if he chooses to waive it previous to trial it is not a matter of which the party in default can complain, nor can it affect the validity of the judgment. The only purpose of a default is to limit the time during which the defendant may file his answer, and such time never extends beyond a trial and judgment. *Manville* v. *Parks*, 603.

See PLEADING AND PRACTICE, 25; REMITTITUR, 1.

DELINQUENT TAXES.

See APPEAL, 9; CORPORATIONS, 6–8; TAXATION, 15.

DEMURRER.

1. DEFENDANT IN DEMURRING TO A COMPLAINT FOR FAILURE TO STATE FACTS SUFFICIENT to constitute a cause of action, and specifying in his demurrer certain grounds of insufficiency, can only rely upon the defects specified. It is otherwise if the demurrer is general, and without specification. *Lopez* v. *Central Arizona Mining Co.*, 41.

2. OBJECTION THAT AN ANSWER DOES NOT CONTAIN FACTS SUFFICIENT to constitute a defense may be made in the supreme court for the first time. If, however, the answer contains any defense, the objection must be overruled. *Caldwell* v. *Ruddy*, 295.

3. OBJECTION THAT AN ANSWER CONTAINS INCONSISTENT DEFENSES CAN NOT BE MADE by demurrer, but by motion to strike out or to require the defendant to elect upon which he will stand. *Id.*

4. OBJECTION RAISED TO A COMPLAINT BY DEMURRING for a misjoinder of causes of action is waived by answering. *Hammersmith* v. *Avery*, 662.

5. QUESTION AS TO THE SUFFICIENCY IN LAW OF AN ANSWER IS RAISED by the filing of a demurrer to a replication. *Brown* v. *Tucker*, 489.

6. PLEADING.—When a special count of the declaration has been demurred to, and the demurrer sustained, and the plaintiff has thereupon filed other amended counts, upon which issue has been joined, it is error for the trial court, against an objection by the defendant, to submit to the jury any issues as arising on such original count, to which a demurrer had been sustained. *Luna* v. *Mohr*, 673.

See EMINENT DOMAIN, 5.

DEPOSITIONS.

1. SUBPŒNAS ISSUED BY A NOTARY PUBLIC IN PROCEEDINGS BEFORE HIM to take the depositions of witnesses, can not be quashed by the court on the ground that the affidavit upon which they were issued was not sufficient. *Pfister* v. *Superior Court*, 134.

2. PARTY DESIRING HAS THE RIGHT TO TAKE DEPOSITIONS, and the adverse party may object to them when the same are offered in evidence, if the proceedings are irregular. *Id.*

3. DEPOSITIONS TAKEN IN AN ACTION IN ANOTHER COURT BETWEEN THE SAME PARTIES, and in regard to the same subject-matter, are admissible in evidence upon parol proof of the existence of such former action. *Ayers* v. *Chisum*, 520.

DEPOSITS IN BANK.

See STATUTE OF LIMITATIONS, 11, 12; TAXATION, 11.

DETAINER.

See FORCIBLE ENTRY AND DETAINER.

DISCHARGE OF MORTGAGE.

See MORTGAGE, 6–8.

DISQUALIFICATION OF JUDGE.

See JUDGE, 1.

DIVORCE.

1. LEGISLATIVE DIVORCE—VALIDITY OF.—The territorial legislature of Oregon had power, under the organic act of congress creating the territory, to grant special divorces. The exercise of such power is not in conflict with the provision of the United States constitution prohibiting states from passing laws impairing the obligations of contracts; nor by the last clause of article 2 of the ordinance of 1787 for the government of the territory north-west of the river Ohio, providing "that no law ought ever to be made or have force in said territory that shall in any manner whatsoever interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed;" nor by article 4 of said ordinance prohibiting the territorial legislatures from interfering "with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers." *Maynard* v. *Valentine*, 840.

2. THE RIGHT OF A WIFE TO LAND CLAIMED UNDER THE OREGON DONATION LAW does not become perfect until the residence and cultivation thereon by her husband, as her husband, is complete. Such act contemplates a common residence and settlement by both husband and wife. Consequently, an act of the legislature of Oregon, divorcing a husband, who had located a section of land under such act, from his wife, who had never been a resident of Oregon, does not impair any of the wife's right of property in such land which the legislature was prohibited from impairing by the United States constitution. *Id.*
3. LEGISLATURE OF COLORADO HAS NO POWER, UNDER THE CONSTITUTION, TO GRANT DIVORCES, nor can it validate a decree for divorce which was absolutely void for want of jurisdiction of the court over the person against whom it was rendered. *Israel* v. *Arthur*, 286.
4. THE ACT OF THE TERRITORIAL LEGISLATURE OF 1852, IN SO FAR AS IT GRANTED TO THE PROBATE COURTS jurisdiction in cases of divorce for statutory causes, is valid. *Whitmore* v. *Harden*, 424.
5. NO JUDICIAL TRIBUNAL IN THIS COUNTRY CAN TAKE JURISDICTION OF DIVORCE CASES without the authority of a statute. Such cases are *sui generis*, and are neither intrinsically actions at law nor suits in equity. *Id.*
6. THE GRANTING OF DIVORCES IS NOT NECESSARILY A JUDICIAL ACT, and consequently the legislature may grant divorces, in the absence of express constitutional provisions to the contrary, although all judicial power has been conferred upon another department of the government. *Id.*
7. AFTER THE HAPPENING OF THE CONTINGENCY UPON WHICH THE INTEREST OF A DIVORCED WIFE in the property of her husband set apart to her has ceased, the court can not so modify the decree of divorce as to cut off the lien of a mortgage which has attached against the property of the former husband, subsequent to the happening of such contingency. *Id.*
8. EXTREME CRUELTY TO WARRANT A DIVORCE ON SUCH GROUND need not be accompanied by physical violence, but must be such as to occasion danger to life, limb, or health, or the reasonable apprehension of such danger. *Kelly* v. *Kelly*, 143.
9. FALSE ACCUSATIONS OF MARITAL INFIDELITY ON THE PART OF THE HUSBAND, made by the wife, may in certain cases constitute such extreme cruelty as to entitle him to a divorce. *Id.*
10. DECEASE OF THE HUSBAND AFTER A DECREE OF DIVORCE HAS BEEN GRANTED in his favor, and before proceedings in error thereon are instituted, does not operate to prevent a review and reversal of such decree. *Israel* v. *Arthur*, 289.

See JUDGMENT, 4; SUMMONS, 4.

DONOVAN on Trial Practice, Review of, 79.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 9; NUISANCE, 7.

EASEMENT.

See FORCIBLE ENTRY AND DETAINER, 1.

EDUCATION.

See BOARD OF EDUCATION.

EJECTMENT.

1. ACTION FOR REALTY—DEFENSE.—A defendant in an action for the possession of real estate, when he claims only a part of the tract sued for, must show what part he claims. *Crœsus Mining etc. Co.* v. *Colorado Land etc. Co.*, 451.
2. JUDGMENT FOR THE DEFENDANT IN AN ACTION OF EJECTMENT WILL BE AFFIRMED where the findings do not show that the plaintiff ever had any title to or estate in the lands sought to be recovered. *Hodgdon* v. *Underhill*, 343.
3. DEFENSES OF POSSESSION UNDER A WRITTEN CONTRACT OF SALE, WITH PAYMENT of the purchase money, and matters constituting an estoppel *in pais*, can not be relied on in an action of ejectment; but the refusal of the court to strike out such defenses will not warrant a reversal, where the jury specially find that the defendant was the owner in fee and entitled to the possession of the land in dispute. *Newby* v. *Rowland*, 521.
4. When lies for possession of wall (note), 80.

See DEED, 1; GROWING CROPS, 1; HUSBAND AND WIFE, 4.

ELECTION.

1. IN AN ACTION TO CONTEST THE RIGHT OF A DEFENDANT TO AN OFFICE to which he has been declared elected, if the evidence satisfied the court that the ballots from certain precincts had not been tampered with, it should adopt the result of such ballots as recounted, and not as returned by the officers of the election. *Coglan* v. *Beard*, 862.
2. IN SUCH AN ACTION THE RETURNS SHOULD BE RECEIVED AS PRIMA FACIE TRUE, and the ballots are not better evidence to overcome the returns, unless the contestant shall affirmatively prove that the ballots remained in the same condition as they were when delivered to the proper custody by the judges of election. *Id.*
3. In cases of insanity (note), 176.

See CORPORATIONS, 19.

EMBEZZLEMENT.

See CRIMINAL LAW, 19.

EMINENT DOMAIN.

1. THE JURISDICTION OF THE COUNTY COURT TO HEAR AND DETERMINE A PROCEEDING FOR THE CONDEMNATION OF LAND for the use of a railroad is primarily determined by the allegations of the petition. When, however, the award of the jury shows that the amount of compensation to be paid to the owner exceeds the amount to which the jurisdiction of such court is limited, the apparent jurisdiction thereof no longer exists, and the court should dismiss such proceeding at the cost of the petitioner. Nor is jurisdiction regained by the action of the court in setting aside the verdict as a prelude to the dismissal. *Denver, Western & Pacific R'y Co.* v. *Church*, 611.
2. THE COMPLAINT IN AN ACTION AGAINST A CORPORATION FOR THE CONDEMNATION OF A STRIP OF LAND for the right of way for a railroad, sufficiently complies with the requirements of the code of civil procedure, section 1244, subdivision 2, when it states the name of the defendant, and shows that it was the known owner and claimant of the land sought to be condemned. *California Southern R. R. Co.* v. *Colton Land and Water Co.*, 470.
3. THE COMPENSATION TO WHICH THE OWNER OF LAND IS ENTITLED, in a proceeding to condemn the same for the use of a railroad, is the market value of such land at the time of making the assessment, and not such value at the time of issuing the summons. *Id.*
4. THE NECESSITY FOR A CONDEMNATION OF PROPERTY FOR A MUNICIPAL OR PUBLIC USE IS SUFFICIENTLY SHOWN by an allegation in the complaint which sets forth the ordinance of the city council authorizing such condemnation, and avers, "that it is now necessary to condemn said land for public use agreeably to the provisions of said ordinance." *Los Angeles* v. *Waldron*, 335.
5. NOTICE OF THE PRESENTATION TO THE COURT OF A PETITION FOR THE CONDEMNATION OF LAND, required to be published by the charter of the city of Los Angeles, is in the nature of a summons, which is waived by the defendants appearing and demurring to the petition. *Id.*
6. ORDINANCE PROVIDING FOR A REMONSTRANCE AGAINST A PROPOSED ASSESSMENT, by the owners of property within the limits to be assessed, and which describes such limits as extending "on both sides of Main street, from Washington street to Adams street," is sufficiently definite. *Id.*
7. DESCRIPTION IN THE COMPLAINT OF LANDS SOUGHT TO BE CONDEMNED held sufficient. *Id.*
8. WHAT CONSTITUTES A "TAKING" OR "DAMAGING" OF PRIVATE PROPERTY, within the meaning of the constitution, stated, and the distinctions between commented upon and explained. *Denver* v. *Bayer*, 505.

See NUISANCE, 4; REMOVAL OF CAUSES, 2, 3.

EQUITY.

1. THE SUPERIOR COURT HAS JURISDICTION OF AN EQUITABLE ACTION BROUGHT TO COMPEL AN ASSIGNEE IN INSOLVENCY to perform his trust, and account for the property assigned. The remedy afforded creditors in such cases, under the law regulating insolvency proceedings, is not exclusive. *Sanderson* v. *McIntosh*, 784.
2. A COURT OF EQUITY WILL NOT SET ASIDE A JUDGMENT OF A COURT OF LAW, and subsequent proceedings thereunder, for the reason that the complaint in the action in which such judgment was rendered was filed on a legal holiday, when there

is nothing in the record to indicate that the debt for which such action was brought was not justly due, especially when the party seeking equitable relief negligently omitted to avail himself of such defense in the action at law. *Peterson* v. *Weissbein Bros. & Co.*, 853.

3. A SUIT IN EQUITY FOR THE PURPOSE OF DETERMINING AN ADVERSE CLAIM, estate, or interest in real property, under section 500 of the code of civil procedure, can not be brought by a person not in possession. Such section has no effect upon the ordinary jurisdiction of courts of equity as to cases not within the scope of its operation. Its purpose is to enlarge, not to impair, such jurisdiction. *Coolidge* v. *Forward*, 832.

See BONA FIDE PURCHASERS; CANCELLATION; ESTOPPEL, 1; EVIDENCE, 13; FORCIBLE ENTRY AND DETAINER, 1; FRAUD, 3–6; INJUNCTIONS; LACHES, 1, 4; MISTAKE; SPECIFIC PERFORMANCE; TRESPASS, 1.

ESTATES OF DECEASED PERSONS.

1. THE PROBATE COURT HAVING ONLY AN INFERIOR AND LIMITED JURISDICTION conferred by express provisions of statutes, jurisdiction must appear affirmatively upon its record; it can not be presumed. *Chaves* v. *Perea*, 807.
2. THE PROBATE COURT HAS NO JURISDICTION TO PASS UPON A CLAIM against the estate of an intestate, presented to it for allowance, unless the administrator of such estate be present in court while the evidence is being taken and the claim passed upon, or has had an opportunity to be present and to be heard by having a citation to appear served on him. Unless such requirements have been complied with, an appeal from the judgment of the probate court allowing or rejecting a claim must be dismissed. *Id.*
3. UNDER THE MEXICAN LAW, WHERE A FATHER DIES, HAVING DEVISED HIS ESTATE to his wife and children in certain proportions, and after his death, but before the death of their mother, certain of such children die intestate, the interests so devised to such deceased children vest in their mother, and not in their surviving brothers and sisters. *Emeric* v. *Alvarado*, 708.

See APPEAL, 2, 3; EXECUTORS AND ADMINISTRATORS, 1; HOMESTEAD, 1.

ESTOPPEL.

1. A GRANTEE IN A DEED WHICH RECITES THAT THE SAME IS GIVEN IN LIEU of a previous deed for different premises, who accepts the same in lieu thereof, is estopped from claiming under such previous deed. Whether such grantee is divested of the title conveyed to him by the previous deed, without a reconveyance, *quære*. Equity might compel such reconveyance, unless the rights of innocent purchasers had intervened. *Emeric* v. *Alvarado*, 708.
2. PARTY IS ESTOPPED FROM TAKING ADVANTAGE OF AN ERROR IN THE ORDER of the introduction of evidence, for which he is himself responsible. *Richardson* v. *Bricker*, 270.
3. UNITED STATES CAN NOT BE ESTOPPED BY THE FRAUDS or crimes of its public officials. *United States* v. *Southern Col. etc. Co.*, 11.
4. OWNER OF PERSONAL PROPERTY IS NOT ESTOPPED FROM ASSERTING HIS RIGHTS THERETO, as against a purchaser from one having the ostensible ownership, if such purchaser had notice of his title. *Sacalaris* v. *Eureka etc. R. R. Co.*, 398.

See ARBITRATION AND AWARD, 7; EJECTMENT, 3.

ESTRAY.

1. NO ONE BUT A HOUSEHOLDER CAN TAKE UP AN ESTRAY ANIMAL under the Colorado statute, and he only when it is found in the vicinity of his residence. *Webber* v. *Hartman*, 272.
2. WHETHER THE TAKING UP OF AN ESTRAY ANIMAL BY AN EMPLOYEE OF A HOUSEHOLDER, without his knowledge or direction, can be subsequently ratified by him, *quære*. *Id.*
3. TAKER-UP OF AN ESTRAY ANIMAL FORFEITS ALL CLAIM TO COMPENSATION, and can not defeat an action for the possession of the property brought by the owner, if the taking up was originally unlawful, or if it has subsequently become unlawful by an abuse of the authority vested in him by statute. *Id.*
4. TAKER-UP OF ESTRAY HORSES CAN NOT USE THEM FOR THE PURPOSE OF GENERAL LIVERY, and if he does so, such use is tortious, and the taker-up forfeits his claim to compensation. *Id.*

EVIDENCE.

1. BURDEN OF PROOF IS ON THE PLAINTIFF TO PROVE THE ALLEGATIONS of his complaint, essential to his recovery; but he need not prove the negative of facts that go merely to support the defense, although he has himself alleged them. *Gilson* v. *Price*, 373.
2. IT IS NOT ERROR FOR A COURT TO PERMIT THE PLAINTIFF TO ANTICIPATE THE DEFENSE of a prior recovery, by introducing evidence, in the opening of his case, tending to show that the cause of action in such case was not identical with that in issue, and determined at a prior date. *Id.*
3. BURDEN OF PROOF IS ON THE COMPLAINANT TO SHOW THAT NEGATIVE ALLEGATIONS are at least *prima facie* true, when such allegations are made the basis of his suit. *United States* v. *Southern Col. etc. Co.*, 11.
4. PROOF OF THE NON-EXISTENCE OF PERSONS NAMED IN UNITED STATES PATENTS AS GRANTEES may be made by the evidence of witnesses who lived in the neighborhood of the lands granted, and who would probably have known such grantees if they had lived at the time and in the place in question. *Id.*
5. AMOUNT OF EVIDENCE REQUIRED TO SUPPORT A NEGATIVE ALLEGATION, and to shift the burden of proof, varies according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into. *Id.*
6. COMPLAINANT IN A SUIT TO SET ASIDE CERTAIN LAND PATENTS, alleged to have been obtained through a fraudulent conspiracy between the officers of the land office and others, need not call such persons as witnesses to prove the fraud if he can make out a *prima facie* case without doing so. On the other hand, the failure of the respondents to call such persons to disprove the fraud, when no reason appears for not having done so, is a strong circumstance of suspicion. *Id.*
7. EVIDENCE OF PAYMENT IS ADMISSIBLE, UNDER THE PLEA of *non assumpsit*, in an action on a promissory note. *Staab* v. *Jaramillo*, 57.
8. A PARTIAL FAILURE OF THE CONSIDERATION UPON WHICH A PROMISSORY NOTE WAS GIVEN may be shown in an action thereon by the payee, under a plea of the general issue. *Staab* v. *Ortiz*, 516.
9. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A PROMISSORY NOTE SUED ON WAS DELIVERED AT A DATE other than that which it bears on its face; but a refusal to admit such evidence is not error when the same would have been immaterial. *Paige* v. *Carter*, 558.
10. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT CERTAIN PROMISSORY NOTES SUED ON WERE GIVEN by the maker to the payee in pursuance of an agreement between them, whereby the latter conveyed to the former certain lands in consideration of the grantee's giving him a home and supporting him during the residue of his life, and that such notes were given by the maker to secure the performance of said agreement, on his part, and that he had performed the same. *Howard* v. *Stratton*, 562, 563.
11. THE ADMISSION OF SUCH EVIDENCE WOULD NOT VIOLATE THE RULE forbidding the introduction of parol evidence to vary or contradict a written contract, as parol evidence is admissible to prove that a written agreement has been totally discharged. *Id.*
12. A WRITTEN INSTRUMENT PURPORTING TO BE AN AGREEMENT between parties, but understood and intended to be a mere form, and never delivered to take effect as an actual agreement, is of no force as between such parties, and parol evidence is admissible to prove such facts. *Branson* v. *Oregonian R'y Co.*, 624.
13. UNITED STATES LAND PATENT IS, IN GENERAL, THE HIGHEST EVIDENCE OF TITLE, and can not be varied, contradicted, or controlled by extrinsic evidence; but upon a proper presentation of adequate facts, with a prayer for equitable relief, a court of equity may control the legal title conveyed thereby, and compel the grantee to convey the same to his *cestui qui trust*, ward, or other person equitably entitled to the same. *Kimball* v. *McIntyre*, 316.
14. DECLARATIONS OF PARTIES WHICH FORM NO PART OF THE RES GESTÆ are hearsay and not admissible. *Emeric* v. *Alvarado*, 708.
15. DECLARATIONS OF A PERSON NOT A PARTY TO THE RECORD, and having no connection with the controversy, are hearsay and inadmissible. *Wells* v. *Adams*, 496.
16. DECLARATIONS OF A TESTATOR, WHILE OF UNSOUND MIND, TO THE EFFECT THAT HE was of unsound mind and under the undue influence of his wife, at the time of the execution of a prior will, do not prove, or tend to prove, the truth of the matters declared by him. *Estate of Lang*, 773.

17. DECLARATIONS OF A PARTY IN POSSESSION AND CLAIMING TITLE to a mining claim, made before parting with his interest, against the validity of the location of such claim, are admissible in evidence against the grantee of the declarant. *Harrington* v. *Chambers*, 63.
18. DECLARATIONS OF AN AGENT MADE IN THE COURSE OF THE TRANSACTION out of which the action arose are admissible in evidence against his principal. *Sacalaris* v. *Eureka etc. R. R. Co.*, 398.
19. DECLARATIONS OF AN AGENT ARE NOT ADMISSIBLE IN EVIDENCE to prove the agent's authority. *Savings and Loan Society* v. *Gerichten*, 591.
20. THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE may be sufficient to warrant a conviction. *Territory* v. *Kinney*, 801.
21. THE TESTIMONY OF A WITNESS TO THE EFFECT THAT HE SAW THE DEFENDANT AT HIS HOME, and in the vicinity of the place where the crime was committed, is corroborative of the testimony of an accomplice as to the defendant's guilt, when the defense relied on is an *alibi*. *Id.*
22. TO CORROBORATE THE TESTIMONY OF AN ACCOMPLICE, the evidence must not only corroborate his story in a general way, as to the fact of the crime itself, but must tend to show that the defendant took part in the commission of the crime. *Id.*
23. EVIDENCE OF THE DEFENDANT'S MANNER AND CONDUCT WHEN ARRESTED, and comments upon the same, made by a third person at the time, in the presence and hearing of the defendants, is admissible. *People* v. *Shem Ah Fook*, 112.
24. WHETHER LEADING QUESTIONS SHALL BE ALLOWED TO BE PUT by the prosecution to its own witnesses, is a matter of judicial discretion. *Id.*
25. REFUSAL TO STRIKE OUT THE TESTIMONY AS TO CERTAIN ADMISSIONS by the defendants, made after their arrest, while in the sheriff's office and in the jail, is not error, where there is nothing to show that such admissions were not voluntary. *Id.*
26. ADMISSIONS MADE BY ONE DEFENDANT IN A CONVERSATION with a third person are competent evidence against him on a trial of two defendants jointly for murder. *Id.*
27. EVIDENCE IS ADMISSIBLE IN A PROSECUTION FOR MURDER THAT THE DEFENDANT HAD IN HIS POSSESSION such an instrument as might have caused the wounds inflicted on the body of the deceased. *People* v. *McDowell*, 478.
28. EVIDENCE AS TO THE PLACE WHERE THE DECEASED WAS SUPPOSED TO HAVE BEEN KILLED is admissible, merely for the purpose of locating the spot as a foundation for further examination. *Id.*
29. MOTIVE OF WITNESS—EVIDENCE OF.—Where, on a prosecution for murder, a witness for the people has testified that he saw the deceased and the prisoner together, and on cross-examination stated that he had a motive for watching them, it is error for the court to allow the witness to testify, in answer to a question by the prosecution, and against the defendant's objection, as to what his motive was. And after testifying that his motive was the expectation of seeing a fight, because the deceased had told him that he had a difficulty with the prisoner, it is error for the court to refuse to strike out such evidence of a difficulty, or to caution the jury that the statement of the witness was not evidence of such difficulty. *People* v. *Biddlecome*, 691.
30. THE EXCLUSION FROM EVIDENCE OF AN UNAUTHENTICATED COPY OF AN ACCOUNT OFFERED BY THE DEFENSE for the sole purpose of fixing a date, and thus corroborating the testimony of a witness, is not error. *Id.*
31. REFUSAL OF THE COURT TO CHARGE THE JURY THAT THERE IS NO EVIDENCE that the prisoner ever shot the deceased, or ever molested or premeditated shooting or killing him, or ever had any malice or ill-feeling against him, is not error, unless the evidence entirely failed to support such facts. *Id.*
32. WHERE A WITNESS HAS TESTIFIED TO A HOSTILITY TOWARD ONE OF THE PARTIES to the action, and has been permitted to detail the grounds of his hostility, the refusal of the court to permit such party to give evidence contradicting the statements of the witness as to such hostility, is not an abuse of discretion. *Busby* v. *Carpenter*, 837.
33. ERROR IN ADMITTING AS EVIDENCE IN REBUTTAL TESTIMONY WHICH IS NOT TECHNICALLY SO ADMISSIBLE, is not sufficient to reverse the judgment, as such evidence might have been received in the sound discretion of the court. *Harrington* v. *Chambers*, 63.
34. REFUSAL OF THE TRIAL COURT TO ALLOW THE DEFENDANTS TO DISPROVE NEW MATTERS first introduced by the plaintiffs in their rebuttal testimony is error. *Chamberlain* v. *Raymond*, 522.
35. THE ERRONEOUS ADMISSION IN EVIDENCE OF A DOCUMENT which did not tend to injure any party, furnishes no ground for a reversal. *Emeric* v. *Alvarado*, 708.
36. THE ADMISSION OF IMMATERIAL EVIDENCE, WHICH COULD NOT HAVE PREJUDICED the beaten party, is not sufficient to warrant a reversal. *Phipps* v. *Hully*, 382.

37. ADMISSION OF EVIDENCE AS TO THE VALUE OF SERVICES other than those sued for is error. *Wells* v. *Adams*, 496.

38. PAPER NOT OTHERWISE PROPER IN A CASE CAN NOT BE ADMITTED for a comparison of handwriting. The admission in evidence of such paper, if calculated to deceive and mislead the jury, is error sufficient to authorize a reversal of the judgment. *Staab* v. *Jaramillo*, 57.

39. WHERE THE RECORD SHOWS THAT THE LOWER COURT EXCLUDED EVIDENCE WHICH SHOULD HAVE BEEN ADMITTED, an appellate court will not presume that it was considered by such court in arriving at its decision. *Jones* v. *Snow*, 465.

40. SECONDARY EVIDENCE OF THE CONTENTS OF AN IMPORTANT DOCUMENT IS INADMISSIBLE, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found, if the circumstances admit of such proof. The mere statement that diligent search had been made in the plaintiff's office, and the same was unsuccessful, is not sufficient. *Wells* v. *Adams*, 496.

41. HYPOTHETICAL QUESTIONS CONTAINING ERRONEOUS RECITALS OF FACTS CAN NOT BE ASKED of an expert witness, for the purpose of determining the value of such services. *Id.*

42. THE PROTEST OF A NOTARY PUBLIC IS ONLY PRIMA FACIE EVIDENCE of the facts recited therein, and evidence is admissible to overcome and contradict the same. *Appelgarth* v. *Abbott*, 469.

43. THE GENERAL ISSUE.—The defense that the defendant is not liable on the bill of exchange in suit, because not a party thereto, is admissible under the general issue, which was pleaded; and his unverified special plea, in substance "that the said supposed bill of exchange is not his deed, and that he never executed the said instrument, nor authorized any person to execute it, and that the signature thereto is not his signature," is mere surplusage and immaterial, and may be rejected. *Luna* v. *Mohr*, 673.

44. A WITNESS MAY REFRESH HIS MEMORY BY REFERRING TO A MEMORANDUM, ALTHOUGH THE SAME WAS NOT MADE BY HIM, nor at the time of the transactions testified to, if it was made under his direction, at any time while the facts were fresh in his memory. *Paige* v. *Carter*, 558.

45. A WITNESS, IN TESTIFYING TO A CERTAIN CONVERSATION, MAY REFRESH HIS MEMORY by referring to and reading from a memorandum of such conversation taken down by him at the time. *Pinschower* v. *Hanks*, 369.

46. ASSAY VALUE OF ORES.—In an action to recover for the reduction of ores, under a contract by the terms of which the defendant agreed to pay the plaintiff "sixty-five per cent. of the assay value of said ores, such assay to be made from said ores taken from the battery samples," evidence is admissible to show the true value of such ores, and that, by reason of fraud or mistake on the plaintiff's part, the battery samples did not correctly show such value. *Phipps* v. *Hully*, 382.

47. INSTRUCTIONS BY THE COURT—CIRCUMSTANTIAL EVIDENCE.—Where defendant's counsel made attacks upon circumstantial evidence as a ground for conviction, and called the attention of the jury to certain cases found in books, where it was claimed innocent persons had been convicted upon circumstantial evidence, an instruction of the court cautioning the jury against attaching too much importance to such cases, in connection with other and proper instructions concerning circumstantial evidence, is not error. *People* v. *Shem Ah Fook*, 112.

48. REFUSAL OF THE COURT TO INSTRUCT THE JURY IN REFERENCE TO CIRCUMSTANTIAL EVIDENCE, "that it is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established, but the hypothesis contended for by the prosecution must be established to an *absolute moral certainty*, to the entire exclusion of any rational probability of any other hypothesis being true," is not error. In such instruction the words "absolute moral certainty" are not synonymous with "moral certainty." *People* v. *Davis*, 341.

49. WHERE THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE, A VERDICT WILL NOT BE DISTURBED on the ground that the evidence was not sufficient to sustain it. *Pinschower* v. *Hanks*, 369.

See ACCOUNT STATED, 1, 2; ADVERSE POSSESSION, 2; ARBITRATION AND AWARD, 5, 6; ATTACHMENT, 4; ATTORNEYS, 2; CHINESE RESTRICTION ACT, 1, 3; CONTINUANCE, 2–4; CONVERSION, 3; CORPORATIONS, 21, 23; COUNTER-CLAIM; CRIMINAL LAW, 18; DEED, 2–4; DEPOSITIONS; EJECTMENT, 1; EJECTION; ESTOPPEL, 2; EXECUTIONS, 1–3; JUDGMENT, 5, 7, 10–15; JURY, 1; MORTGAGE, 2, 3, 6, 7, 11; NEW TRIAL, 6; PARTNERSHIP, 6–8; RIOT; STATUTE OF LIMITATIONS, 9; SURETIES, 13; SURVIVORSHIP, 1; TAXATION, 18; TRESPASS, 5; TRUSTS, 2; VARIANCE; VENDOR AND VENDEE, 1, 2; WILLS, 2.

EXECUTIONS.

1. ORDER OF THE LOWER COURT REFUSING TO SET ASIDE A SALE UNDER EXECUTION of four ditches and the water rights connected therewith, which were sold in one parcel, will not be reversed when the evidence as to whether such ditches constituted a single system of water supply or not was conflicting. *Gleason* v. *Hill*, 770.
2. SEIZURE OF PROPERTY EXEMPT FROM EXECUTION.—In an action against an officer for taking, under execution, the implements of trade of the plaintiff, a barber, exempt from execution, evidence of the customary wages of barbers for the period of time between the seizure and plaintiff's employment is inadmissible to establish the damages resulting by reason of the interruption to plaintiff's business. *Hammersmith* v. *Avery*, 662.
3. EVIDENCE OF AN OFFER MADE TO THE PLAINTIFF FOR THE PROPERTY SO TAKEN is inadmissible to show the value thereof. *Id.*
4. THE RIGHT TO THE EXEMPTION OF PROPERTY FROM EXECUTION IS A PERSONAL PRIVILEGE, which, if not claimed, is waived by the debtor; and therefore an officer who seizes property exempt from execution is not a trespasser *ab initio*. *Id.*

See APPEAL, 1; CONVERSION, 1; COSTS, 2; INJUNCTION, 1, 2; MANDAMUS, 3; PARTIES, 2.

EXECUTORS AND ADMINISTRATORS.

1. AN ADMINISTRATOR IS NOT AUTHORIZED TO ERECT A DWELLING-HOUSE with the assets of the estate, to be occupied by him, or for any other use or purpose; nor is money borrowed for such purpose a charge against the estate, although it may be against the administrator individually. *Ralfson* v. *Cannon*, 696.
2. THE WORDS "TESTAMENTARY EXECUTOR" ARE A CORRECT TRANSLATION of the Spanish word *albacea*. *Emeric* v. *Alvarado*, 708.

See ATTACHMENT, 5; ESTATES OF DECEASED PERSONS, 2; PARTIES, 10.

EXEMPTION FROM EXECUTION.

See EXECUTIONS, 2–4.

EXPERT TESTIMONY.

See EVIDENCE, 41; INJUNCTION, 4; MINES AND MINING, 17.

EXPRESS COMPANIES.

See COMMON CARRIERS, 1–5, 8; NEGLIGENCE, 9.

EXTRADITION.

See FUGITIVES FROM JUSTICE.

FENCE LAW.

1. IN THE ABSENCE OF A SHOWING THAT THE PEOPLE OF A CERTAIN COUNTY HAVE ADOPTED the so-called "fence law," the court will presume that the same has never taken effect therein. *Willard* v. *Mathesus*, 355.

FERRY.

See COMMON CARRIERS, 4.

FICTITIOUS GRANTEE.

See BONA FIDE PURCHASER, 2; CANCELLATION, 1; DEED, 6, 7; EVIDENCE, 4.

FINDINGS.

1. FAILURE TO FIND UPON AN IMMATERIAL ISSUE IS NOT ERROR. *Allenberg* v. *Zellerbach*, 777.
2. FINDING OF THE COURT WHICH SUBSTANTIALLY RESPONDS TO THE ISSUES made by the pleadings is sufficient. *Jones* v. *Meyer*, 348.
3. WHERE ONLY PART OF THE ISSUES RAISED BY THE PLEADINGS are submitted to the jury, in a proceeding to set aside the probate of a will, the refusal of the court to hear testimony and make findings as to the remaining issues is error. *Sanders* v. *Simcich*, 868.
4. FINDINGS MUST BE OF THE ULTIMATE FACTS PUT IN ISSUE by the pleadings, and not argumentative. *Coglan* v. *Beard*, 862.

5. THE FINDINGS OF THE LOWER COURT ON THE ISSUES RAISED BY THE PLEADINGS MUST STATE separately the facts found and the conclusions of law, in such a manner that the appellate court may see that the conclusions of law follow as a deduction from the facts found. Tested by such rule, certain findings of the lower court, to the effect that no assessments for taxes during certain years were made on a portion of the property in controversy, and certain judgments rendered for such taxes were void, held insufficient. *Emeric* v. *Alvarado*, 708.
6. FINDING TO THE EFFECT THAT A SUBSEQUENT UNDERTAKING WAS GIVEN in the place of a former one which was required upon the issuance of a preliminary restraining order, is erroneous, when the complaint alleges, and the undertaking recites, that the same was given "as a condition to the further continuance of the said injunction." *California Farmers' etc. Ins. Co.* v. *Schindler*, 122.
7. FINDINGS OF FACT CAN NOT BE CONSIDERED ON APPEAL, unless they are embodied in the statement of the case. *Simpson* v. *Ogg*, 303.
8. APPELLANTS CAN NOT TAKE ADVANTAGE OF THE FAILURE OF THE COURT TO MAKE ADDITIONAL FINDINGS of fact, within the time required by the statute, when all of such findings were favorable to them. *Smith* v. *Logan*, 391.
9. WHERE THE EVIDENCE IN SUPPORT OF A FINDING AS TO THE MENTAL CAPACITY of a grantor to make a deed is conflicting, such finding will not be disturbed by the appellate court. *Emeric* v. *Alvarado*, 708.
10. FINDING OF THE JURY THAT A TESTATOR WAS INDUCED TO EXECUTE A CERTAIN WILL by the undue influence and threats of his wife, held unsupported by the evidence. *Estate of Lang*, 773.

See ADVERSE POSSESSION, 2; CONVERSION, 1; EJECTMENT, 2; LANDLORD AND TENANT, 6; MORTGAGE, 11; NEW TRIAL, 14.

FINE.

See CONTEMPT, 2, 3, 5.

FIRE INSURANCE.

See AGENT, 1; MISTAKE, 2.

FORCIBLE ENTRY AND DETAINER.

1. AN ACTION OF FORCIBLE ENTRY AND DETAINER DOES NOT LIE TO ENFORCE AN INCORPOREAL RIGHT OF WAY, although an action on the case might be maintained for its obstruction, or a suit in equity to restrain an interference therewith. *Roberts* v. *Trujillo*, 519.
2. ACTION OF FORCIBLE DETAINER CAN NOT BE MAINTAINED when the facts and circumstances indicate no purpose or determination upon the part of the defendant to resist the entry of the plaintiff by force. *Harrington* v. *Watson*, 59.
3. NEITHER THE LEGAL TITLE TO LAND NOR THE RIGHT TO THE POSSESSION can be determined in an action of forcible entry and detainer. *Romero* v. *Gonzales*, 160.
4. UNLAWFUL ENTRY, UNACCOMPANIED BY ACTUAL FORCE, IS INSUFFICIENT to sustain an action of forcible entry and detainer, under the statute of this territory, on the ground of such entry being constructively forcible. *Id.*
5. OBJECT OF THE STATUTE OF FORCIBLE ENTRY AND DETAINER is to prevent persons from disturbing the public peace, or perpetrating gross and willful wrongs, by maintaining by actual fraud or force what they claim as private rights in the possession of land. *Id.*

FORECLOSURE.

See MORTGAGE, 9, 10; PARTIES, 2, 4; PLEADING AND PRACTICE, 1, 6.

FORFEITURE.

See CORPORATIONS, 20; MINES AND MINING, 20.

FORWARDERS.

See COMMON CARRIERS, 5, 7.

FRAUD.

1. DEED UNTAINTED BY FRAUD IS NOT IMPEACHABLE FOR FRAUD COMMITTED AFTERWARDS in the obtainment of another deed, for different premises, by the same grantee from the same grantor. *Gutierrez* v. *Brinkerhoff*, 127.

2. ONE WHO IS A PARTICEPS CRIMINIS IN CERTAIN FRAUDULENT TRANSACTIONS to obtain land from the United States can not enforce a cause of action against his alleged partners in fraud, growing out of such transactions. *Id.*
3. EQUITY WILL NOT INTERFERE TO SET ASIDE A CONVEYANCE ON THE GROUND OF FRAUD, at a suit of a general judgment creditor of the grantor, where the latter has other property subject to execution sufficient to satisfy the judgment. In such action the complaint must allege the insolvency of the debtor, or facts sufficient to indicate that the judgment could not be collected without equitable aid. *Emery* v. *Yount*, 499.
4. FAILURE TO MAKE SUCH ALLEGATIONS CAN BE TAKEN ADVANTAGE OF at any time, and is not cured by evidence establishing the insolvency of the judgment debtor. *Id.*
5. VOLUNTARY CONVEYANCE WILL NOT BE SET ASIDE ON THE GROUND OF FRAUD on the grantor's creditors, unless it is averred and proved that the grantor was in debt at the time of such conveyance, or that the same was made with a view of contracting further obligations. *Id.*
6. COMPLAINT IN AN ACTION BY A JUDGMENT CREDITOR, HAVING A SPECIFIC LIEN by attachment upon a particular parcel of his debtor's land, need not aver the fact of the debtor's insolvency, where the object of the action is to have a subsequent conveyance of such land declared fraudulent and void as to the plaintiff, and that, as to the extent of his lien upon the same, his right to obtain satisfaction of his judgment therefrom be recognized and enforced. *Id.*

See ATTORNEYS, 1; BONA FIDE PURCHASERS, 2; CANCELLATION, 1; CHATTEL MORTGAGE; CONTRACTS, 2; DEED, 7; EVIDENCE, 46; REPLEVIN, 3; VENDOR AND VENDEE, 1, 2.

FUGITIVES FROM JUSTICE.

1. CUSTODIAN OF A PRISONER HELD UNDER AUTHORITY OF A WARRANT FOR HIS ARREST, issued by the governor of California, upon the requisition of the governor of another state, may be compelled, upon the application of the prisoner for a writ of *habeas corpus*, to produce the body of such prisoner before a court of the state in which he is detained, so that the cause of his imprisonment and detention can be inquired into; and upon a failure so to do, such custodian is guilty of contempt. *In re Robb*, 255.
2. WARRANT OF EXTRADITION.—A warrant for the arrest and return of a fugitive from justice must recite or set forth the evidence necessary to authorize the state executive to issue it; and unless it does, it is illegal and void. *In re Doo Woon*, 333.
3. HABEAS CORPUS, JURISDICTION OF.—A person arrested under a warrant of extradition from one state of the Union to another "is in custody under or by color of the authority of the United States," and the national courts have jurisdiction to inquire by *habeas corpus* into and determine the legality of the same, *Id.*
4. FUGITIVES FROM JUSTICE ARRESTED AND RETURNED UNDER LAWS OF THE UNITED STATES.—The governor of a state in issuing a warrant for the arrest of a fugitive from justice, the officer who makes the arrest, and the party commissioned to receive the fugitive and deliver him to the authorities of the state where the offense is charged to have been committed, in pursuance of the provisions of sections 5278 and 5279 of the revised statutes of the United States, act under the authority of the laws of the United States, and *pro hac vice* are officers or agents of the United States. *In re Robb*, 439.
5. WRIT OF HABEAS CORPUS—JURISDICTION.—Where a petition for a writ of *habeas corpus* presented to a state judge or court by a party in the custody of one claiming, in good faith, to be authorized to deliver him to the authorities of another state, as a fugitive from justice, in pursuance of the provisions of said sections, shows upon its face that the petitioner is so held in custody, under such claim made in good faith, the state judge or court has no jurisdiction to issue the writ. The jurisdiction, in such case, is exclusively in the courts of the United States. *Id.*
6. ID.—DUTY OF CUSTODIAN.—Where a writ of *habeas corpus* has been issued by a state judge or court, and been served on the party having the custody of such alleged fugitive, it is the duty of such custodian to make full return to the writ as to the authority under which he holds the prisoner, and to exhibit to the court the original papers evidencing his authority, and respectfully decline to produce the body of the prisoner; and if it appears from said return, or said petition and return, that the prisoner is claimed to be held in good faith, in pursuance of the provisions of said statute, the judge or court issuing the writ has no jurisdiction or authority to proceed further, and no jurisdiction or authority to compel the production of the body

of the prisoner, or to commit the party holding him for contempt in thus respectfully declining to produce the prisoner. *Id.*

7. THE EFFECT OF THE PRODUCTION OF THE PRISONER would be to place him in the physical control of the court, and to deprive himself of all power to execute the superior commands of the laws of the United States, to which he owes obedience. *Id.*

8. WHERE THE RETURN TO A WRIT OF HABEAS CORPUS, SUED OUT BY A PRISONER held under requisition proceedings, shows a substantial compliance with the act of congress concerning fugitives from justice, the prisoner will be remanded. *Ex parte Bailey*, 485.

FUTURE ADVANCES.

See CHATTEL MORTGAGE, 2.

GAMING.

1. GAMING—ACT OF 1876 DEFINING.—Section 1 of the act of 1876 (Sess. L. 39) includes not only the games therein enumerated, but also any game played for anything of value with any device or means suitable and convenient for that purpose; and in which the game depends largely on chance, or more on chance than skill. *In re Lee Tong*, 35.

2. THE CHINESE GAME OF "TANTAN" is a game of pure chance, and when played for anything of value, constitutes gambling within the inhibition of said statute. *Id.*

3. POWER "TO SUPPRESS" WHEN NOT POWER "TO PUNISH."—A grant of power to a city "to suppress gaming and gambling-houses," includes the power to suppress "gaming;" but when the crime of gaming is defined, and the punishment therefor prescribed by the law of the state, the city is not authorized to suppress any game not prohibited by such law, nor to punish any person playing thereat; but it is confined to the use of such means as may be within its power to enforce the state law within its limits. *Id.*

GARNISHMENT.

See ATTACHMENT, 1; JUDGMENT, 5.

GENERAL AVERAGE.

See ADMIRALTY, 1.

GRAND JURY.

See JURY, 1, 2.

GRAY on Restraints on Alienation, Review of, 77.

GROWING CROPS.

1. A MORTGAGEE OF GROWING CROPS PENDENTE LITE IN AN ACTION OF EJECTMENT is bound by the judgment against the mortgagor, and may be evicted under the writ issued on such judgment. As between him and the successful plaintiff, such growing crops are part of the realty, and pass to the plaintiff, and consequently the mortgagee is not entitled to a restitution of the premises for the purpose of harvesting such crops. *Huerstal* v. *Muir*, 475.

See INJUNCTION, 5.

GUARDIAN AD LITEM.

1. NEITHER AN ORDER APPOINTING A GUARDIAN AD LITEM FOR AN INFANT NOR THE PETITION FOR SUCH APPOINTMENT NEED APPEAR in the judgment roll. Such appointment may be made on an application *ore tenus* in open court, as well as in writing. *Emeric* v. *Alvarado*, 708.

See PARTIES, 3.

HABEAS CORPUS.

1. RETURN TO HABEAS CORPUS.—Unless the return to a writ of *habeas corpus* shows that the caption and detention are legal at the time of the service of the writ, the prisoner ought to be discharged; and a return showing a caption and detention upon valid process since such service is not sufficient. *In re Doo Woon*, 333.

2. RETURN TO A WRIT OF HABEAS CORPUS, WHICH SETS OUT IN FULL THE RECORD of the proceedings under which the petitioner is held, is a full and complete answer to every allegation contained in the petitioner's application for his discharge, and being admitted as true, negatives the same. *In re Waldrip*, 44.
3. NO APPEAL LIES FROM AN ORDER OR JUDGMENT OF THE DISTRICT COURT, directing the discharge of a prisoner after a hearing on an application for a writ of *habeas corpus*, either by the defendant named in such writ or by the people. *In re Clasby*, 524.

See CHINESE RESTRICTION ACT, 1, 7, 8, 10, 11; CONSTITUTIONAL LAW, 9; FUGITIVES FROM JUSTICE, 1, 3, 5, 7.

HARBOR COMMISSIONERS.

See BOARD OF HARBOR COMMISSIONERS.

HEARD'S Precedents of Equity Pleading, Review of, 879.

HOLIDAY.

See EQUITY, 2.

HOMESTEAD.

1. SUPERIOR COURT SITTING AS A COURT OF PROBATE HAS NO JURISDICTION to try the title to real estate as between adverse claimants, although, for the purpose of selecting a homestead, it may examine into the title to a given parcel of land mentioned in the inventory. *Estate of Burton*, 254.

See APPEAL, 2, 3; HUSBAND AND WIFE, 1.

HUSBAND AND WIFE.

1. PROPERTY OF A HUSBAND IS PRESUMED TO BE COMMUNITY PROPERTY in the absence of evidence to the contrary; and upon a declaration of homestead being made and recorded thereon by the wife, becomes, by operation of law, the estate in joint tenancy of the husband and wife, of which they are jointly seised in equal shares. *Schuler* v. *Savings and Loan Society*, 125.
2. HUSBAND AND WIFE MAY CONTRACT TOGETHER IN RELATION TO PROPERTY in which they are joint owners, and it would seem that the wife is entitled to the fruits of such contract as her separate property. *Id.*
3. POSSESSION OF THE WIFE AS TO THE COMMUNITY PROPERTY IS THE POSSESSION OF THE HUSBAND, and he can not, except in cases of conversion, sue her for the possession of such property or for his interest therein. *Id.*
4. WIFE OF A DEFENDANT IN AN ACTION OF EJECTMENT, AGAINST WHOM A JUDGMENT IS RENDERED, who was in possession of the premises at the commencement of the action, in the absence of proof of a separate property in her, will be presumed to be in possession under her husband, and can be evicted under the judgment against him. *Huerstal* v. *Muir*, 475.

See DIVORCE; MARRIED WOMEN; PARTIES, 7; SURVIVORSHIP, 1.

HYDRAULIC MINING.

See ACQUIESCENCE, 1; ADVERSE POSSESSION, 3; NUISANCE, 1, 2, 4, 7, 8, 10.

INDIANS.

1. DISTRICT COURT HAS NO JURISDICTION TO TRY AN INDIAN BELONGING TO A TRIBE which is recognized and treated with as such by the federal government, having its chief and tribal laws, for killing another Indian belonging to the same tribe. *State ex rel. Truman* v. *McKenney, Judge, etc.*, 407.
2. NEITHER THE GENERAL LAWS OF THE TERRITORY NOR OF THE STATE, DEFINING CRIMES and providing for their punishment, were intended to apply to crimes committed by one Indian against another of the same tribe. *Id.*
3. POLICY OF THE FEDERAL AND STATE GOVERNMENTS TOWARDS THE INDIAN TRIBES within their borders, and the status of such Indians stated and examined. *Id.*

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 12.

INFANTS.

See PARTIES, 3; SUMMONS, 2.

INFRINGEMENT OF COPYRIGHT.

See COPYRIGHT, 3.

INFRINGEMENT OF PATENT.

See PATENT.

INJUNCTION.

1. EQUITY WILL NOT, AT THE INSTANCE OF AN ALLEGED GRANTEE HAVING MERELY A CONSTRUCTIVE POSSESSION, enjoin a sheriff's sale of the real property conveyed under a subsequent execution against the grantor, where the validity of the conveyance to such grantee, and his title depending thereon, are fairly questioned. *Coolidge* v. *Forward*, 832.
2. AN INJUNCTION WILL NOT ISSUE TO RESTRAIN PROCEEDINGS UNDER A JUDGMENT rendered in favor of a plaintiff in an action prosecuted by him by a name in which merely the initial of his Christian name was stated, when no objection was made to the complaint on that ground. *Boyd* v. *Platner*, 798.
3. PROSECUTION IN ONE COURT OF AN ACTION FOR THE RECOVERY OF AN INDEBTEDNESS, in which an attachment has issued against the property of the debtor, can not be stayed by another court of co-ordinate jurisdiction, at the instance of the assignee, for the benefit of creditors of such debtor, although the plaintiffs in the attachment suit had agreed to release the property attached and dismiss such suit. *Wilson* v. *Baker*, 550.
4. INCONVENIENCE TO DEFENDANTS.—In granting relief, where the complainant's rights are certain, and the invasion of them is clearly established, a court of equity can not consider the inconvenience which will result to defendants from the relief. Nor is it the province of the court to speculate upon, or to consider, or to suggest, any possible modes by which defendants may avoid the injurious consequences of their acts, or to decide upon the conflicting opinions of scientific experts concerning the feasibility or sufficiency of such suggested modes. The only duty of the court is, to grant the relief to which the complainant is entitled upon the law and facts of the case. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.
5. AN ORDER DISSOLVING AN INJUNCTION ISSUED UPON AN EX PARTE APPLICATION restraining the defendants in an action of ejectment from interfering with the crops growing on the premises sought to be recovered, on the ground that such defendants were insolvent and a judgment against them for the value of the crops would be unavailing, will not be reversed where there is nothing in the record to show upon what the court below acted in the hearing and determination of the motion to dissolve. *Fowler* v. *Heimrath*, 484.
6. SUPREME COURT HAS NO POWER TO STAY THE OPERATION OF AN INJUNCTION restraining the appellant from diverting the waters of a certain stream, pending an appeal. *Swift* v. *Sheppard*, 133.
7. INJUNCTION TO BE OBEYED.—When a party to an injunction doubts its extent or significance, he ought not to disobey or disregard it, with a view of testing it in this particular, but he should apply to the court for a modification or construction of it. *Wells, Fargo & Co.* v. *Oregon R'y & N. Co.*, 547.

See CONTEMPT, 6; FINDINGS, 6; JUDGMENT, 22.

INSANE PERSONS.

1. CONTRACT OF AN INSANE PERSON IS MERELY VOIDABLE, not absolutely void. The right to avoid it is a personal right, which can only be exercised by the insane person or his guardian or representatives. Other parties to the contract who are of sound mind are not affected until it is avoided by the party entitled to disaffirm it. *Caldwell* v. *Ruddy*, 295.
2. INSANE PERSON CAN NOT DISAFFIRM HIS CONTRACT WITHOUT RETURNING THE CONSIDERATION therefor. *Id.*

INSOLVENCY.

1. SUPERIOR COURT HAS NO JURISDICTION TO MAKE A DECREE DISCHARGING AN ALLEGED INSOLVENT, where the schedule filed by him was not sworn to before the judge having jurisdiction, as required by section 4 of the insolvency act of 1852, but was sworn to before a notary public. *Baker* v. *Everhart*, 779.

2. EVERY CREDITOR OF AN INSOLVENT DEBTOR MAY FILE HIS OPPOSITION to the debtor's discharge, and may control the same to the extent of withdrawing it, whether other creditors consent thereto or not. *Brangon* v. *His Creditors*, 120.
3. A PROCEEDING BY CERTAIN CREDITORS OF A DEBTOR TO HAVE HIM ADJUDGED AN INSOLVENT, and that a surrender of his property be made for the benefit of his creditors, may be dismissed upon the motion of the debtor for delay in prosecuting such proceeding, which is unaccounted for and inexcusable. *Kornahrens* v. *His Creditors*, 563.
4. A CREDITOR WHO HAS JOINED IN THE EXECUTION OF A COMPOSITION AGREEMENT with his debtor can not object that the sum due him has not been paid in accordance with its exact terms, if he afterwards agrees to a different time and mode of payment. *Paige* v. *Carter*, 558.

See ATTORNEYS, 1; EQUITY, 1; FRAUD, 3–6; INJUNCTION, 3, 5.

INSTRUCTIONS.

1. SUPREME COURT WILL REVERSE A JUDGMENT FOR THE REFUSAL OF THE LOWER COURT to give an instruction only when it was the duty of the court to give such instruction exactly as requested. If any part of a single instruction ought not to have been given, the rejection of the whole thereof will be affirmed. Such result follows when any part of a single instruction is so worded that it may have a tendency to mislead the jury, as well as when a part directly declares that to be law which is not law. *People* v. *Davis*, 341.
2. WHEN AN INSTRUCTION ASKED FOR CONTAINS SEVERAL PROPOSITIONS, one or more of which are erroneous, and the balance unobjectionable, it is not error for the court to refuse the whole request. *People* v. *Biddlecome*, 691.
3. INSTRUCTION AS TO WHAT CONSTITUTES A MURDER, GIVEN IN THE LANGUAGE OF THE STATUTE, is not error. *Id.*
4. REFUSAL TO GIVE AN INSTRUCTION WHICH HAS ALREADY BEEN GIVEN in substance is not error. *Id.*; *People* v. *Lee Hung*, 45; *Martin* v. *Hill*, 629.
5. REFUSAL OF THE COURT TO GIVE AN INSTRUCTION WHICH HAS ALREADY BEEN GIVEN in substance, in reference to the nature of and degree of credibility to be attached to the testimony of an accomplice, is not error. *Territory* v. *Kinney*, 801.
6. INSTRUCTING THE JURY IN ACCORDANCE WITH THE LANGUAGE OF THE PENAL CODE, without identifying the sections read by number, is not error. *People* v. *Lewis*, 131.
7. REFUSAL OF THE COURT TO GIVE AN INSTRUCTION CONTAINING HYPOTHETICAL RECITALS of fact, having no bearing on the matters at issue, is not error. *Dreyfuss* v. *Tompkins*, 350.
8. AN APPELLANT CAN NOT COMPLAIN OF THE INSTRUCTIONS OF THE COURT, as to the test of his liability, which were given at his own request. *Gilson* v. *Price*, 373.
9. AFTER THE JURY HAVE BEEN INSTRUCTED AND HAVE RETIRED to consider their verdict, in a prosecution for a felony, the court can not, at their request, give them further instructions in the absence of the defendant. If such were done, it would be presumed that the irregularity *per se* constituted error. *Territory* v. *Lopez*, 821.
10. INSTRUCTIONS TO A JURY MUST BE IN WRITING, and the materiality of a fact will be presumed from the fact that the court below deemed it proper to give an instruction thereon. *Id.*
11. INSTRUCTION TO A JURY IN A PROSECUTION FOR A FELONY, that they must determine a certain fact "according to the evidence, and just as they would any fact in their own private affairs," is erroneous, as tending to mislead the jury to infer therefrom that they might determine every question submitted to them by the same rule. The jury should have been instructed that they should be convinced or satisfied from the evidence, to the exclusion of every reasonable doubt, that such fact had been established. *Id.*
12. JUDGMENT WILL NOT BE REVERSED BECAUSE CERTAIN PORTIONS OF THE CHARGE ARE OBJECTIONABLE, if such charge as a whole is unobjectionable. *People* v. *McDowell*, 478.
13. FAILURE OF THE TRIAL COURT TO NOTE THE MODIFICATIONS MADE BY HIM in an instruction as asked for in the manner required by statute is an irregularity, but not such an error as to warrant a reversal. *Denver and Rio Grande R'y Co.* v. *Harris*, 826.

See APPEAL, 13, 14; CRIMINAL LAW, 8–13, 20, 21; EVIDENCE, 31, 47, 48; NEGLIGENCE, 6; NEW TRIAL, 12, 13.

INTERLOCUTORY JUDGMENT.
See APPEAL, 6, 7; PARTITION, 4.

JETTISON.
See ADMIRALTY, 1.

JOINT TENANTS.
See HUSBAND AND WIFE, 1.

JUDGE.

1. JUDGE OF THE COUNTY COURT WHO HAS BEEN OF COUNSEL FOR THE DEFENDANT in a former trial is disqualified from acting as judge in a subsequent trial of such case. It is his duty to certify such case up to the district court for further proceedings, either upon his own motion or that of a party desiring the same, without imposing as a condition to such removal that the party so desiring shall pay all the accrued costs. *Connell* v. *Gavitt*, 488.
2. LEGISLATURE MAY ENJOIN UPON A JUDGE THE PERFORMANCE OF JUDICIAL FUNCTIONS in matters outside of actions and proceedings in courts, and in such cases the provisions of the practice act in reference to appeals to the supreme court are inapplicable. *Lyon County* v. *Esmeralda County*, 395.

JUDGMENT.

1. JURISDICTION OVER THE PERSONS AS WELL AS SUBJECT-MATTER IN CONTROVERSY WILL ALWAYS BE PRESUMED in support of the judgments and orders of courts of general jurisdiction, when the same are questioned in collateral actions, and the record shows nothing to the contrary, although such jurisdiction does not affirmatively appear. *Hughes* v. *Cummings*, 608.
2. VALIDITY OF AN ORDER MADE BY THE COUNTY JUDGE SETTING ASIDE A JUDGMENT OF DISMISSAL, and reinstating a cause on the docket of the county court, can not be questioned in a collateral action, although the record fails to show that the requisite notice was given to the judgment creditor, or his assignee, if the judgment has been assigned. If erroneous, the error can only be corrected in a direct proceeding. *Id.*
3. THE JURISDICTION OF THE COUNTY COURT OVER ITS JUDGMENTS IS NOT LOST upon filing and recording a transcript of the judgment of the justice of the peace in the office of the clerk of the district court. The object of such filing and recording is merely for the creation of a lien on the real property of the judgment debtor. *Id.*
4. VALIDITY OF A JUDGMENT FOR DIVORCE MAY BE COLLATERALLY ATTACKED FOR WANT OF JURISDICTION over the person of the defendant, when such fact affirmatively appears from the record, although such judgment recites that due service of process had been made. *Israel* v. *Arthur*, 286.
5. JUDGMENT CAN NOT BE RENDERED AGAINST ONE SUMMONED AS GARNISHEE, until after judgment has been recovered in the action against the principal debtor. In proceedings against the garnishee he may show either by the record, or other competent evidence, that the judgment against the principal debtor was void for want of jurisdiction. *Smith* v. *Montoya*, 152.
6. JURISDICTION OF A COURT OF GENERAL JURISDICTION WILL BE PRESUMED from the judgment itself, although the record does not recite the facts conferring jurisdiction. Otherwise, if the entire record discloses a want of jurisdiction. *Id.*
7. SUFFICIENT EVIDENCE IN SUPPORT OF A JUDGMENT WILL BE PRESUMED to have been given, in the absence of an affirmative showing to the contrary. This principle is always applied in appeals upon the judgment roll alone. *Kelly* v. *Kelly*, 143.
8. JUDGMENT OF THE LOWER COURT WILL BE REVERSED FOR FAILURE to find on a material issue. *Southern Pacific R. R. Co.* v. *Bennett*, 140.
9. JUDGMENT WILL BE REVERSED WHEN THE TRIAL COURT FAILS TO FIND on all the material issues. *Duane* v. *Neumann*, 565.
10. WHEN THERE IS EVIDENCE TO SUSTAIN THE JUDGMENT, the same will be affirmed. *Tweed* v. *Lowe*, 658.
11. WHEN THE EVIDENCE IS CONFLICTING, THE JUDGMENT WILL BE AFFIRMED. *Rathgeb* v. *Dasso*, 566.
12. WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE, the judgment will not be reversed because the evidence does not sustain the findings. *Burton* v. *Nichols*, 343.

13. JUDGMENT WILL BE REVERSED WHEN THERE IS NO EVIDENCE to support a material finding. *Crites* v. *Wilkinson*, 565.
14. JUDGMENT WILL BE REVERSED WHEN THE EVIDENCE IS INSUFFICIENT to support the findings. *Wilson* v. *Baker*, 551.
15. JUDGMENT OF THE LOWER COURT WILL BE REVERSED WHERE THE PREPONDERANCE OF EVIDENCE is so great as to a particular finding that the appellate court has no hesitancy in declaring such finding against the evidence. *Chamberlain* v. *Raymond*, 522.
16. FINAL JUDGMENT, WHAT IS.—While proceedings are pending for a review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case, between the parties, is not ended; and until litigation on the merits is ended, there is no finality to the judgment in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it. *Gillmore* v. *American Central Ins. Co.*, 872.
17. A JUDGMENT ENTERED FOR THE PLAINTIFF IN ONE ACTION, in pursuance of a stipulation which authorized the entry of the same upon a final judgment for the plaintiff in another action, is premature, if entered pending a motion by the defendant in the latter action for a new trial, although entered more than one year after a judgment in the latter action, from which no appeal was taken. *Id.*
18. A MOTION FOR A JUDGMENT, PURSUANT TO A STIPULATION, can not be considered a trial on the merits. If a party to such stipulation is entitled to judgment, it is upon the stipulation which has been entered as an order of the court, and not upon a trial of the cause. A motion for a new trial in such case is irregular, and should be dismissed. *Id.*
19. WHERE JUDGMENT HAS BEEN RECOVERED IN EXCESS OF THE AMOUNT claimed in the declaration, and such excess is capable of exact computation, the proper practice on appeal is, to permit the judgment creditor to file a remission of the excess, and if such is done, to affirm the judgment as to the residue; otherwise to reverse the judgment and order a new trial. *Orr* v. *Hopkins*, 157.
20. COURTS HAVE NO AUTHORITY, UNDER SECTION 813 OF THE CODE OF CIVIL PROCEDURE, TO REVIVE A JUDGMENT rendered in favor of a partnership, and continue the same in the names of the surviving partners, and issue execution thereon in such names after more than six years have elapsed since the rendition of the judgment. *Boyd* v. *Platner*, 798.
21. AFTER JUDGMENT HAS BEEN RENDERED AGAINST A PRISONER AND HE HAS BEEN COMMITTED to jail thereunder, the court has no power, even during the same term, to revise such judgment and increase the sentence imposed. *State of Oregon* v. *Cannon*, 836.
22. DECREE DIRECTING SALE OF STOCK SUBJECT TO INJUNCTION.—In an action to foreclose a lien upon certain mining property and certain stock, the sale of which is restrained by an existing injunction, there is no error in a decree which provides for the sale of the mining property, and if a deficiency then exists, that the plaintiff may, upon notice to the defendant, apply to the court for an order directing the sale of the stock, subject to the injunction, and the application of the proceeds of said sale to the payment of said deficiency, and that until such order no process issue for the sale of such stock. *Allenberg* v. *Zellerbach*, 777.
23. WHERE A MAP OR OTHER PAPER IS REFERRED TO IN A JUDGMENT as a material part of it, it should be identified by the judgment and made a part of it. It should not be referred to as a paper recorded elsewhere. *Emeric* v. *Alvarado*, 708.

See APPEAL, 5–7, 14; ATTACHMENT, 5, 6; COSTS, 2–4; CRIMINAL LAW, 1, 6, 14; DIVORCE, 3, 7, 10; EQUITY, 2; GROWING CROPS, 1; HUSBAND AND WIFE, 4; INJUNCTION, 2, 5; PARTITION, 1–4; PARTNERSHIP, 7; SUMMONS, 5–9; WRIT OF ERROR, 1.

JUDGMENT ROLL.

See APPEAL, 6; GUARDIAN AD LITEM, 1.

JURISDICTION.

See ARBITRATION AND AWARD, 2–4; BOARD OF HARBOR COMMISSIONERS, 1; CONSTITUTIONAL LAW, 6; CORPORATIONS, 17; DIVORCE, 3–5; EMINENT DOMAIN, 1; EQUITY, 1, 3; ESTATES OF DECEASED PERSONS, 1, 2; HABEAS CORPUS, 3–7; HOMESTEAD, 1; INDIANS, 1; INSOLVENCY, 1; JUDGMENTS, 1–6; JUSTICES' COURTS, 1; LIENS, 1, 2; REMOVAL OF CAUSES, 7; SPECIFIC PERFORMANCE, 1; SUMMONS, 4–7; WARRANTS, 2.

JURY.

1. A GRAND JUROR CAN NOT BE COMPELLED TO TESTIFY, under sections 903, 920, and 926 of the penal code, as to how he voted with respect to the finding of a particular indictment; nor is such testimony permissible under section 995 of the penal code, which authorizes a motion to set aside an indictment where it has not been "found" as prescribed by such code. *Ex parte Sontag*, 588.
2. GRAND JURY, WHILE ENGAGED IN THE DISCHARGE OF ITS DUTIES, is a component part of the court with which it is connected. *In re Tyler*, 337.
3. JUROR, DISQUALIFICATION OF.—Impressions, or qualified and conditional opinions formed upon reports, which easily yield to the evidence of witnesses having personal knowledge of the facts and testifying under oath, constitute no valid objection to a juror. *People* v. *O'Loughlin*, 164.
4. BUT IF THE JUROR'S MIND IS CLOSED AGAINST AND IS IN OPPOSITION to the truth as it may be related by the witnesses, resists its force, and perverts the judgment, then such juror is disqualified for having "formed an unqualified opinion." *Id.*
5. IN CLOSELY BALANCED CASES, MUCH WEIGHT SHOULD BE GIVEN to the judgment of the trial court before whom the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized. *Id.*
6. JUROR, PEREMPTORY CHALLENGE OF.—One of several defendants, jointly indicted and on trial, can not for himself alone peremptorily challenge a juror; and the same rule applies where all the defendants, jointly challenging, have exhausted their challenges under an act of congress, even though they claim the right to severally challenge under a territorial statute. *Id.*
7. AN OBJECTION TO A JUROR ON THE GROUND OF GENERAL OR ABSOLUTE DISQUALIFICATION, under the statute, differs from an objection on the ground of bias merely. The latter is addressed to the sound discretion of the trial judge; while under the former, if sustained by the evidence, the rejection of the juror becomes mandatory by an arbitrary rule of law. *Territory* v. *Lopez*, 821.
8. ONE NOT THE HEAD OF A FAMILY IS NOT QUALIFIED TO ACT AS A JUROR.—As to what constitutes a head of a family, *quære*. But one of two equal partners living together in the same house, and under a contract with their employees by which they were to board and lodge them at their house, and all partners and employees were to eat at the same table, is not such head of a family within the meaning of the statute. *Id.*
9. RECEIVING A VERDICT ON SUNDAY.—The act of the trial court in permitting the verdict of the jury in a criminal case to be rendered and received on Sunday is not error. *Territory of New Mexico* v. *Nichols*, 668.
10. SEPARATION OF THE JURY.—The fact that the jury, on the trial of a prisoner charged with murder, after having the case submitted to them, and being sent out to deliberate upon their verdict, separated without the permission of the court and mingled with the people, and afterwards reassembled, came into court, and returned a sealed verdict of guilty, is not a sufficient ground for setting aside such verdict, when it affirmatively appears from the record that the prisoner was not prejudiced by the proceeding. *Id.*
11. THE SAME.—The record showed that the jury agreed upon their verdict at about four o'clock in the morning; that they wrote it out and each juror signed it; in this condition it was placed in an envelope, sealed, and taken in charge by the foreman of the jury; that the jurors then separated and reassembled at the court-house at eight o'clock the same morning and returned their verdict to the court; that the verdict was not in any way changed after the jury separated, but the verdict which they agreed to, signed, sealed up in the envelope, and delivered to their foreman, was the same verdict upon which they were polled. *Held*, that the refusal of the trial court to set aside the verdict upon these facts was not error. *Id.*
12. WHERE THE EVIDENCE IN REGARD TO A FACT IN ISSUE IS CONFLICTING, the jury should determine such fact, and with their determination the court will not interfere. *Sacalaris* v. *Eureka & Palisade R. R. Co.*, 398.

See CHATTEL MORTGAGE, 1; CONTEMPT, 1; CORPORATIONS, 14, 16.

JUSTICES' COURTS.

1. NO INTENDMENTS CAN BE PRESUMED IN FAVOR OF THE JURISDICTION OF A JUSTICE OF THE PEACE, but each step towards its acquirement must be affirmatively shown. *Victor Mill and Mining Co.* v. *Justice's Court*, 299.
2. SECTIONS 1093 TO 1097, BOTH INCLUSIVE, OF THE CIVIL PRACTICE ACT, relating to service of summons, are applicable to justices' courts. *Id.*

3. ORDER OF A JUSTICE OF THE PEACE DENYING A MOTION TO SET ASIDE AN EXECUTION SALE OF LAND will be presumed to be correct unless the contrary appears. The party aggrieved by such order could have the action of the justice's court reviewed by the superior court on appeal from the judgment. *Peterson* v. *Weissbein & Co.*, 853.

See CORPORATIONS, 17; MANDAMUS, 3.

LACHES.

1. LACHES—STATUTE OF LIMITATIONS.—The defense of laches, neglect, or acquiescence is peculiar to equity courts, and will been forced in proper cases. No formal plea of the statute of limitations is necessary to raise this defense in a court of equity. It may arise upon the bill as presented to the court, or upon the case as made by the complainant. *Pratt* v. *California Min. Co.*, 87.

2. DILIGENCE IN PROSECUTING DEMAND—CHARACTER OF PROPERTY INVOLVED.—Where property is of a speculative, fluctuating value, parties are held to a stricter diligence in the assertion of alleged rights therein than where the property involved is of a value fixed, permanent, and little changeable. *Id.*

3. NEITHER THE DEFENSE OF THE STATUTE OF LIMITATIONS NOR THAT OF LACHES can be pleaded against the United States, although, as a general rule, whenever the government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. *U. S.* v. *Southern Col. etc. Co.*, 11.

4. COURTS OF EQUITY MAY REFUSE TO ENTERTAIN A CONTROVERSY when the lapse of time since the cause of action accrued is so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead, and the proofs lost or destroyed. *Id.*

See ACQUIESCENCE, 1.

LAKES.

See WATER RIGHTS.

LANDLORD AND TENANT.

1. DESTRUCTION OF PREMISES, WHEN TERMINATES OBLIGATION TO PAY RENT.—The doctrine of the common law is, that when lands and buildings are leased, and the tenant expressly covenants, without limitation or reservation, to pay rent for a term of years, he is not released from that obligation by the destruction of the building leased by accidental fire. *Harrington* v. *Watson*, 59.

2. EXCEPTION TO THIS RULE EXISTS WHEN THE LEASE IS OF AN UPPER STORY or basement, or an apartment in a building, founded upon the idea that it is not the intention of the lease to grant any interest in the land beyond that connected with the enjoyment of the room demised, and when this is destroyed by accidental fire, there is nothing upon which the demise can operate, and the lease terminates with the destruction of the thing rented. *Id.*

3. LEASES MUST BE CONSTRUED ACCORDING TO THE INTENTION of the parties, and with reference to the subject-matter. *Id.*

4. LEASE—COVENANT OF.—The execution of a lease for real estate implies a covenant to lessee for quiet enjoyment during the term. *Owens* v. *Wight*, 541.

5. SAME—REMEDY OF LESSEE.—In case of entry upon the demised premises by the lessor during the term, the remedy of the lessee is in damages by suit at law for breach of covenant, and not by action in equity for an accounting. *Id.*

6. FINDING THAT A TENANT WAS AUTHORIZED BY HIS LANDLORD TO MAKE CERTAIN REPAIRS to the leased premises held not to be supported by the evidence. *Savings and Loan Society* v. *Gerichten*, 591.

LARCENY.

See CRIMINAL LAW, 15–18.

LAUNDRY ORDINANCE.

1. LAUNDRY ORDINANCE—VALIDITY OF.—The provisions of the ordinance of the city and county of San Francisco, approved June 25, 1883, declaring it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are cleansed for hire, within certain named limits, with-

out having first obtained a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of fire wardens that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property; and providing that no person or persons owning or employed in such laundries shall wash or iron clothes between the hours of 10 o'clock P. M. and 6 o'clock A. M., nor upon any portion of that day known as Sunday, are not in conflict with the fourteenth amendment of the constitution of the United States, nor with section 1 of article 1 of the constitution of California, guaranteeing to all men the inalienable right of acquiring, possessing, and protecting property, and pursuing and obtaining happiness; nor with section 11 of the same article, declaring that all laws of a general nature shall have a uniform operation; nor with section 21 of the same article, declaring that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens. *Ex parte Moynier*, 782.

LAWSON on Expert and Opinion Evidence, 174.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILLS, 6.

LIENS.

1. MECHANICS' LIENS—JURISDICTION—ASSIGNMENT.—In actions, begun in the United States circuit court by an assignee to foreclose mechanics' liens, the jurisdiction of the court as to all of the original lien claimants, whose liens are sought to be enforced, must be affirmatively shown by the bill of complaint. *Hampton* v. *Truckee Canal Co.*, 17.
2. WHERE IT APPEARS FROM THE BILL THAT ANY OF THE ORIGINAL LIEN HOLDERS, by reason of their citizenship, could not maintain an action in this court to foreclose or enforce their liens, the bill must be dismissed for want of jurisdiction. *Id.*
3. LIEN OF A MECHANIC CAN ONLY BE MAINTAINED BY A SUBSTANTIAL OBSERVANCE OF, and compliance with, the provisions of the statute; and omissions so to do can not be aided by any averments in the complaint, or by extrinsic evidence. *Malter* v. *Falcon Mining Co.*, 514.
4. FAILURE TO STATE IN THE NOTICE OF A MECHANIC'S LIEN THE NAME OF THE OWNER of the building against which the lien is sought to be enforced, as required by statute, is fatal to the existence of such lien. The name of such owner should be stated in a direct, clear, and positive manner, and not inferentially. *Id.*
5. A VENDOR'S LIEN EXISTS IN FAVOR OF A PARTNER on his share of the partnership real estate which he has conveyed to his copartner, and the same may be enforced against the estate of the latter, in the absence of fraud. *Reese* v. *Kinkead*, 386.
6. LIEN OF AN ATTACHING CREDITOR IS SPECIFIC, AND IS NOT MERGED in the judgment until a transcript of the judgment docket is filed in the office of the county recorder. No time is limited by law for filing such transcript, and it is optional with the attaching creditor to do so or not. *Emery* v. *Yount*, 499.
7. LIEN OF A JUDGMENT CREDITOR OBTAINED BY FILING A TRANSCRIPT OF HIS JUDGMENT extends to all the reality of the debtor not exempt from execution, unattached as well as attached. Such lien takes precedence over subsequent purchasers or encumbrancers; but if such transcript is not recorded, the rights of *bona fide* purchasers or encumbrancers of the debtor's realty, prior to execution levy thereon, are in no way affected by such judgment. *Id.*

See FRAUD, 6; JUDGMENT, 3.

LIFE INSURANCE.

1. Insurable interest in life of mother-in-law (note), 176.

See CORPORATIONS, 17.

LOCATION OF MINE.

See MINES AND MINING, 2–14, 21.

LOST INSTRUMENTS.
See EVIDENCE, 40.

MAIL.
See OBSTRUCTING THE MAIL.

MALICE.
See CRIMINAL LAW, 8–10.

MALICIOUS PROSECUTION.

1. QUESTION AS TO THE WANT OF PROBABLE CAUSE, IN AN ACTION FOR MALICIOUS PROSECUTION, is a mixed question of law and fact: of fact for the jury, if there is a conflict of evidence, under proper instructions by the court; and of law for the court, if the underlying facts are admitted or uncontroverted. *Hynes* v. *Nelson*, 473.
2. PROBABLE CAUSE FOR AN ARREST EXISTS WHERE THE DEFENDANT BELIEVED THE FACTS CHARGED AGAINST THE PLAINTIFF, and, acting upon such belief, consulted his counsel and was advised by him that such facts constituted a crime, and that he might and ought to have the plaintiff arrested. *Id.*

MANDAMUS.

1. A PROVISION IN THE CITY CHARTER OF SACRAMENTO PROHIBITING ANY SUIT or actions against the city upon any bonds which had been issued under its former charter, is no defense to a proceeding by *mandamus* against the treasurer of such city to compel him to pay the interest coupons on certain bonds issued by such city under the authority of its charter granted in April, 1858, the payment of which was a duty enjoined upon such treasurer by the provisions of such charter. *Meyer* v. *Porter*, 874.
2. IT IS NO DEFENSE TO SUCH PROCEEDING, BROUGHT BY AN INDIVIDUAL BONDHOLDER, that such coupons have never been presented to the board of trustees for audit and examination, nor the fact that there are other creditors interested in the fund provided for their payment who have not demanded payment. *Id.*
3. A WRIT OF MANDATE MAY BE ISSUED by the superior court to compel a justice of the peace to issue an execution in favor of a judgment creditor who is entitled to the same. The issuance of such execution by the justice calls for the exercise of a ministerial function only, and is a duty especially enjoined upon him by law, resulting from his office. *Hamilton* v. *Tutt*, 858.

See APPEAL, 1; WARRANTS, 1, 4.

MAP, INFRINGEMENT OF.
See COPYRIGHT, 3.

MARITIME LAW.
See ADMIRALTY.

MARRIED WOMEN.

1. A MARRIED WOMAN WHO HOLDS THE TITLE TO HER SEPARATE PROPERTY in her own name may mortgage the same in such name. *Rickards* v. *Hutchinson*, 659.

See HUSBAND AND WIFE.

MASTER AND SERVANT.
See NEGLIGENCE, 1–3, 7, 8, 11, 12.

MEASURE OR DAMAGES.
See DAMAGES.

MECHANICS' LIEN.
See LIENS, 1–4.

MEMORANDUM.

See EVIDENCE, 44, 45.

MEXICAN GRANTS.

1. SURVEYOR GENERAL OF NEW MEXICO, UNDER THE ACT OF CONGRESS of July 22, 1854 (10 U. S. Stat. 309), is clothed with judicial powers and duties with reference to Mexican and Spanish grants of land made prior to the acquisition of the territory by the United States. *Whitney* v. *McAfee*, 162.
2. COURTS HAVE NO AUTHORITY TO REVIEW, REVERSE, OR MODIFY ANY DECISION OF THE SURVEYOR GENERAL, as to the validity or invalidity of such grant, made in a case before him. Such power rests with congress alone, and until reversed or modified by congress, any such decision of the surveyor general is binding upon the courts, and must be regarded as *res adjudicata*. *Id.*
3. REPORT OF THE SURVEYOR GENERAL, UNDER THE ACT OF JULY 22, 1854, PRONOUNCING VALID a Mexican grant, operates so as to segregate from the public domain the lands covered by such grant, and to except and reserve them from the operation of the homestead and other general laws of the United States providing for the disposal of the public domain, and pending the final action of congress on such decision, to vest by necessary implication in the grantee, and those claiming under him, the exclusive right of possession in and to the entire tract covered by the grant as reported on. *Id.*
4. THE PUBLICATION AND APPROVAL BY THE SURVEYOR GENERAL OF A PLAT AND SURVEY of a Mexican grant, under the act of congress of June 14, 1860, in the absence of an application to have the same returned to the district court, has the same effect in law "as if a patent for the land so surveyed had been issued by the United States." After that the grant was in no sense *sub judice*. *Southern P. R. R. Co.* v. *Garcia*, 586.
5. A PATENT FOR LANDS PREVIOUSLY WITHDRAWN FROM SALE, IF AT THE TIME OF WITHDRAWAL the same were within the exterior limits of a Mexican grant *sub judice*, is invalid. *Id.*
6. GRANT BY THE MEXICAN GOVERNMENT TO THE "HEREDEROS" OF A DECEASED TESTATOR.—Under the Spanish and Mexican law an heir (*heredero*) could be instituted by will, if designated therein by apt words, so that it can be perceived who is meant. And where, in the proceedings to obtain a grant of land, the Mexican governor declares that a certain deceased testator was the lawful owner of the land, and by his death his successors (*herederos*) are lawful owners of the same, and directs that a title in conformity with this view be delivered and handed over to the testamentary executor of said deceased, for the ends required, the grant issued to such successors (*herederos*) will be held to have issued to the successors as established by the will of the testator. The governor had power to make such grant under the decree of 1824 and the regulations of 1828. *Emeric* v. *Alvarado*, 708.

See PARTITION, 1-3, 5, 6.

MINES AND MINING.

1. A GRANT OF AN UNDIVIDED ONE-THIRD INTEREST IN A PIECE OF MINING GROUND, together with the water rights, reservoirs, and tail-races belonging to the same, expressly conditioned that such grant should convey no other rights to the grantee except a mining right, does not make the grantee a coparcener, joint tenant, or tenant in common with the grantor. It simply conveys to him a right to enter upon and occupy the land for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. Such right is not capable of partition. *Smith* v. *Cooley*, 855.
2. FINDING OF THE COURT THAT THE NOTICE OF LOCATION OF A MINING CLAIM CONTAINED A SUFFICIENT DESCRIPTION of the location, by reference to natural objects and permanent and well-known monuments, to identify the same, will be presumed to be correct when the record contains no copy of the notice. *Eilers* v. *Boatman*, 632.
3. LOCATION OF A MINING CLAIM IS SUFFICIENTLY DEFINITE WHEN THE ACCESSIBLE BOUNDARIES THEREOF are plainly marked on the ground by stakes and natural objects, and the inaccessible boundaries described by courses and distances sufficient to point out to any one honestly endeavoring to ascertain where such boundaries were. *Id.*
4. RIGHT OF THE OCCUPANTS OF MINING GROUNDS ON THE PUBLIC DOMAIN WILL BE UPHELD, when the appropriation thereof has been made by means which substantially comply with the law, and which in view of the surrounding circumstances, convey

notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private person. *Id.*

5. LOCATOR OF A MINING CLAIM, IN MARKING HIS CLAIM ON THE GROUND so that its boundaries can be be readily traced, is not held to absolute exactness in running the lines or in fixing the corner or other posts. The difference of a few feet or a few points between the monuments fixed by an actual survey for a patent and those fixed at the time of location is immaterial, and does not affect the validity of the original location. *Id.*
6. THE LOCATION OF A VEIN OR LODE MADE UPON THE SURFACE WHERE THE VEIN OR LODE FINDS ITS APEX will not be defeated by the secret, underground workings and possession by parties having no possession of or right to the surface embracing it. The possession of a vein recognized by the mining laws, and to which protection is given, is a possession by one who holds the surface where the vein makes its apex. *Id.*
7. AS BETWEEN TWO LOCATORS, AND AS AFFECTING THEIR RIGHTS ONLY, ONE CAN NOT LOCATE a mining claim on ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied. *Id.*
8. EXPRESS FINDING, IN AN ACTION TO DETERMINE THE CONFLICTING RIGHTS OF TWO ADVERSE CLAIMANTS of a mining claim, that the defendant was in possession of the same at the time suit was commenced is not necessary where the facts found establish the defendant's right to the possession, and that he had done all that was required by law in order to inaugurate a title to and hold a valid mining claim, and that he was constructively, if not actually, in possession. *Id.*
9. LOCATION OF MINING CLAIM—END STAKES.—The statute of Colorado, R. S. 630, affords no support to one who, in locating his claim, fails to set the proper stakes at the end of the claim, when the proper position for them was not inaccessible, but merely difficult of access, or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are subsequently set. *Crœsus Mining etc. Co.* v. *Colorado Land etc. Co.*, 451.
10. SAME—CHANGE OF LINES.—The locator of a mining claim can not, after the location, change the lines of his claim so as to take in other ground, when such change will interfere with the previously accrued rights of others. *Id.*
11. ALIEN—RIGHT TO LOCATE MINING CLAIM.—Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands. *Id.*
12. SAME—STATE COURT MAY NATURALIZE.—The necessary oath declaratory of intention by an alien to become a citizen of the United States, may be administered in the courts of record of the state. One who has so declared his intention to become a citizen may make a valid location of a mining claim. *Id.*
13. ADVERSE CLAIMANT, IN A SUIT BROUGHT AGAINST AN APPLICANT FOR A PATENT, MAY SHOW that the location of the claim applied for is invalid, for the reason that the ground contained therein is embraced by a third claim, in which neither party has or claims any interest. *Harrington* v. *Chambers*, 63.
14. VALID LOCATION OF A MINING CLAIM MAY BE MADE, whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following them, in the expectation of finding ore. *Id.*
15. MINERAL VEIN, WHERE MAY BE SHOWN TO EXIST.—Where the validity of a claim depends upon whether a lode has been discovered and located, evidence that such claim contains a vein within its boundaries, at places other than at the discovery point, is admissible. *Id.*
16. DEFINITION OF LODE AND VEIN.—The terms "lode" and "vein," as used in the acts of congress in reference to the location of mining claims, are such "lodes" and "veins" as are so called by miners. *Id.*
17. EXPERT TESTIMONY IS ADMISSIBLE TO SHOW THAT A CLAIM CONTAINED SUCH A VEIN as a miner discovering it would be likely to follow, with the reasonable expectation of finding paying ore. *Id.*
18. MINING CLAIM, WORK UPON, WHAT CONSTITUTES.—Work done outside of a mining claim, if done for the purpose and as a means of developing the same, is as available for holding the claim as if done within the boundaries of the claim itself. One general system of work may be devised, well adapted and intended to develop several contiguous claims, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it. *Id.*
19. WORK ON PLACER CLAIMS.—The provisions of the United States revised statutes requiring a certain amount of work to be performed or improvements made during

each year on each mining claim located after May 10, 1872, and until a patent issues therefor, apply as well to that class of claims known as placer claims as to the class known as lode or vein claims. *Carney* v. *Arizona Mining Co.*, 851.

20. IN AN ACTION OF EJECTMENT TO RECOVER THE POSSESSION OF A MINING CLAIM, where the defendant relies upon a forfeiture by plaintiff, for failure to do the necessary work, as required by the act of congress (R. S., sec. 2326), such forfeiture need not be specially pleaded. *Steele* v. *Gold Lead Gold and Silver Mining Co.*, 363.

21. A PRIOR LOCATOR OF A MINING CLAIM, WHO HAS REGULARLY APPLIED FOR A PATENT, need not, in order to preserve his rights, protest against any subsequent application for the same ground, while his own application is pending in the land department; and, in a controversy between such applicants, the prior locator is entitled to be heard and have his rights determined in the proper forum where they are questioned, whether it be in the state courts or in the land office. *Id.*

See EVIDENCE, 17; NEGLIGENCE, 12; NUISANCE, 1c, 2, 4, 7, 8, 10; PARTNERSHIP, 1–4.

MISTAKE.

1. SUIT TO REFORM A CONTRACT.—The evidence necessary to support a bill to reform a contract must show certainly in what the mistake consists, and that it was mutual. *Spare* v. *Home Mut. Ins. Co.*, 542.

2. IDEM.—The owners of a warehouse applied to an insurance company, of which they were agents to receive and transmit applications for insurance, for a policy on the same as the property of their judgment creditor, and the company, knowing nothing to the contrary, issued the policy accordingly, and upon the destruction of the property by fire, refused to pay the insurance, on the ground that the assured had no insurable interest therein; the assured having failed in an action on the policy to recover the insurance, on the ground that it did not appear but that his debt could be otherwise made out of the remaining property of his debtors (8 Saw. 618), brought a suit in equity to reform the policy, alleging that by mistake it was issued in the name of the creditor, as owner, when it should have been issued in the name of the debtor, and for his benefit, in case of loss: *Held*, that the evidence did not support the allegation of mistake; but, on the contrary, showed that the company was induced to issue the policy by the false representation of the owners and applicant, on account of which deception it was entitled to rescind the contract or treat it as null. *Id.*

See EVIDENCE, 46.

MORTGAGE.

1. MORTGAGE EXECUTED BY A RAILWAY COMPANY ON ITS ROAD-BED, rolling-stock, and buildings, together with all lands which are or may be necessary for the use and operation thereof, and also "all rights, privileges, franchises, and property whatever, now belonging, or hereafter to be acquired by" said company, will be construed to convey only such property as was or would be useful or necessary in the construction, operation, preservation, or security of the railroad mortgaged, and not lands which were to be used for other purposes. *State* v. *Glenn*, 50.

2. A DEED ABSOLUTE IN FORM, GIVEN MERELY TO SECURE A DEBT, is to be deemed a mortgage, as between the parties thereto, and as to subsequent purchasers with notice; and parol evidence of such facts is admissible in actions at law as well as in equity. *Taylor* v. *McLain*, 585, 586.

3. A FINDING OF THE LOWER COURT THAT A CERTAIN CONVEYANCE OF LAND, ABSOLUTE ON ITS FACE, and a bill of sale of personal property, were intended as mortgages to secure a loan made by the grantee to the grantors, reviewed, and held to be supported by the evidence. *Miller* v. *Ausenig*, 839.

4. A DEFENDANT IN AN ACTION TO HAVE A DEED ABSOLUTE IN FORM DECLARED A MORTGAGE, and to redeem the same, who asserts, by cross-complaint, that such deed is not a mortgage but a conveyance indefeasible, may ask, and if he maintains his averments by proof or if the plaintiff fails to establish his case is entitled to, a judgment for possession of the premises. *Taylor* v. *McLain*, 585, 586.

5. WHERE, ON A FORMER APPEAL, THE COURT HAS HELD THAT THE ACTION WAS ONE TO REDEEM a mortgage, it will hold the same on a subsequent appeal, when no changes have been made in the pleadings. *Id.*

6. PAROL EVIDENCE TO VARY THE DISCHARGE OF A MORTGAGE.—In an action to foreclose a mortgage which had been fully and completely discharged and canceled on the record by the mortgagee, parol evidence is inadmissible to show that such discharge was merely conditional. *Ivinson* v. *Hutton*, 703.

7. THE SAME.—Even if such evidence were admissible, it would have to be as full, clear, positive, and satisfactory as if it were offered for the purpose of reforming the discharge as entered on the record for fraud, accident, or mistake. The facts of the case reviewed, and held not to comply with such requirements. *Id.*

8. A DEBT SECURED BY MORTGAGE IS NOT NECESSARILY RELEASED by a discharge of the mortgage on the record. *Id.*

9. A DECREE OF FORECLOSURE SHOULD DIRECT A SALE OF THE PARTICULAR ESTATE or interest of the mortgagor in the mortgaged premises, as the same has been described in the mortgage. If such decree directs the sale of any greater or less estate than that so described, it is erroneous and should be corrected on motion. *Schwartz* v. *Palm*, 852.

10. A DECREE OF FORECLOSURE WHICH DIRECTS THE SALE OF ALL the interest which the mortgagor had in the premises described in the mortgage on the date when the same was given, is erroneous when the mortgage described the estate mortgaged as an "undivided fourth interest, being all the interest which the mortgagor owns." *Id.*

11. AN AVERMENT AND FINDING THAT AT THE DATE OF A MORTGAGE THE MORTGAGOR WAS IN POSSESSION of a certain tract of land, described by metes and bounds, is not supported by evidence of a mortgage in which the mortgaged premises are described as "all of the mortgagor's right, title, and interest in and to nine lots of land in block number 113, as per map of Clinton, said property being now in possession of" the mortgagor. *Borel* v. *Donohue*, 347.

12. SALE OF MORTGAGED PREMISES WILL NOT BE STAYED, PENDING AN APPEAL from the judgment against a subsequent purchaser from the mortgagor in possession, unless an undertaking be filed for the payment of the deficiency, if any shall arise on said sale. The rule is otherwise if the judgment is against such a purchaser not in possession. *Home Loan Association* v. *Wilkins*, 119.

13. IMPLIED PROMISE—LIABILITY EX ÆQUO ET BONO—VALUABLE CONSIDERATION.—Where in the final judgment in a suit for the foreclosure of a mortgage, the court, with the consent of the plaintiff—the mortgagee—allows to the defendant—the mortgagor—as a credit upon or part payment of the mortgage debt, a sum which had not actually been paid, and which the mortgagee was not, as between said parties, equitably bound to pay, but which the mortgagor himself was equitably bound to pay to a third person, and which was therefore a virtual advance by the mortgagee to the mortgagor, and the final decree so made is executed by a sale of the mortgaged premises in satisfaction of the debt so reduced, so that the mortgagor obtains and enjoys the full benefit of the credit as a virtual advance, the mortgagor defendant thereby becomes bound *ex æquo et bono* to refund to the mortgagee plaintiff the amount so credited, and the law implies a promise on his part to make such repayment, which is a valuable consideration sufficient to sustain and validate a second mortgage, executed previously to the rendition of said judgment, by the same mortgagor—defendant—to the same mortgagee—plaintiff—to secure the repayment of the said sum so finally credited. And it makes no difference with this result that at the time of rendering said final judgment, the mortgagor defendant refused to consent to said credit, since his subsequent acceptance of the judgment and enjoyment of its benefits was a waiver of his previous objection, and was itself a legal consent. *De Celis* v. *Porter*, 575.

14. STATUTE OF LIMITATIONS—CAUSE OF ACTION.—In such a case, the liability to repay the amount of said credit, and the cause of action to recover the same, arose and accrued at the date of the rendition of the final judgment when the credit was made, and an action begun within two years from that date is not barred by the statute of limitations. *Id.*

15. IN AN ACTION TO REDEEM A MORTGAGE, WHERE MORE THAN FOUR YEARS HAVE ELAPSED since the maturity of the indebtedness, a decree quieting the plaintiffs' title and possession, and enjoining the defendant from asserting any claim to the premises, is erroneous, when not authorized by the plaintiffs' pleadings. *Taylor* v. *McLain*, 585, 586.

See CHATTEL MORTGAGE; DIVORCE, 7; GROWING CROPS, 1; MARRIED WOMEN, 1; SURETIES, 6.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 1–8; STREETS, 3.

MUNICIPAL COURT OF APPEALS.

See PLEADING AND PRACTICE, 18.

MURDER.

See CRIMINAL LAW, 6–14; EVIDENCE, 26–31; INDIANS, 1; INSTRUCTIONS, 3.

NAVIGABLE STREAMS.

See WATER RIGHTS, 1–6.

NEGLIGENCE.

1. INJURY CAUSED BY NEGLIGENCE OF FELLOW-SERVANTS.—The rule first suggested in Priestly v. Fowler, 3 Mee. & W. (1837), 1, that a master who has exercised due care and skill in the employment and retention of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision, so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions, under the direction and control of local bosses, superintendents, or heads of departments, who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen, and to provide the necessary material and appliances for their convenient and safe employment. *Gilmore* v. *Northern Pacific Railway Company*, 455.
2. WHEN FELLOW-SERVANT STANDS FOR MASTER.—It seems well established that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow-servant: 1. When the latter, having authority over the former, orders him to do an act not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and he is injured in so doing. 2. Where the master has charged the latter with the duty of providing proper material and appliances for carrying on a work in which he is personally engaged with the former or not, and by the neglect to do so he is injured. *Id.*
3. CASE IN JUDGMENT.—In February, 1883, the Northern Pacific Railway was engaged in constructing its road through western Montana, and had many gangs of men, numbering not less than fifty each, at work on the line of the route, at from three to five miles apart, under the control and direction of foremen or local bosses, with the power to employ and discharge, subject themselves to the control of a general superintendent and assistant, who passed along the route and inspected the camps at certain periods; some of these gangs used giant-powder for blasting the rocks and frozen earth, and in such case the foreman was charged specially with the duty of handling the powder and thawing it when frozen; the general superintendent was aware of the danger of thawing powder before a fire, and had given general notice not to do it, and provided a safe appliance, called a "heater," for the purpose, subject to the requisition of the local boss; the plaintiff was employed as a common laborer in one of these gangs where powder was always thawed without a "heater" before the fire, and while assisting in so thawing powder by direction of the local boss, was injured by its explosion. *Held*, that the local boss, so far, stood in the place of the defendant, and that the neglect of the former to obtain and use the proper appliance for thawing powder, and his directing the plaintiff to assist in thawing powder without the security of such appliance, were wrongful acts, for which the defendant is responsible to the plaintiff so far as he was injured thereby. *Id.*
4. WHERE A RAILROAD COMPANY HAS PROVIDED A PLATFORM ON ONE SIDE OF ITS TRACK on which passengers may alight, an attempt of a passenger to get off on the other side is not negligence *per se*. *McQuilkin* v. *Central Pacific R. R. Co.*, 479.
5. THE ACT OR OMISSION ON THE PART OF A PASSENGER, CLAIMED TO HAVE CONTRIBUTED TO THE INJURY complained of, must have direct relation to the act or omission charged to be negligence on the part of the carrier. Whether such act or omission was negligence, and whether such negligence was to any extent an immediate concurring cause of the injury, are matters to be decided by the jury. *Id.*
6. IF THE NEGLIGENCE OF THE PASSENGER CONTRIBUTED DIRECTLY OR PROXIMATELY TO THE INJURY COMPLAINED OF, no recovery can be had against the carrier, whatever may have been his negligence. It is not giving the defendant the benefit of this rule as to contributory negligence to charge the jury that the negligence of the plaintiff which contributed as a proximate cause to the injury, will prevent a recovery, provided the defendant has not been guilty of negligence. *Id.*

7. RAILROAD COMPANIES OWE A DUTY TO THEIR EMPLOYEES TO KEEP THE TRACKS OF THEIR RAILWAYS FREE from obstructions that would endanger the lives of the latter. The duty thus imposed is that of ordinary care, to be determined by the danger of the service, and proportioned to it, but such company neither warrants nor insures against defects. *Wilson* v. *Denver, South Park & Pacific R. R. Co.*, 595.
8. ALLEGATION THAT AN INJURY TO AN EMPLOYEE WAS OCCASIONED BY AN OBSTRUCTION OF THE TRACK does not make out a *prima facie* case of liability against a railroad company; but when it is further alleged that such obstruction was upon the track by reason of the negligence of the company, and that the employee was in the discharge of his duty, and exercising due care and skill at the time of the injury, such allegations are sufficient to constitute a *prima facie* case against the company. *Id.*
9. EXPRESS COMPANY IS LIABLE FOR LOSS RESULTING FROM THE FAILURE of its agent to seal a valuable package, if it were their custom so to do, or for negligence in receiving such package unsealed, and afterwards shipping it in such condition, if it were their custom not to receive such packages until sealed by the shipper. Nor can it escape from liability for such loss on the ground that it may have occurred on one of their connecting lines. *Overland Mail etc. Co.* v. *Carroll*, 281.
10. RAILROAD COMPANY MUST CONSTRUCT ITS WORKS, SUCH AS DITCHES FOR DRAINING WATER, with proper skill and care, having due regard to the features of the ground over which it passes, and must keep the same in repair; and it is liable for injuries resulting to an adjoining owner of land from failing so to do, although such injuries do not happen immediately after the completion of the work. *Davidson* v. *Oregon etc. R. R. Co.*, 421.
11. PLAINTIFF IN SUCH ACTION CAN NOT RECOVER IF HIS OWN WANT OF CARE or negligence in any degree contributed to the result complained of. It is no defense, however, if the plaintiff's act might have, or did, contribute to the injury. It must have been by his fault, not merely by his act. *Lopez* v. *Central Arizona Min. Co.*, 41.
12. OWNER OF A MINE WHO WORKS IT IN A DANGEROUS BUT THE ONLY PRACTICABLE MANNER, is not liable for injuries to an employee, caused by a fellow-servant in the course of the employment, if such employee had knowledge of the danger, unless the injury complained of resulted from the wrongful act, neglect, or default of the owner. *Id.*

See COMMON CARRIERS, 6–8; CORPORATIONS, 2, 3, 10, 12; PLEADING AND PRACTICE, 3.

NEGOTIABLE INSTRUMENTS.

1. PARTY TO A BILL OF EXCHANGE.—In a suit upon the following bill of exchange, duly protested for non-acceptance: "$10,000. Santa Fé, N. M., Nov. 25, 1876. Three days after sight, pay to the order of J. M. Luna & Bro. ten thousand dollars, and charge the same to the account of (signed) Max Lichtenthal, Ag't. To Messrs. Mohr & Mohr, Cincinnati, Ohio"—*held*, that the action can not be maintained on this bill against the defendant, Paul Mohr, as a drawer thereof, by means of parol evidence tending to show that in drawing said bill Max Lichtenthal acted as agent for the firm of Mohr & Mohr, the drawees thereof, that the bill was thus in reality drawn by said firm as drawers upon themselves, and that defendant was a member of said firm. *Luna* v. *Mohr*, 673.
2. PARTIES TO NEGOTIABLE INSTRUMENTS.—In general, a person can not be held liable as a party to a negotiable instrument where his name does not in any way appear on the instrument as such party. *Id.*
3. LIABILITY FOR THE ORIGINAL CONSIDERATION.—A person not liable on a negotiable instrument, because he is not a party thereto, may still be held liable in a suit brought, or upon a separate count, upon the original consideration for which the note or bill was given. *Id.*
4. EVIDENCE OF PAYMENT OF A PROMISSORY NOTE IN A MANNER AGREED UPON by the maker and payee at the time of the execution thereof, is admissible in an action thereon by a transferee, under a plea of payment. Such agreement as to the manner of payment is not void for want of consideration. *Jones* v. *Snow*, 465.
5. TERMS OF A PROMISSORY NOTE PROVIDING FOR THE PAYMENT OF EXCHANGE, where the instrument is made payable at a particular bank in a designated city, may be rejected as surplusage, and do not render the note non-negotiable by reason of the amount due thereon being uncertain. *Orr* v. *Hopkins*, 157.
6. NEGOTIABLE PROMISSORY NOTE IMPLIES A CONSIDERATION for the promise therein contained. *Id.*
7. DECLARATION ON A PROMISSORY NOTE, WHICH DESCRIBES SUCH INSTRUMENT as payable generally or absolutely, can not be supported by evidence of a note in which the place of payment is specifically designated. *Id.*

8. INADEQUACY OF CONSIDERATION IS NO DEFENSE TO AN ACTION ON A PROMISSORY NOTE unless there was fraud also on the part of the promisee. *Caldwell* v. *Ruddy*, 295.
9. A HOLDER OF A NOTE IS NOT EXCUSED FROM PRESENTING IT FOR PAYMENT, so as to charge the indorsers, by the fact that the maker of the note, before its maturity, notified the president of the bank in which it was left for collection that he would not be able to pay it at maturity. *Appelgarth* v. *Abbott*, 469.
10. MERE AUTHORITY TO EXECUTE A PROMISSORY NOTE DOES NOT INCLUDE authority to pay the same when it becomes due. *Luning* v. *Wise*, 138, 257.
11. PRESENTMENT OF A PROMISSORY NOTE FOR PAYMENT TO A JOINT MAKER THEREOF IS EXCUSED, if, at the time of the execution and maturity of the note, such maker resided in a state other than that in which payment should be made. *Id.*
12. INDORSEMENT OF A PROMISSORY NOTE IS PRESUMED TO HAVE BEEN MADE for a valuable consideration, and before maturity, in the absence of evidence to the contrary. *Id.*

See ACCOUNT STATED, 2; CORPORATIONS, 11; EVIDENCE, 7-11, 43; PLEADING AND PRACTICE, 8, 13, 14; SURETIES, 1, 6; WARRANTS, 1, 2.

NEW CITY HALL COMMISSIONERS.

See SAN FRANCISCO, 4.

NEW TRIAL.

1. MOTION FOR NEW TRIAL, WHEN MUST BE MADE.—The provisions of the compiled laws of Wyoming, sections 308 and 309, regulating the time within which motions for new trials may be filed, are mandatory, and the lower court can not extend such time upon the oral *ex parte* application of the party desiring to move. Unless such motion is made within the required time, an appeal therefrom will not be considered by the appellate court. *Kent* v. *Upton*, 700.
2. A PARTY INTENDING TO MOVE FOR A NEW TRIAL HAS TEN DAYS ALLOWED HIM BY STATUTE, AFTER THE SERVICE ON HIM of the notice of the filing of the findings and the entry of judgment, to give notice of such intention and serve his bill of exceptions; and an order of the court, made before such ten days have elapsed, extending the time within which such notice and service may be made for thirty days, will be construed as extending such time from the end of the period of ten days allowed him by statute. *Emeric* v. *Alvarado*, 708.
3. NOTICE OF MOTION FOR A NEW TRIAL IN AN ACTION TRIED BY A REFEREE, and subsequent proceedings instituted thereon, are ineffectual for any purpose if made before the date of filing the decision and judgment of the referee. *Harris* v. *Carraga*, 467.
4. WHERE THERE IS NOTHING IN THE TRANSCRIPT TO SHOW THAT ANY OBJECTION WAS MADE in the lower court to the hearing of a motion for new trial on the ground that the motion was made too late, the appellate court will presume that the time was extended by consent of the parties. *Patrick* v. *Morse*, 477.
5. AFFIDAVIT FOR A NEW TRIAL ON THE GROUND OF SURPRISE SHOULD BE MADE BY THE ATTORNEY of the beaten party, and not by his client. Such affidavit must show that the facts constituting the surprise had a material bearing upon the case, and that the verdict was mainly attributable to them. *Martin* v. *Hill*, 629.
6. AFFIDAVITS FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE must show that due diligence was used by the defeated party to procure such evidence for the trial; and the acts performed by such party must be particularly stated, so that the court may determine whether they constitute due diligence or not. The same amount of diligence is required of the defeated party, whether he be the real or only a nominal party to the action. *Pinschower* v. *Hanks*, 369.
7. DEFENSE OR QUESTION NOT MADE TO JURY.—Where a party has a defense to an action arising out of the testimony in the case, and omits to present it to the jury, but relies upon a defense involving a different, if not inconsistent, conclusion from the testimony, a new trial will not be granted to enable him to submit the case to another jury upon this untried question, unless it clearly appears from the evidence that he is entitled to a verdict on that ground, and then only upon the payment of the costs of the first trial. *McCune* v. *Northern Pacific Railway Company*, 461.
8. ERRORS ALLEGED TO HAVE OCCURRED ON THE TRIAL WILL NOT BE CONSIDERED by the appellate court, when the statement used on the motion for a new trial was not signed, when filed, either by the appellant or his attorney, or other person for him, in the manner required by statute. *Snow* v. *Crow*, 698.
9. APPLICATION FOR A NEW TRIAL, ON THE GROUNDS OF INSUFFICIENCY OF THE EVIDENCE to justify the findings of fact, conclusions of law, and judgment of the court,

and that the same were against law, and for errors of law occurring at the trial, must be made upon a statement prepared as the statute requires. *Simpson* v. *Ogg*, 303.

10. APPEAL FROM AN ORDER DENYING AN APPLICATION FOR A NEW TRIAL, made on such grounds, will be dismissed, unless the transcript contains a statement of the case, properly certified as to its correctness by the judge. *Id.*
11. ERRORS APPEARING IN THE JUDGMENT ROLL CAN NOT BE REVIEWED on an appeal from an order denying a motion for a new trial only. *Id.*
12. CONFLICTING CHARGE TO THE JURY, IF NOT PREJUDICIAL TO THE BEATEN PARTY, is not ground for a new trial. *Overland Mail etc. Co.* v. *Carroll*, 281.
13. NEW TRIAL WILL BE GRANTED WHEN THE JURY ARE INSTRUCTED to find upon a material fact concerning which no evidence has been introduced at the trial. *Tognini* v. *Hansen*, 146.
14. NEW TRIAL, WHEN NOT GRANTED WHERE EVIDENCE IS CONFLICTING.—Where the evidence is conflicting, an appellate court will not grant a new trial upon the ground that the findings are contrary to the evidence, unless the preponderance is so apparent and marked that the court can have no hesitancy in declaring that the particular finding under review is against the evidence. *Harrington et al.* v. *Chambers*, 63.
15. WHETHER AN APPELLATE COURT SHOULD GRANT A NEW TRIAL FOR AN ERROR in admitting evidence of a parol agreement between the parties when a written agreement was alleged, unless it is plain from the case that a different result would be reached on a new trial, *quære*. *Tweed* v. *Lowe*, 658.

See AMENDMENTS, 1; APPEAL, 7; JUDGMENT, 16–19; PARTIES, 5.

NONSUIT.

A NONSUIT MAY BE GRANTED AFTER THE EVIDENCE ON BOTH SIDES HAS BEEN HEARD, in a case where, if the motion for the same had been denied and a verdict found for the plaintiff, it would have been set aside as not supported by the evidence. Such practice, however, should be rarely resorted to, especially where the plaintiff has introduced evidence in support of all the averments of his complaint, and the materiality of establishing a further fact only appeared after the defendant had made out his affirmative defense. *Vanderford* v. *Foster*, 857.

NOTARIAL PROTEST.

See EVIDENCE, 42.

NOTICE.

See AGENT, 2; DEED, 7; ESTOPPEL, 4.

NUISANCE.

1. PUBLIC AND PRIVATE NUISANCE FROM MINING DEBRIS.—The Yuba river rises in the Sierra Nevada mountains, and after flowing in a westerly direction about twelve miles across the plain after leaving the foot-hills, joins the Feather. At the junction, within the angle of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles and empties into the Sacramento. These three rivers were originally navigable for steamboats and other vessels for more than one hundred and fifty miles from the ocean, at least as far as Marysville—the Sacramento being navigable for the largest-sized steamers. The defendants have for several years been and they are still engaged in hydraulic mining, to a very great extent, in the Sierra Nevada mountains, and have discharged and they are discharging their mining debris—rocks, pebbles, gravel, and sand—to a very large amount, into the head-waters of the Yuba, whence it is carried down, by the ordinary current and by floods, into the lower portions of that stream, and into the Feather and the Sacramento. The debris thus discharged has produced the following effects: It has filled up the natural channel of the Yuba above the level of its banks and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It has buried with sand and gravel and destroyed all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It is only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public expense by the property owners of the

county and inhabitants of the city, which levees continually and yearly require to be enlarged and strengthened to keep pace with the increase in the mass of debris thus sent down, at a great annual cost, defrayed by means of special taxation. It has polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It has filled to a large extent, and is filling up the bed and narrowing the channels of these rivers, and the navigable bays into which they flow, thereby lessening and injuring their navigability, and impeding and endangering their navigation. All these effects have been constantly increasing during the past few years, and their still further increase is threatened by the continuance of the defendants' said mining operations. *Held*, that these acts, unless authorized by some law, constitute a public and private nuisance, destructive, continuous, increasing, and threatening to continue, increase, and be still more destructive. *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 183.

2. SPECIAL INJURIES TO THE COMPLAINANT.—During all this time the complainant was and he now is owner in fee of a block of buildings in Marysville, in the business portion of the city, about five hundred feet from the levee on the Yuba. Originally the steamboat landing for the city was on the Yuba, nearly opposite to this block, but by reason of the filling up of that river its navigation has been prevented, and the landing is now in the Feather, three fourths of a mile distant from said block. By a break in the levee of the Yuba during one of its annual floods, the city of Marysville was inundated, the water stood several feet deep in this block, debris was deposited in it; its underpinning was washed out so that the roof fell in, and the repairs of these injuries cost between two thousand and three thousand dollars. The building is liable in the same manner to similar injuries from every flood in the river. The complainant, also, owns two farms, one of nine hundred and fifty-two acres abutting on the Feather a few miles below Marysville, upon which there was formerly a public steamboat landing for shipping and receiving freight and passengers, but which has become useless by the filling up of the river in front; the other of seven hundred and twenty acres abutting on the opposite bank of the Feather. Seventy-five acres of one of these tracts and fifty acres of the other have been completely buried and destroyed by the debris, and the remaining portions are only protected from destruction by the levees, which, on several occasions, have broken, and the lands have been damaged by water charged with debris, and they are in danger of being overflowed and injured in a similar manner from a breach of the levees at any flood. The value of the complainant's land has been depreciated from these causes; his access to the river from his farms for the purpose of shipping or receiving freights has been cut off; he has been obliged to pay an extraordinary, onerous, annual tax for the erection and maintenance of the levees to protect his property from the constantly increasing danger of loss or destruction. *Held*, that these facts constitute special injuries to the complainant, which entitle him to maintain a suit in equity to restrain the further commission of the public nuisance created by the defendants. *Id.*

3. SUIT BY A PRIVATE PERSON TO RESTRAIN A PUBLIC NUISANCE.—When a private person has sustained special injuries from a public nuisance, he thereby gains a standing in court which enables him to maintain a suit for such injury. In the suit so brought, the plaintiff acts on behalf of all others who are or may be injured, as a public prosecutor rather than on his own account. The court, in deciding such suit, has regard to the interests of the public, as well as to those of the plaintiff. *Id.*

4. SUCH NUISANCE NOT AUTHORIZED BY LEGISLATION.—The acts of defendants creating such a public and private nuisance are not authorized or justified by the legislation of congress recognizing, permitting, and regulating mining on the public lands of the United States, or on lands granted by the government to private owners (U. S. R. S., sec. 2338, act of 1866); or by statutes providing for the improvement of the navigable rivers of California, which recognize the injuries above described as existing facts (river and harbor bills of 1880 and 1882); or by the legislation of California regulating mining operations, or purporting to permit the condemnation of lands for the uses of miners (C. C. P., sec. 1238, subd. 5); or by the act of 1878 (sec. 1, subd. 8), concerning the Sacramento and San Joaquin rivers, and recognizing the injuries as above described from the mining debris. *Id.*

5. NUISANCES NOT AUTHORIZED BY IMPLICATION.—Under the provisions of the California civil code, section 3482, defining nuisances, acts otherwise constituting a nuisance can not be justified and legalized by implication but only by the express authority of some statute. *Id.*

6. SAME, IN SUIT BY A PRIVATE PERSON.—The same doctrine applies to a suit brought by a private person who has sustained special injuries from a public nuisance, as to a suit brought by the attorney-general, or by some corporate portion of the public. A public nuisance is not unlawful as to the whole public, and lawful as to its constituents; it is absolutely and wholly unlawful. *Id.*

7. POWERS OF THE STATE TO AUTHORIZE SUCH A NUISANCE.—A statute of the state of California expressly authorizing the acts of the defendants, and the injuries caused by them, would be in conflict with the fourteenth amendment of the United States constitution, and with similar provisions of the state constitution. Such legislation would either deprive the complainant and others of their property without due process of law, or would take or damage their property for alleged public use without compensation. *Id.*

8. NO PRESCRIPTIVE RIGHT ACQUIRED.—The defendants have acquired no right or title by presciption to commit or continue the nuisance complained of, whether regarded as a public or a private nuisance; there has been no acquiescence, either by the public or by complainant, in the acts of defendants as done under an adverse claim of right. *Id.*

9. NO PRESCRIPTION IN FAVOR OF A PUBLIC NUISANCE.—No right or title can be acquired by prescription to commit, or continue, a public nuisance. *Id.*

10. CUSTOMS OF MINERS.—The acts of defendants are not authorized by the "customs of miners" recognized by the legislation of California and of congress, which customs so recognized are only local, not general customs. A custom which authorized such acts, if it existed, would be "in conflict with the laws and constitution of the state," and would be illegal and void. *Id.*

See ACQUIESCENCE, 1; SAN FRANCISCO, 1.

OBSTRUCTING THE MAIL.

1. OBSTRUCTING THE PASSAGE OF THE MAIL.—The defendant and others, discharged railway laborers, to the number of one hundred and fifty, assembled at Pendleton, Oregon, and by threats of violence prevented the daily train of the Oregon Railway and Navigation Company, including the mail car with the United States mail therein, from proceeding to Portland, because the conductor would not permit them to ride thereon to Portland free of charge, on the ground that they had no money, and the company having "passed them up" ought to "pass them down;" and for the same reason, and by the same means, prevented the conductor from detaching said mail car from said train and sending it to Portland with the United States mail therein. *Held*, that whether the company was under any legal obligation to carry the defendant to Portland free of charge or not, he had no right to prevent the conductor from sending the mail car on to Portland, as he did; and that the conduct of the defendant and his associates being unlawful and necessarily causing the passage of the mail to be obstructed, the law imputes to him an intention, whatever the primary purpose of his conduct was, to cause such obstruction, and therefore he is guilty of obstructing and retarding the passage of the mail, contrary to section 3995 of the revised statutes. *United States* v. *Kane*, 653.

2. PASSENGER ON TRAIN.—A person who is entitled to travel on a railway car may go upon the same peacefully, and remain therein until he arrives at his destination; and if the conductor undertakes to put him off, on the ground that he is not entitled to travel thereon, he may resist force with force; but if the conductor stops the train on his account, and undertakes to detach the mail car therefrom and send it on with the mail, he has no right to prevent him from so doing, and if he does his act is unlawful. *Id.*

ORDINANCE.

See CORPORATIONS, 5; EMINENT DOMAIN, 6; LAUNDRY ORDINANCE; PLEADING AND PRACTICE, 2.

PATENT.

1. VERIFICATION OF PLEADINGS.—Under section 914 of the revised statutes the pleadings in an action for the infringement of a patent must be verified as provided in section 79 of the Oregon code of civil procedure. *Cottier* v. *Stimson*, 251.

2. DOUBLE PLEAS OR DEFENSES.—Both at common law and under the code special pleas or defenses may be pleaded with the general issue or a denial of the allegations of the complaint. *Id.*

3. DEFENSES TO AN ACTION FOR INFRINGEMENT.—The five matters which may be given in evidence upon notice under the general issue, as provided in section 4920 of the

revised statutes, as defenses to an action for the infringement of a patent, may be pleaded specially with the general issue, and other defenses thereto may be pleaded specially, either with or without the general issue and such notice. *Id.*

4. SPECIAL PLEAS CRITICISED.—*Quære:* Is it sufficient to allege in a special plea that the thing patented was not marked with the word "patented," without also alleging that the defendant was not otherwise notified of the infringement? and is not a plea that the thing patented was not an invention when produced by the patentee a mere repetition of the special matter that said patentee was not the original and first inventor thereof? But a defense that an invention is not useful must be specially pleaded. *Id.*

PARENT AND CHILD.

See CHINESE RESTRICTION ACT, 1, 6.

PARTICULARS, BILL OF.

See PLEADING AND PRACTICE, 10.

PARTIES.

1. "PARTY," MEANING OF.—The word "party" imports the person or persons having a joint right or liability, whether one or more. *People* v. *O'Loughlin*, 164.
2. FORECLOSURE OF MORTGAGE—PARTIES TO ACTION FOR.—In an action to foreclose a mortgage after a conveyance of the mortgaged premises and the death of the mortgagor, when no judgment against the estate of the latter is asked for, it is unnecessary for the mortgagee to present the note and mortgage to the administratrix of such estate for allowance. The mortgagee may maintain such action against the grantee of the mortgaged premises alone, without serving the administratrix, as she was not a necessary party to the action. *Rickards* v. *Hutchinson*, 659.
3. THE INFANT SUCCESSORS IN INTEREST OF DECEASED DEFENDANTS IN AN ACTION FOR PARTITION may be substituted for such defendants on motion, without the issuance of a summons to bring them in. Such infants may appear by their general guardians, or by guardians *ad litem* appointed for them, and where the record is silent as to their manner of appointment the regularity of such appointment will be presumed. *Emeric* v. *Alvarado*, 708.
4. MISJOINDER OF PLAINTIFFS IN A MORTGAGE FORECLOSURE SUIT.—In a suit to foreclose a mortgage, where, in addition to the proper plaintiffs, other parties were unnecessarily and improperly joined as co-plaintiffs, and a demurrer was interposed to the complaint on that ground, the supreme court, on appeal, may render a final judgment in favor of the proper plaintiffs, and direct the court below to amend the complaint by striking out the parties improperly joined as co-plaintiffs, with such provisions as may be necessary to protect their rights. *De Celis* v. *Porter*, 575.
5. PLAINTIFF WHO IS NOT THE REAL PARTY IN INTEREST in an action on a promissory note can not assign the same so as to entitle his assignee to prosecute such action in his own name. *Skewes* v. *Dunn*, 628.
6. SUBSTITUTION OF A DIFFERENT PLAINTIFF WILL NOT BE ALLOWED when it would result in injury to any right of the defendant. *Id.*
7. SUBSTITUTION OF A WIFE AS PLAINTIFF IN THE PLACE OF HER HUSBAND SHOULD NOT BE ALLOWED when the effect of such substitution would be to permit her to testify in her own behalf, unless such substitution is made on condition that she does not testify. *Id.*
8. PRINCIPALS AND SURETIES ON AN INJUNCTION BOND MAY BE SUED TOGETHER in an action for the breach of the conditions thereof, and the damages assessed and awarded in such action. *Duckett* v. *Price*, 495.
9. TENANTS AT WILL OF A TRUSTEE ARE NOT NECESSARY OR PROPER PARTIES in an action against the trustee to compel a conveyance of the trust estate. *Reynolds* v. *Lynch*, 344.
10. HEIRS OF A DECEASED MORTGAGOR NEED NOT BE MADE PARTIES in an action against his executor or administrator to foreclose the mortgage. *Bayley* v. *Muche*, 125, 263.
11. ONE TO WHOM LANDS ARE GRANTED FOR THE PURPOSE OF MAINTAINING AN ACTION connected with the ownership thereof, may prosecute such action in his own name, notwithstanding there is an oral agreement between him and his grantors that upon the termination of the litigation he would reconvey such lands to his respective grantors. *Smith* v. *Logan*, 391.
12. IN AN ACTION BETWEEN CERTAIN APPROPRIATORS OF WATER, TO DETERMINE THEIR RELATIVE RIGHTS THERETO, another appropriator, higher up the stream, who re-

turns the water taken by him, undiminished in quantity, before the stream reaches the appropriator whose rights are interfered with, is not a necessary party. *Id.*

See NEGOTIABLE INSTRUMENTS, 1-3; WATER RIGHTS, 14.

PARTITION.

1. PARTITION OF GRANT BY JUDGE OF FIRST INSTANCE—POWER OF TO MAKE.—In a proceeding before the judge of first instance for the partition of land granted by the Mexican government to several grantees within larger and unlocated boundaries, the attempt of such judge to fix the boundaries of the land granted could give no additional force to the judgment of partition. If juridical possession had previously been given, its effect would be to confine all the rights of the grantees within the limits of such juridical possession, and the judge could not, *pendente lite*, or by his judgment, extend their rights beyond such limits. If juridical possession had not been given, the right of the grantees or their assigns to the temporary possession of all the lands, as the same appeared from the *diseño* and grant, could not be extended beyond the exterior limits thus appearing. *Mound City Land and Water Association* v. *Phillips*, 579.
2. SUCH JUDGMENT OF PARTITION was binding and conclusive, if at all, only with respect to its subject-matter. It affected merely the right to the temporary possession previously held in common. The lands beyond the boundaries which the United States, as successor of Mexico, established, continued to be government property until such boundaries were established. The right of the grantees to possess the same was not an equitable right which ripened into a legal title to the same lands upon final measurement; it was contingent, and limited in time, as to the lands which should be excluded by the final measurement. *Id.*
3. SUCH PARTITION AS TO LANDS WITHOUT THE LIMITS OF THE FINAL SURVEY AFTERWARDS MADE had effect, even as to the parties to it, only while their occupation lasted with the consent of the government, and ceased to operate, as a whole, if it made no provision for the separate disposition of the specific portion with respect to which the rights of the grantee ultimately became perfect, when the boundaries of such specific portion were determined. *Id.*
4. IN ALL ACTIONS FOR PARTITION, INCLUDING THOSE PROVIDED FOR IN SECTION 760 OF THE CODE OF CIVIL PROCEDURE, BEFORE ANY PARTITION IS ORDERED OR CAN BE MADE, the interests and shares of all the parties must be determined and adjudged by the court, and also the moieties in which the land is to be divided. Such moieties must be specified in the interlocutory judgment, so that the referees appointed to make the partition may have no question of title to determine, and may intelligently discharge the duties as to making the allotments devolved on them by the decree. An interlocutory decree which fails to observe such requirements is erroneous. *Emeric* v. *Alvarado*, 708.
5. EVIDENCE OF THE PETITION OF A TESTAMENTARY EXECUTOR TO THE BOARD OF LAND COMMISSIONERS, for the confirmation of a Mexican grant to his testator, is admissible in an action for the partition of such grant, when offered along with a copy of the will attached to the petition, the opinion of the board confirming the claim, and the decree of confirmation. *Id.*
6. AN ATTEMPTED PARTITION OF A MEXICAN GRANT, THE BOUNDARIES OF WHICH HAD NEVER BEEN DETERMINED by the United States, in pursuance of a written agreement for partition, in which all the tenants in common of such grant are named as parties, is null and void when it appears that some of such parties never executed such agreement, or where a much larger tract of land was included in such attempted partition than was included within the boundaries of such grant as the same were finally determined by the survey approved by the United States courts. And the same is true of all other deeds and transactions between such parties, the object and purpose of which are to facilitate and perfect such partition, when the same is the only consideration on which they are founded. *Id.*

See APPEALS, 6, 7; MINES AND MINING, 1; RECEIVERS, 1.

PARTNERSHIP.

1. A MINING PARTNERSHIP IS NOT RESTRICTED TO CASES WHERE THE MINE IS OWNED by the parties working it. Such partnership may exist as well where the parties have a joint interest and co-operation merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself. *Manville* v. *Parks*, 603.

2. THE RELATION OF MINING PARTNERSHIP BETWEEN THE DEFENDANTS, WITH RESPECT TO THE MINING OPERATIONS, for the carrying on of which the debt sued for was created, held to be established by the facts. *Id.*
3. CO-WORKERS IN A MINING OPERATION, TO THE EXTENT OF THEIR INTEREST IN THE PROPERTY, are tenants in common, and in the working of the mine are considered as partners. *Id.*
4. ONE MEMBER OF A MINING PARTNERSHIP HAS IMPLIED AUTHORITY TO BIND THE FIRM for articles purchased, essential to the carrying on of the business and the accomplishment of the purpose of the partners in working the mine, notwithstanding there is a secret agreement between such partners by which some of them were not to be liable for the expenses of the business. Such agreement could not affect the rights of those who dealt with the partnership without any notice of the limitation upon the individual liability of particular members. *Id.*
5. DEFENSE OF SPECIAL PARTNERSHIP AND NOTICE THEREOF BY THE PLAINTIFF must be pleaded, or evidence thereof is inadmissible. *Id.*
6. THE FAILURE TO JOIN A DORMANT PARTNER AS DEFENDANT, in an action against a partnership, can not be pleaded in abatement; and the refusal to admit in evidence the deposition of such partner, when all his acts and declarations in reference to the subject-matter of the controversy are already in evidence, is not error. *Pinchower* v. *Hanks*, 369.
7. JUDGMENT AGAINST A PARTNERSHIP ON ACCOUNT OF GOODS SOLD AND DELIVERED TO IT will be reversed when the evidence shows that many of the items of such account were furnished to one of the partners individually, and that the same were included in the findings and judgment against the firm. *Burt* v. *Collins*, 566.
8. PARTNERSHIP AGREEMENT REDUCED TO WRITING, BUT NOT EXECUTED by the partners, is not evidence of the terms and conditions of the partnership. *Tweed* v. *Lowe*, 658.

See JUDGMENT, 20; LIENS, 5; SURETIES, 12.

PASSAGE OF ACT.

See CONSTITUTIONAL LAW, 2, 3; STATUTE OF LIMITATIONS, 1, 2.

PAYMENT.

See EVIDENCE, 7, 10, 11; NEGOTIABLE INSTRUMENTS, 4, 5, 7, 9–11.

PENALTY.

See SPECIFIC PERFORMANCE, 2.

PLACE OF TRIAL.

See VENUE.

PLEADING AND PRACTICE.

1. A COMPLAINT IN AN ACTION TO RECOVER THE AMOUNT OF A DEFICIENCY after a sale of mortgaged premises under a judgment of foreclosure must allege that such deficiency has not been paid. An allegation of the involvency of the judgment debtor is not enough. *Vogel* v. *Walker*, 699.
2. PASSAGE OF AN ORDINANCE BY THE CITY COUNCIL IS SUFFICIENTLY SHOWN by an allegation which sets forth a copy of the ordinance, and avers that the same was "duly passed and adopted." *Los Angeles* v. *Waldron*, 335.
3. ABSENCE OF FAULT ON THE PART OF THE PLAINTIFF, in an action to recover for personal injuries caused by the defendant's negligence, need not be averred or proved by him. *Lopez* v. *Central Arizona Min. Co.*, 41.
4. DISTRICT COURTS OF UTAH HAVE JURISDICTION BOTH IN LAW AND IN EQUITY, under the act of congress of June 23, 1874, and by the territorial legislation the distinctions in the forms of actions at law and suits in equity are abolished. There is now but one form of civil action for the enforcement of private rights and the redress or prevention of private wrongs, and the defendant is permitted to set up by answer as many defenses as he may have. *Kimball* v. *McIntyre*, 316.
5. EQUITABLE DEFENSE SET UP AGAINST AN ASSERTED LEGAL RIGHT should be first considered and passed upon by the court. *Id.*
6. ALLEGATION IN AN ANSWER IN AN ACTION FOR THE FORECLOSURE of an assessment lien for replanking a street in the city and county of San Francisco, to the effect that such street had not been graded to the official grade, is immaterial, and a fail-

ure to find on such allegation is not error, if it appears that the grade and width of such street had been established by the board of supervisors before that body ordered it planked. *Knowles* v. *Seale*, 46.

7. A DENIAL IN AN ANSWER OF ANY KNOWLEDGE OR INFORMATION SUFFICIENT to form a belief as to an allegation in the complaint is a sufficient denial under section 713 of the civil code. *Wilson* v. *Allen*, 687.
8. IN ACTIONS UPON CONTRACTS WHICH DO NOT IMPORT A CONSIDERATION, and where the consideration must, therefore, be averred in the complaint, a denial in the answer of such averment forms a complete issue, and needs no reply; and where the consideration is implied, as in an action on a promissory note, the implication stands in the place of the alleged consideration, and an answer averring want of consideration is, in effect, but a denial of such implication, and needs no reply. *Alden* v. *Carpenter*, 598.
9. PLEA OF SET-OFF MAY BE INTERPOSED BY THE DEFENDANT IN AN ACTION ON A PROMISSORY NOTE, given in final settlement of account, arising from a failure of the plaintiff to deliver some of the goods for which such note was given. Such set-off may be averred as though it arose on an account for goods sold and delivered by the defendant to the plaintiff. *Staab* v. *Ortiz*, 576.
10. PLEA OF SET-OFF, WITH A BILL OF PARTICULARS OF THE SAME, MUST SET FORTH THE NATURE of the defendant's claim with sufficient particularity to enable the plaintiff to meet it at the trial. It should state the items of the demand, and when and how it arose, but it need not be in any particular form. *Id.*
11. AN ITEM OF A PLEA OF SET-OFF, the plaintiff's liability for which is shown to depend upon a condition precedent, can not be considered by the jury without evidence of the performance of such condition. *Id.*
12. THE DEFENSE OF A PRIOR RECOVERY IS NEW MATTER which the defendant must plead and prove. *Gilson* v. *Price*, 373.
13. PLEAS IN THE ACTION OF ASSUMPSIT.—The plea of *non est factum* is only proper in actions on written instruments under seal, and can not properly be interposed as a defense to an action of *assumpsit* on any simple contract in writing, such as a promissory note or bill of exchange. *Luna* v. *Mohr*, 673.
14. PLEAS OF NON EST FACTUM AND NON ASSUMPSIT, in an action on a promissory note, are not so repugnant or inconsistent as to be inadmissible. *Stabb* v. *Jaramillo*, 57.
15. WHETHER AFTER ISSUE JOINED THE PLAINTIFF CAN WITHDRAW CERTAIN COUNTS in the declaration, without leave of the court or consent of the defendant, so as to deprive the latter of a portion of his defense to the plaintiff's case as originally stated, *quære*. *Id.*
16. RULING OF THE CIRCUIT JUSTICE OR JUDGE.—A ruling of the circuit justice or judge, on the circuit, ought to be followed by the other judges thereon, until the question is determined by the supreme court. *United States* v. *Morris*, 332.
17. U. S. v. LOFTIS, 8 SAW. 194.—The ruling in this case being opposed to the decision of the circuit judge, in an unreported case in the district of California, not then known to the district judge of Oregon, the latter is now followed and the former disregarded, without reference to the personal opinion of said district judge; but in the light of further examination of and information on the subject the case is not regarded as sound, and is overruled. *Id.*
18. NO ORDER OF TRANSFER WAS NECESSARY BY THE COUNTY COURT of the city and county of San Francisco to give the municipal court of appeals jurisdiction over actions pending in the former court. *Canavan* v. *Municipal Court of Appeals*, 876.
19. PENDING THE CONSIDERATION OF A MOTION, WHICH THE COURT HAS TAKEN UNDER ADVISEMENT until a subsequent day, it is not an irregularity, assignable for error fatal to the judgment, for the court to try another case, unless a party has been prejudiced thereby or deprived of some right affecting the fairness and verity of the judgment. *Alden* v. *Carpenter*, 598.
20. THE COURT WILL NOT HESITATE TO REVERSE A PRIOR RULING made in the same case, on a mere matter of practice, when satisfied that such ruling is erroneous. *Kent* v. *Upton*, 700.
21. AN ORDER OF A TRIAL COURT SETTING ASIDE A VERDICT IS REVIEWABLE upon a statement on appeal, in the same manner as an order made on motion for a new trial. Such order is within the legal discretion of the court making it, and an appellate court will not interfere with it, unless the circumstances of the case and the principles of law applicable to them show an abuse of discretion. *Hynes* v. *Nelson*, 473.
22. AN OPINION OF A COURT IS NOT DECISIVE OF A QUESTION NOT MENTIONED therein, although the same might, and perhaps should, have been passed upon. *Denver* v. *Bayer*, 505.

23. EXCEPTIONS TO STATEMENTS OF COUNSEL.—Mere objections or "exceptions" made by defendants on the trial to statements by the counsel for the prosecution in his argument before the court and jury, can not be considered by the appellate court, where no action by the trial court in the matter was demanded, and no exception was taken to any ruling or action of the court. *People* v. *Shem Ah Fook*, 112.
24. JUDGMENT WILL BE AFFIRMED WHERE NO POINTS AND AUTHORITIES ARE FILED within the required time. *People* v. *Lee Hung*, 485.
25. JUDGMENT WILL NOT BE REVERSED FOR FAILING TO SERVE AMENDED COMPLAINTS on a defendant against whom a default has been entered for not answering the original complaint, where it does not appear from the record that such amended complaints were not served. *Heinlen* v. *Erlanger*, 561.
26. Defects in judicial system of California (note), 639.

See AMENDMENTS, 1; APPEAL; ATTACHMENT, 4–6; CONTINUANCE; COUNTER-CLAIM; DAMAGES, 4; DEFAULT; DEMURRER; DEPOSITIONS; EJECTMENT; EMINENT DOMAIN, 1–7; EVIDENCE, 7, 8, 43; FINDINGS; FORCIBLE ENTRY AND DETAINER; FRAUD, 3–6; GUARDIAN AD LITEM; INSOLVENCY; INSTRUCTIONS; MINES AND MINING, 20; NEGOTIABLE INSTRUMENTS, 1–3, 7; NEW TRIAL; NONSUIT; PATENT; PARTIES; PARTNERSHIP, 6; REMITTITUR, 1; REMOVAL OF CAUSES; REPLEVIN; SUMMONS; SURETIES, 9; TAXATION, 12; TRESPASS, 4; USE AND OCCUPATION; VARIANCE; VENUE; VERIFICATION.

POINTS AND AUTHORITIES.

See APPEAL, 12; PLEADING AND PRACTICE, 24.

POLICE COMMISSIONERS.

See SAN FRANCISCO, 2, 3.

PRE-EMPTION.

See PUBLIC LANDS, 2.

PRESCRIPTION.

1. PRESCRIPTION, NATURE OF.—The statute of California merely fixes the time in which a right by prescription shall be acquired at five years; but it nowhere determines the circumstances which constitute prescription, and thus leaves them to be determined by the settled law as it stood prior to the code. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.

See NUISANCE, 8, 9.

PRESENTMENT FOR PAYMENT.

See NEGOTIABLE INSTRUMENTS, 9, 11.

PRESIDENT OF UNITED STATES.

See CHINESE RESTRICTION ACT, 10, 11.

PRINCIPAL AND AGENT.

See AGENT.

PRIOR APPROPRIATION OF WATER.

See WATER RIGHTS.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURTS.

See DIVORCE, 4; ESTATES OF DECEASED PERSONS, 1, 2; HOMESTEAD, 1.

PROMISE.

1. IMPLIED PROMISE NOTWITHSTANDING THE DEBTOR'S OBJECTION—CONDUCT AMOUNTING TO CONSENT.—Whenever, in any transaction or under any form, one person receives a sum of money which he is bound, *ex æquo et bono*, to refund to another, the

law implies a promise by him to make such repayment. Such promise is implied under the same circumstances, even though the debtor party objected to receiving the money, provided he nevertheless does actually receive it and use it for his own purposes, or so deal as to retain and enjoy its benefits. Such conduct waives the objection, and amounts in contemplation of law to a previous consent. *De Celis* v. *Porter*, 575.

See MORTGAGE, 13; STATUTE OF LIMITATIONS, 3–8.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROPERTY.

See CONSTITUTIONAL LAW, 8.

PUBLIC LANDS.

1. ONE NOT AN ACTUAL SETTLER, WHO FILES HIS APPLICATION TO PURCHASE LANDS suitable for cultivation from the state, prior to the adoption of the present constitution, but who makes no payment thereon, acquires no right to purchase such land after the adoption of such constitution. *Urton* v. *Wilson*, 775.
2. A SETTLER ON PUBLIC LANDS WHICH HAD BEEN WITHDRAWN FROM SALE, and consequently were not open for pre-emption, acquires no title thereto, as against a subsequent grantee of the government, by virtue of his settlement. *Southern Pacific R. R. Co.* v. *Garcia*, 586.
3. IMPROVEMENTS UPON THE PUBLIC LANDS ARE LAWFUL SUBJECTS OF SALE, and are sufficient consideration to support promissory notes and other contracts. *Caldwell* v. *Ruddy*, 295.

See MEXICAN GRANTS, 3; NUISANCE, 4; TRESPASS, 2, 3; UNITED STATES, 1; WATER RIGHTS.

PUBLICATION OF SUMMONS.

See SUMMONS.

PUBLIC POLICY.

See COMMON CARRIERS, 6.

PUBLIC USE.

See EMINENT DOMAIN.

QUIETING TITLE.

See EQUITY, 3.

RAILROADS.

See AGENT, 2; COMMON CARRIERS, 1–4; EMINENT DOMAIN, 1–3; MORTGAGE, 1; NEGLIGENCE, 3–9; OBSTRUCTING THE MAIL; REMOVAL OF CAUSES, 2. 3; STREETS, 1–3; TAXATION, 1–4.

RATIFICATION.

See CONTRACTS, 3.

RECEIVERS.

1. NO APPEAL LIES FROM AN ORDER OF THE LOWER COURT APPOINTING A RECEIVER in an action for partition, notwithstanding the fact that such order may operate as an injunction in restraining the rights of the parties to the action to hold and manage their lands. *Emeric* v. *Alvarado*, 708.

RECORD.

See REMOVAL OF CAUSES, 6.

REDEMPTION OF MORTGAGE.

See MORTGAGE, 4, 5, 15.

REFORMATION.
See MISTAKE.

RELEASE.
See SURETIES, 4, 13, 14.

REMITTITUR.

1. REMITTITUR, WHEN TO ISSUE—JUDGMENT BY DEFAULT.—Where one of the departments of the supreme court, on the eighth of February, 1883, reversed a judgment by default, and on the twenty-third of February modified such judgment and remanded the cause, with leave to the appellant to file an answer within twenty days after the filing of the *remittitur* in the court below, such *remittitur* should not be issued until thirty days after the last date. If issued before such time has elapsed, a judgment by default for failure to answer within twenty days after its filing in the court below will be set aside. And the same effect will be given to a judgment by default for not answering within the time required after the *remittitur* has rightfully issued, where such default was occasioned by the inadvertence of a deputy clerk of the supreme court, in failing to enter of record the date on which such *remittitur* was issued, and in repeatedly informing the attorney for the party in default that no *remittitur* had issued. *Hog's Back Con. Min. Co.* v. *New Basil Con. C. Min. Co.*, 770.

REMOVAL OF CAUSES.

1. PETITION FOR REMOVAL.—When it appears upon a petition for removal of a cause that the same is removable upon the application of the petitioners, under the second clause of section 2 of the act of 1875, it will not limit or restrain the effect or operation of such petition if the petitioners only ask the court therein to proceed no further "as to them." *Northern Pacific Terminal Company* v. *Lowenberg*, 97.

2. PROCEEDING TO APPROPRIATE PROPERTY.—A judicial proceeding to appropriate private property to the use of a railway corporation is subject to the usual incidents of a civil action or suit, including the liability to removal into the circuit court. *Id.*

3. SEPARABLE CONTROVERSY.—In an action against two or more persons to appropriate property held by them as tenants in common, to the use of a railway corporation, there is a separable controversy between such corporation and each of said tenants, which can be fully determined as between them, and if either of such tenants is a citizen of a different state from such corporation, he may remove the whole case into the circuit court, under the second clause of section 2 of the act of 1875. *Id.*

4. IRREGULARITIES IN REMOVAL.—Although there are irregularities in the removal of a cause, still, if it appears from the record that it involves a controversy cognizable by the circuit court, a motion to remand to the state court will not be allowed. *Id.*

5. AMENDMENT.—*Quære:* Can the petition for removal be amended in the circuit court? *Id.*

6. RECORD, WHAT CONSTITUTES, UNDER THE ACT OF 1875.—The term "record," as used in sections 3 and 7 of the act of 1875 (18 Stat. 470), held to include the testimony taken and on file in a cause at the time of filing a petition and bond for its removal from a state court. *Miller* v. *Tobin*, 236.

7. JURISDICTION OF STATE COURT, WHEN IT CEASES.—Upon the filing of a petition and bond in due form and effect for the removal of a cause from a state court, whether in vacation or term time, in a case removable under the act of 1875, the jurisdiction of the state court ceases at once, and depositions taken thereafter before a referee theretofore appointed to take the testimony in the case, are no part of the record or proceedings therein. *Id.*

8. RIGHT OF REMOVAL BY DEFENDANT NOT LOST BY INSUFFICIENT DENIALS IN ANSWER. When it appears from the case made by the complaint that it arises under an act of congress, the right of removal by the defendant is not lost by reason of insufficient denials in the answer. *Id.*

9. TIME FOR FILING PETITION FOR REMOVAL.—A hearing on a demurrer to a complaint, and an order overruling the same and allowing the defendant to answer to the merits of the case, is not a "trial" within the meaning of that term as used in section 3 of the act of 1875, *supra;* but such "trial," whether it be an issue of fact or law, is one upon which a final disposition of the case is made. *Id.*

10. "TRIAL" AND "HEARING."—"Trial" is a common-law term, to denote that step in the case by which the facts are ascertained, and is always final unless the matter

is set aside for cause. "Hearing" is an equity term, and may denote the argument and consideration of a case at more than one stage of its progress; but when it results in an absolute disposition of the case it is called "final;" but the term "trial," as used in the act of 1875, *supra*, comprehends that step or proceeding in a cause at law or in equity, which results in a final judgment or decree, whether the "trial" be of an issue or question of law or fact. *Id.*

REPLEVIN.

1. JUDGMENT FOR THE PLAINTIFF IN AN ACTION FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY should be primarily for the very property, or its value at the date of the trial, and an amendment to the complaint showing such value, and increasing that already alleged, is permissible. *Phillips* v. *Sutherland*, 350.
2. COMPLAINT IN AN ACTION OF REPLEVIN UNDER THE CODE MUST AVER the value of the property taken, and the amount of damages sustained by its detention. The truth of such allegations is admitted by a failure to deny the same, and evidence thereof is inadmissible on the part of the defendant. *Tucker* v. *Parks*, 264.
3. DEFENDANT IN AN ACTION OF REPLEVIN CAN NOT ATTACK THE PLAINTIFF'S TITLE on the ground that it was obtained through fraud, unless such fraud be specially pleaded. *Id.*
4. IN AN ACTION OF REPLEVIN, INTEREST ON THE VALUE OF THE PROPERTY, from the time of the wrongful taking until the time of the trial, may be recovered as general damages. *Id.*
5. ADMISSION OF AN ALLEGATION OF DAMAGES admits only that the plaintiff has sustained such damages as were consequential upon the facts alleged. *Id.*

RESTRICTION ACT.

See CHINESE RESTRICTION ACT.

RIOT.

1. CRIMINAL LAW—RIOT—"FORCE AND VIOLENCE"—"DISTURBANCE OF PUBLIC PEACE," WHAT CONSTITUTES—DECLARATIONS OF ONE RIOTER, WHEN ADMISSIBLE.—S., a mining company, having reduced the wages of its employees, the defendants, thirteen in number, and one hundred and fifty others, miners, some employees of S. and others not, comprising a miners' union, in pursuance of a resolution by them passed in mass meeting in Miners' Union hall and for the purpose of resisting such reduction of wages, organized in the village of Silver Reef, marched through the village to the neighboring mines, ordered therefrom all union men, and having collected a force of three hundred men, among whom were all of the defendants, marched back through the village to the mining properties of S., and there appointed from their number a committee, which, in the presence and view of the men outside and pursuant to their behests, entered the mining works of S. and demanded of the employees there in charge that they shut down all works, quit possession of the shafts, shaft-houses, buildings, and works, and surrender the same to such committee, and not to start up the works again until ordered so to do by the union; which demands were acceded to by the employees of S., whereupon the body of men marched away, leaving their committee, one of whom was the defendant C., in charge and in possession of such works.

   Held: 1. That if, by the resolution, meeting, marching, and demands of defendants and their companions, and the manner and circumstances under which the same were done and accomplished, well-grounded fear or apprehension of bodily harm or injury would be raised in the minds of reasonable men of ordinary courage and firmness, by a resistance to such demands, and that well-grounded fears existed in the minds of the residents of Silver Reef for the safety of life or security of property, the same constituted a breach of the "public peace" by "force and violence," within the meaning of the act defining riot.

   2. That the terms "force" and "violence" do not necessarily mean the actual use of physical force, accompanied with turbulence or violence; but any unlawful act, however apparently peaceable and quiet, when done with such numbers, in such manner, and under such circumstances as show that the actors intend to, and are capable of carrying out, and do so carry out, an unlawful purpose in an unlawful manner, rendering resistance thereto apparently, in the minds of reasonable men of ordinary courage, dangerous to life or property, is such "force" and "violence" as is contemplated by the statute.

3. That evidence of the effect upon the minds and the feelings of the residents of Silver Reef, as to fear for the security of life or property, occasioned by these unlawful acts, was admissible, as tending to show a breach of the public peace, and to show this, proof might be offered of the declarations, expressions of fear, and acts of such residents, during and while the acts of the defendants were being done and performed.

4. That the acts and declarations of defendant C., one of the committee of miners in charge of the works of S., while in possession in pursuance of the orders of the other defendants and other miners, comprising the miners' union, are admissible in evidence against all the defendants on trial. *People* v. *O'Loughlin*, 164.

RIPARIAN PROPRIETOR.

See WATER RIGHTS, 7, 8, 12, 17.

SALVAGE.

See ADMIRALTY, 1.

SAN FRANCISCO.

1. CITY AND COUNTY OF SAN FRANCISCO IS LIABLE FOR DAMAGES TO AN INDIVIDUAL caused by the refuse matter from the city and county hospital flowing on to his land, and injuring his business and health, although no claim for such injury has been presented to the board of supervisors for allowance. *Bloom* v. *City and County of San Francisco*, 564.

2. POWER OF APPOINTING POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO, vested in the judges of certain of the district courts by the act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the state. *Heinlen* v. *Sullivan*, 47.

3. SUCH POWER WAS NOT CONTINUED IN FORCE by section 11 of article 22 of the constitution of 1879, and does not now devolve upon the judges of the superior court in the city and county of San Francisco. *Id.*

4. BOARD OF NEW CITY HALL COMMISSONERS ARE AUTHORIZED TO ALLOW THE CLAIM of a contractor for extra work done under the direction of their architect, and for losses suffered by him through the action and incompetency of their former architect. *Keating* v. *Edgar*, 45.

See BOARD OF HARBOR COMMISSIONERS, 1; DEDICATION, 1; LAUNDRY ORDINANCE; WATER RIGHTS, 5.

SET-OFF.

See PLEADING AND PRACTICE, 9, 11.

SHERIFF.

See ATTACHMENT, 3; CONVERSION, 1.

SHIP, DETENTION OF.

See CHINESE RESTRICTION ACT, 9.

SPEAR on Law of the Federal Judiciary, Review of, 76.

SPECIFIC PERFORMANCE.

1. SUPERIOR COURT HAS JURISDICTION OF AN ACTION FOR THE SPECIFIC PERFORMANCE of a contract for the sale of lands against the heirs and personal representatives of a deceased vendor, after the probate court has dismissed a petition praying that the administrator be compelled to convey such land. Such dismissal will be presumed to have been made on the ground of the dubiety of the petitioner's right, although the jurisdiction of the superior court does not depend upon the *correctness* of the action of the probate court in holding such right doubtful. *Hall* v. *Rice*, 346.

2. EQUITY WILL DECREE THE SPECIFIC ENFORCEMENT OF A WRITTEN AGREEMENT FOR THE SALE OF LAND, in the absence of fraud, undue influence, or want of actual consideration, notwithstanding such agreement provides for the payment of a penalty upon the breach of the condition thereof. *Borel* v. *Mead*, 614.

3. AN AMENDMENT TO A COMPLAINT FOR THE SPECIFIC PERFORMANCE OF A CONTRACT for the sale of land, alleging the adequacy of the price agreed to be paid therefor, may be allowed by the court after the trial and during the argument. *Hall* v. *Rice*, 346.
4. CONSIDERATION EXPRESSED IN A CONTRACT FOR THE SALE OF LAND will be deemed adequate, in the absence of evidence to the contrary. *Id.*
5. WRITTEN AGREEMENT UNDER SEAL FOR THE SALE OF LAND IMPORTS A VALUABLE CONSIDERATION IN EQUITY as well as at law; and in a suit for the specific performance thereof, the want of consideration can not be raised by demurrer, although it may be by answer. *Borel* v. *Mead*, 614.
6. SPECIFIC PERFORMANCE OF SUCH AGREEMENT MAY BE DECREED AGAINST THE DEFENDANT WHO HAS SIGNED the same, although it has not been signed by the plaintiff. *Id.*

STARE DECISIS.

See MORTGAGE, 5; PLEADING AND PRACTICE, 20.

STATEMENT OF CASE.

See APPEAL, 7; FINDINGS, 7; NEW TRIAL, 8–10.

STATUTE.

1. PROVISIONS OF AN ACT, OR SECTIONS OF AN ACT, WHICH ARE CONSTITUTIONAL, and not connected with or dependent upon other provisions which are unconstitutional, will be enforced by the courts. Such rule applied to the act granting to one person the right to use and enlarge the ditches of another: Sess. Laws, 1881, p. 164. *Trippe* v. *Overacker*, 352.
2. IT IS A CONDITION ALWAYS IMPLIED BY LAW, that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.
3. ACT INCORPORATING THE NORTHERN PACIFIC, CONSTRUCTION OF.—The act of July 2, 1864 (13 Stat. 365), incorporating the Northern Pacific Railway Company, and the acts amendatory thereof, are a grant by the public to a private corporation, and must therefore be construed most strictly against the latter, so that no authority, right, or privilege can be held to pass thereby unless the same is therein plainly expressed or clearly implied. *Hughes* v. *Northern P. R'y Co.*, 21.

See CHINESE RESTRICTION ACT.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS, WHEN ACT TAKES EFFECT.—Where the statute of limitations provides that in cases where the cause of action has already accrued at the passage of the act, the party shall have the whole period prescribed by the act, after its passage, in which to commence action, and by another act of the same legislative session it was provided that said statute should take effect at a day subsequent to its approval by the governor, the period of limitation to an existing cause of action will not begin to run until such latter date. *Schneider* v. *Hussey*, 294.
2. THE WORDS "PASSAGE OF THIS ACT," used in such connection, mean the time when the act takes effect. *Id.*
3. DEBT BARRED BY THE STATUTE OF LIMITATIONS CAN ONLY BE RECOVERED UPON PROOF of a new promise sufficient to revive the debt. *Richardson* v. *Bricker*, 270.
4. CONTRACT CREATED BY A CONDITIONAL PROMISE TO PAY A DEBT BARRED by the statute of limitations can not be enforced, except upon the performance or happening of such condition, and the burden of proving the same rests upon the plaintiff. *Id.*
5. NEW PROMISE TO PAY SUCH DEBT "WHEN ABLE" IS CONDITIONAL, and must be construed as referring to financial ability. Such ability is not a matter left to the debtor's discretion or judgment, but is a question of fact for the jury, who may find that it existed at the very time the conditional promise was made. *Id.*
6. WHETHER A GENERAL ADMISSION OF INDEBTEDNESS IS SUFFICIENT to remove the bar of the statute of limitations is questionable, unless it be unmistakably shown to relate to the particular demand sued for, or unless, from the nature of such debt, or the particular circumstances connected therewith, a legal presumption fairly arises that it was referred to. *Id.*
7. DEBT BARRED BY THE STATUTE OF LIMITATIONS WILL BE REVIVED by a letter from the debtor to his creditor containing an unequivocal acknowledgment of the indebtedness, and a clearly implied promise to pay the same. *Morell* v. *Ferrier*, 277.

8. SUFFICIENCY OF A PROMISE TO TAKE SUCH DEBT OUT OF THE BAR OF THE STATUTE is a question of law for the court, while the question whether such promise refers to the debt sought to be recovered is generally to be determined by the jury. *Id.*
9. BURDEN OF PROOF IS ON THE DEFENDANT TO SHOW THAT AN ACKNOWLEDMENT of indebtedness by him did not relate to the demand in suit, but to an entirely distinct debt. *Id.*
10. WHERE A WOMAN WHO HOLDS THE LEGAL TITLE TO REAL ESTATE IN HER OWN NAME mortgages the same to a *bona fide* mortgagee, without notice that she holds the same in secret trust for her son, to whom she afterwards conveys it, the right of the mortgagee to foreclose the mortgage is not barred, as against such grantee, because more than four years have elapsed since the maturity of the indebtedness secured, unless the right to foreclose is barred as against the mortgagor. *Rickards* v. *Hutchinson*, 659.
11. THE STATUTE OF LIMITATIONS DOES NOT RUN AGAINST A CAUSE OF ACTION to recover money deposited in a bank. *Green* v. *Odd Fellows Savings and Commercial Bank*, 877.
12. THE ASSIGNEE OF A SAVINGS BANK WHO ASSUMES ALL OF THE DEBTS OF THE SAME, including its liability to one of its depositors, and who credits such depositor with the amount of his deposit and pays him a dividend thereon, accruing partly before and partly subsequent to the transfer, can not set up the statute of limitations as a defense to an action to recover the amount of such deposit. *Id.*
13. COUPONS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS until the bonds to which they belong are barred. *Meyer* v. *Porter*, 874.

See CONVERSION, 3; LACHES, 1, 3; MORTGAGE, 14; SURETIES, 7.

STOCK AND STOCKHOLDERS.

See ATTACHMENT, 1; CORPORATIONS, 10–19; TAXATION, 5, 7–9.

STREAMS.

See WATER RIGHTS.

STREETS.

1. AN OWNER OF LAND ADJOINING A STREET IS NOT ENTITLED TO COMPENSATION UNDER A CONSTITUTIONAL GUARANTY FOR INJURIES to his property, occasioned by a reasonable improvement of the street by the proper authorities, for the greater convenience of the public, or for a temporary inconvenience resulting from a legitimate use thereof by the public; but where such injuries result from a change in or use of the street, wholly foreign to the ordinary purposes of a highway, as where the same is devoted to the purposes of a steam-railroad, such owner is entitled to compensation, although such use was authorized by the authorities having charge of the streets. And this result follows whether the fee in the street is in such owner or not. *Denver* v. *Bayer*, 505.
2. THE MEASURE OF DAMAGES IN AN ACTION FOR SUCH INJURIES IS THE ACTUAL DIMINUTION in the market value of the land, for any use to which it may reasonably be put; and if, by reason of the proximity of such railroad, such land has been in any way peculiarly benefited, such benefit should be deducted in determining the amount of the owner's compensation. *Id.*
3. A MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES TO LAND caused by building and operating a steam-railroad in an adjoining street, although the right so to use such street was conferred upon the railroad company by an ordinance of the city council. *Id.*

SUBSTITUTION OF PARTIES.

See DEFAULT, 1, 2; PARTIES, 3, 5–7.

SUMMONS.

1. DEFECTS IN THE SERVICE OF SUMMONS ARE WAIVED BY THE DEFENDANT'S APPEARING and answering. *New York and Brooklyn Mining Co.* v. *Gill*, 595.
2. TO SUSTAIN A SERVICE OF SUMMONS BY PUBLICATION AGAINST MINOR DEFENDANTS, the court will presume, unless the contrary appears, that such minors were over the age of fourteen years, in which case no service of summons on their mother, or other person having them in charge, is required. *Emeric* v. *Alvarado*, 708.
3. STRICT COMPLIANCE WITH THE STATUTORY REQUIREMENTS IS NECESSARY in order to obtain a valid service of summons by publication. *Israel* v. *Arthur*, 286.

4. NO JURISDICTION OVER THE DEFENDANT IN AN ACTION FOR DIVORCE is acquired by a service of summons by publication where the record shows on its face that the summons was issued and returned by the sheriff on the same day, when the statute commanded the "usual exertion on the part of the sheriff to serve the summons," in actions for divorce, notwithstanding the proceedings by publication. *Id.*
5. WHERE SERVICE OF A SUMMONS BY PUBLICATION IS RELIED ON, as conferring jurisdiction on a court, the material requirements of the statute must be strictly complied with; and although the court acquires jurisdiction of the defendant at the expiration of ten days after the expiration of the time prescribed for publication, it is error to render judgment against him until after forty days after such service is complete. Such error may be taken advantage of on a direct proceeding to review the judgment, but not collaterally. *Brown* v. *Tucker*, 489.
6. JUDGMENT AGAINST A NON-RESIDENT DEBTOR, RENDERED ON A SERVICE OF SUMMONS BY PUBLICATION, is not void where property of the debtor was taken under attachment after the institution of the action, although the judgment is entered *in form* as a personal judgment against the defendant. Such judgment need not contain an order as to the application of the attached property, as the statute expressly authorizes the sheriff to subject such property to the satisfaction of the judgment lien. *Id.*
7. PUBLICATION OF A CITATION TO NON-RESIDENT DEBTORS in a proceeding by attachment, as provided by Prince's statutes, section 11, page 138, which fails to notify the defendants that their property has been attached and will be sold to satisfy whatever judgment is rendered against them, is insufficient and confers no jurisdiction on the court. Such statute is in derogation of the common law, and must be strictly construed. *Smith* v. *Montoya*, 152.
8. PERSONAL JUDGMENT CAN NOT BE RENDERED AGAINST A NON-RESIDENT DEBTOR, who has failed to appear, upon a constructive service upon him by publication. *Id.*
9. PROPERTY OF A NON-RESIDENT DEBTOR WITHIN THE JURISDICTION OF THE COURT may be attached and a judgment *in rem* recovered against it, upon publication of the notice to the non-resident debtor, as required by statute. *Id.*
10. AFFIDAVIT FOR PUBLICATION OF SUMMONS AGAINST A NON-RESIDENT DEFENDANT, the same being a California corporation, must state the facts showing what diligence had been used to obtain a personal service. An allegation that the plaintiff has used due diligence, and that the summons has been returned by the constable unserved, is not sufficient. *Victor Mill and Min. Co.* v. *Justice's Court*, 299.
11. SERVICE OF SUMMONS BY PUBLICATION IS VOID, WHERE THE RESIDENCE OF THE NON-RESIDENT or absent defendant is known, unless the order for publication directs a copy of the summons and complaint to be deposited in the post-office, directed to the person to be served, at his place of residence. The affidavit for such publication must show that a cause of action exists against the defendant, and state whether his residence is or is not known; and if known, such residence must be stated. *Id.*
12. DEPOSIT OF COPIES OF THE SUMMONS AND COMPLAINT IN THE POST-OFFICE, directed to a non-resident defendant at his known place of residence, has no effect on an attempted service by publication, unless done by order of the court. *Id.*
13. STATEMENT IN AN AFFIDAVIT FOR PUBLICATION OF SUMMONS, that the amount claimed was "due from defendant to plaintiff," is simply an allegation of a legal conclusion. *Id.*

See EMINENT DOMAIN, 5; JUSTICE'S COURT, 2; PARTIES, 3.

SUPERVISORS, BOARD OF.

See CORPORATIONS, 6–8.

SUPREME COURT OF THE UNITED STATES.

1. Measures for the relief of (note), 80.

SURETIES.

1. SURETY TO A PROMISSORY NOTE IS DEEMED TO CONTRACT that the principal maker is in every way competent to contract in the way he has done. *Caldwell* v. *Ruddy*, 295.
2. SURETIES ON AN UNDERTAKING GIVEN ON CONDITION of the further continuance of a restraining order, or in place of a former undertaking given when such order was made, only bind themselves prospectively from the date of the execution of their undertaking, and upon a breach thereof are not liable for damages sustained by the obligee before such date. *California Farmers' etc. Ins. Co.* v. *Schindler*, 122.

3. SURETIES ON AN UNDERTAKING GIVEN IN PURSUANCE of section 540 of the code of civil procedure, which recites the issuance of a writ of attachment, and that the undertaking is given in order to prevent a levy of the same, are liable, although sufficient property had been seized under the writ to satisfy the plaintiff's demand, and afterwards released by the sheriff. *Preston* v. *Hood*, 135.
4. SURETIES ARE DISCHARGED BY A VALID CONTRACT BETWEEN THEIR PRINCIPAL AND HIS OBLIGEE to extend the time of payment, if made without their consent. *Id.*
5. SURETIES ON AN ATTACHMENT BOND ARE NOT RELEASED FROM LIABILITY by reason of a stipulation of counsel staying execution on the judgment, to secure which their undertaking was given. *Id.*
6. A SURETY ON ONE OF SEVERAL NOTES SECURED BY THE SAME MORTGAGE on real estate, after a foreclosure of the same, can not compel the judgment creditor or his assignee to apply the proceeds arising from the sale of the mortgaged premises *pro rata* towards the payment of such notes. *Wilson* v. *Allen*, 687.
7. AN ACTION AGAINST SURETIES ON A BOND GIVEN TO SECURE the faithful performance by their principals of a written contract, by the terms of which the latter agreed to make stated returns to the plaintiff on account of certain sewing machines consigned to them for sale, is an action founded on a written contract, and is not barred by the statute of limitations until four years have elapsed after the cause of action accrued. *Victor Sewing Machine Co.* v. *Crockwell*, 428.
8. SURETIES ON A BOND GIVEN TO SECURE AN OBLIGATION OF THEIR PRINCIPAL, by which the latter agreed to pay the plaintiff all moneys which they might receive under a certain contract, "or which should arise therefrom by notes, renewals, or extensions of notes, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of protest, and diligence," are liable upon the failure of their principals to pay such notes, so received by them under such contract, when the same became due. *Id.*
9. IN AN ACTION AGAINST SURETIES ON AN INJUNCTION BOND, an allegation of damage is sufficient to the effect that by reason of said injunction plaintiff has been damaged in a certain amount, "no part of which has been paid." *Rosendorf* v. *Mandel*, 384.
10. NO DEMAND FOR PAYMENT IS NECESSARY IN ORDER TO ENFORCE THE LIABILITY OF SURETIES on an injunction bond, conditioned for the payment to the plaintiff of whatever damages might suffer by reason of the injunction. *Id.*
11. WHERE A SHERIFF IS RESTRAINED FROM APPLYING any moneys that he might realize from the sale of certain property of a judgment debtor to the satisfaction of the judgment, and upon a sale thereof he consequently refuses to credit the amount of such judgment on the judgment creditor's bid, whereby the latter was prevented from purchasing such property, the damages resulting from such refusal of the sheriff may be recovered in an action against the sureties on the injunction bond. *Id.*
12. A CONTRACT BETWEEN TWO PARTNERS, ENTERED INTO UPON THE DISSOLUTION of the copartnership, by the terms of which one partner agreed to assume the firm indebtedness, renders the other partner, as between the partners themselves, and all others dealing with them with knowledge of the facts, the surety of the one so agreeing; and as such he has the right to protect himself by settling the indebtedness for which he is liable with the firm creditors, at any time, whether such indebtedness, as between the partners themselves or their creditors, was due or not. If, however, the partner assuming the firm indebtedness has made a prior compromise with the creditors, the surety can not recover from him the amount paid in procuring the release of his own liability. *Barber* v. *Gillson*, 366.
13. IN AN ACTION BY A SURETY AGAINST HIS PRINCIPAL, A PAPER PURPORTING TO RELEASE the former from his liability to the creditor is admissible as a receipt showing the payment of the consideration for the release, although inadmissible as a release because not under seal. *Id.*
14. WHERE A SURETY HAS SURRENDERED TO THE CREDITOR CERTAIN NOTES OF HIS PRINCIPAL, payable to himself, in consideration of the creditor releasing him from liability on his contract of suretyship, the measure of damages in an action by the surety against his principal is the face value of such notes, and not their value as determined by the principal's ability to pay them. *Id.*

See PARTIES, 8.

SURPRISE.

See NEW TRIAL, 5.

SURVEYOR GENERAL.

See MEXICAN GRANTS, 1–4.

SURVIVORSHIP.

1. PRESUMPTION AND PROOF OF SURVIVORSHIP.—Where both the husband and wife perished in the same calamity, the survivorship of the wife is not conclusively presumed, in a proceeding brought by her administrator to set aside the probate of her husband's will, from the fact that the order of the probate court granting the letters of administration recites that such deceased was "the surviving wife" of the testator. A finding that the wife survived her husband, based entirely upon such recital, is unsupported by the evidence; and a refusal of the court to admit evidence on the question of survivorship is error. *Sanders* v. *Simcich*, 868.

TAXATION.

1. RAILROAD EXEMPTION FROM TAXATION.—The act of February 2, 1878, providing for the general incorporation of railroads, and exempting all the property of the same from taxation of every kind until after the expiration of six years from the completion of their roads; and the act of February 12, 1878, extending such exemption to railroads already incorporated; and the act of February 15, 1878, defining when such railroads shall be deemed to be completed, should be construed as *in pari materia* and as parts of one act. So construed, such exemption applies to a railroad incorporated prior to the time the act of February 2, 1878, went into effect. *Board of County Comm'rs of Santa Fé Co.* v. *New Mexico & S. P. R. R. Co.*, 812.

2. SUCH EXEMPTION OF ALL RAILROAD CORPORATIONS FROM TAXATION IS NOT VOID, as being in conflict with the act of congress of March 2, 1867, prohibiting the legislative assemblies of the several territories from granting private charters and special privileges. *Id.*

3. AFTER THE INCORPORATION OF A RAILROAD and the completion of its lines, under the provisions of such act, the exemption from taxation therein contained is not a mere gratuity. It becomes a part of the contract between the railroad and the territory, the obligation of which the latter can not impair. *Id.*

4. AN EXEMPTION FROM TAXATION AS TO ALL THE PROPERTY OF A RAILROAD EXEMPTS THE SAME from taxation upon its capital stock. *Id.*

5. ASSESSMENT OF MINING STOCK, DESCRIPTION OF.—The rule as to the degree of certainty required in describing personal property in assessments for taxation is, that the property must be so described that tax-payers may know for what they are to be taxed. Tested by such rule, an assessment which describes the property assessed as "mining stock" is sufficiently definite. Such description is also sufficient for the purpose of equalization. *San Francisco* v. *Flood*, 567; *San Francisco* v. *Sharon*, 583; *San Francisco* v. *Phelan*, 583; *San Francisco* v. *Flood*, 583; *San Francisco* v. *Baldwin*, 584.

6. A TAX-PAYER OUGHT NOT TO BE HEARD TO COMPLAIN OF THE INSUFFICIENCY OF THE DESCRIPTION OF PERSONAL PROPERTY assessed by him, when such description was taken from a list furnished by himself, or by some one on his behalf and by his authority, or when made by the assessor without the aid of such list, if the description is as certain as could reasonably be required of the assessor under the circumstances. *Id.*

7. SHARES IN THE CAPITAL STOCK OF CORPORATIONS ARE TAXABLE PROPERTY under the constitution of 1849, and the revenue laws in force during the fiscal year 1876–7. *Id.*

8. SECTIONS 3640 AND 3641 OF THE POLITICAL CODE DO NOT APPLY TO SHARES IN MINING CORPORATIONS constituted under the laws of California but whose tangible property is situated in another state. The former section by its express terms only exempted shares in corporations from assessment where the entire capital or property of the corporation in which the shares were owned was assessed. *Id.*

9. TO SUSTAIN AN ASSESSMENT OF SHARES IN A MINING CORPORATION, IT WILL BE PRESUMED that the assessor in making the assessment acted in accordance with law, and that the circumstances existed which authorized such assessment; and in an action to enforce the same it is incumbent on the defendant to show that the action of the assessor was unauthorized. *Id.*

10. TAX-PAYERS SHOULD FURNISH A TRUE AND CORRECT LIST OF THEIR TAXABLE PROPERTY to the assessor, and if they fail so to do, and any loss results to them in consequence of such failure, their complaints on such score should meet with no favor from the courts. *Id.*

11. MONEY OF AN ESTATE ON GENERAL DEPOSIT AT A BANK IS IN LEGAL EFFECT A LOAN, and is taxable in the county in which the decedent formerly resided, and not in the

county where such money is deposited. *City and County of San Francisco* v. *Lux*, 555.

12. THE ENUMERATION OF THE PROPERTY ASSESSED IN A COMPLAINT, IN AN ACTION FOR THE COLLECTION OF DELINQUENT TAXES, sufficiently complies with the requirement of the statute, Stat. 1877-8, p. 338, when the same is made in words identical with those used by the assessing officer, and set down in the assessment book. *San Francisco* v. *Flood*, 567.
13. DISTRICT COURT HAS JURISDICTION OF AN ACTION TO RECOVER BACK money paid under protest in satisfaction of an illegal tax, although the amount in controversy is less than three hundred dollars. *Robinson* v. *Longley*, 306.
14. PROPERTY BELONGING TO A CIRCUS WHICH IS PASSING THROUGH THE STATE, although it remains there for a few days in the ordinary course of its business, is not subject to taxation. *Id.*
15. DISTRICT ATTORNEYS CAN NOT COMMENCE AND PROSECUTE ACTIONS for the recovery of delinquent taxes, unless authorized so to do by the boards of supervisors of their respective counties. In such actions commenced and prosecuted by district attorneys without authority of the boards of supervisors, no attorney's fees can be recovered against the defendants, nor costs against the plaintiffs. *County of San Diego* v. *California Southern Railroad Company*, 341.
16. A TAX CERTIFICATE OF SALE WHICH RECITES THAT THE PROPERTY WAS ASSESSED TO G. A. H., "and to all owners and claimants known and unknown," is void. *Daley* v. *Ah Goon*, 584.
17. A TAX DEED WHICH FAILS TO RECITE THE RECITAL IN THE CERTIFICATE OF SALE, with reference to the time when the purchaser would be entitled to a deed, is void. *Anderson* v. *Hancock*, 349.
18. A VOID TAX CERTIFICATE IS ADMISSIBLE IN EVIDENCE FOR THE PURPOSE OF DEFEATING A TAX DEED founded thereon, which is valid on its face by reason of the omission of an invalidating recital. *Daley* v. *Ah Goon*, 584.

See ADVERSE POSSESSION, 1; APPEAL, 4, 9.

TIEDMAN on Real Property, Review of, 319.

TORTS.

See CORPORATIONS, 21-23; ESTRAY, 4.

TRANSCRIPT.

See APPEAL, 10, 14; LIENS, 6, 7.

TREATY, CHINESE.

See CHINESE RESTRICTION ACT, 2-6.

TRESPASS.

1. AN ACTION, THE MAIN PURPOSE OF WHICH IS TO OBTAIN A DECREE RESTRAINING the commission of continuing trespasses, of a character to produce irreparable injury, is an equitable action, and issues of fact raised therein should be tried by the court, unless it saw fit to order any or all of them to be submitted to a jury. *McLaughlin* v. *Del Re*, 486.
2. CUTTING TIMBER ON THE PUBLIC LANDS.—Section 4 of the act of June 3, 1878 (20 Stat. 89), prohibits the cutting of any timber on the public lands with intent to dispose of the same; but the proviso thereto permits a settler under the pre-emption and homestead acts to clear his claim as fast as the same is put under cultivation, and the timber cut in the course of such clearing may be disposed of by the settler to the best advantage. *United States* v. *Williams*, 100.
3. IDEM.—But if such settler cuts timber on his claim with the intent to dispose of the same, and not merely as a means of preparing the land for tillage, he is a willful trespasser and is liable accordingly. *Id.*
4. DAMAGE BY TRESPASSING SHEEP.—A complaint in an action brought under the act of March 7, 1878, which alleges that the plaintiff was at stated times the owner and in possession of a certain piece of land; that at such time the defendant was the owner, in the possession, and chargeable with the care of certain sheep, which then entered and trespassed upon such land and injured the grain, grass, and hay thereon, to the plaintiff's damage, is sufficient; and if such averments are true, the defendant is liable. *Faber* v. *Cathrin*, 871.

5. ALLOWING THE PLAINTIFF IN SUCH ACTION TO TESTIFY THAT BY REASON OF THE DAMAGE done by such sheep she was compelled to feed her own stock with hay, is not error, when such fact was first drawn out by the defendant on cross-examination. *Id.*

6. OWNER'S LIABILITY FOR DAMAGE FROM TRESPASSING SHEEP.—When a flock of sheep is in the charge of herders upon a range, ordinary care should be exercised in preventing a trespass thereby upon the crop of another. When the crop is of such a nature as to be readily recognized, or is surrounded by a fence of any kind, so that the herder may know when he reaches its vicinity, he should use ordinary care to prevent the sheep from going upon the same and doing injury thereto. If such ordinary care be not exercised and a trespass and injury result, the owner of the sheep is liable for such damage. *Willard* v. *Mathesus*, 355.

7. DISTINCTION BETWEEN THE LIABILITY OF AN OWNER FOR DAMAGES RESULTING FROM TRESPASSING CATTLE and those resulting from trespassing sheep, stated, and shown to depend upon the difference in the customary manner of herding such animals. *Id.*

See CORPORATIONS, 21–23; DAMAGES, 6, 7; EXECUTIONS, 4.

TRUSTS.

1. PROPERTY PURCHASED FROM A PRIVATE CORPORATION, in good faith and for an adequate consideration, is not subject to a trust in the hands of a purchaser for the satisfaction of unpaid debts of the corporation, although the purchaser had notice of such debts at the time of the purchase. And the rule is the same whether the purchase includes all the property of the corporation or only a part of it. *Branson* v. *Oregonian R'y Co.*, 624.

2. A DEED BY A TRUSTEE, PURPORTING TO CONVEY TO THE GRANTEES THE LEGAL TITLE to their shares in the land, may be admitted in evidence, notwithstanding an objection thereto which goes merely to the effect of such conveyance. The operation of such conveyance was a matter for the consideration of the court when it rendered judgment. *Emeric* v. *Alvarado*, 708.

See EQUITY, 1; PARTIES, 9.

ULTRA VIRES.

See CORPORATIONS, 22.

UNDERTAKING ON APPEAL.

See APPEAL, 1, 9; MORTGAGE, 12.

UNDERTAKING ON ATTACHMENT.

See ATTACHMENT, 4–6.

UNITED STATES.

1. POWERS OF THE UNITED STATES OVER PUBLIC LANDS WITHIN A STATE.—Over the public lands within a state the United States has only the rights of a proprietor, and it has no power to authorize its grantees of such lands to invade the private rights of other proprietors. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.

See CANCELLATION, 1; CHINESE RESTRICTION ACT, 3–8, 10–12; CONSTITUTIONAL LAW, 6, 7, 9; ESTOPPEL, 3; HABEAS CORPUS, 3–8; LACHES, 3; WATER RIGHTS.

USE AND OCCUPATION.

1. ACTION ON AN IMPLIED CONTRACT FOR THE USE AND OCCUPATION of a saw-mill lies against a vendee who has been in possession under a written contract for the sale of the same, the conditions of which he has failed to perform. *Jones* v. *Nathrop*, 279.

VARIANCE.

1. WHERE NO OBJECTION TO A VARIANCE BETWEEN THE COMPLAINT AND THE PROOF was made in the court below, which, under sections 77 and 78 of the code, might have been cured by an amendment, and where the appellant was not misled by such variance, an objection thereto is too late when made for the first time in the appellate court. *Smith* v. *Roe*, 502.

2. ASSIGNMENT OF ERROR ON THE GROUND OF VARIANCE between the facts alleged and those proved must specify the grounds of objection. *Davidson* v. *Oregon & California R. R. Co.*, 421.
3. EVERY MATTER WHICH WOULD HAVE BEEN ADMISSIBLE IN EVIDENCE BY WAY OF AMENDMENT to the complaint will be deemed to have been added, or its absence waived or cured, after verdict. *Id.*

See NEW TRIAL, 15.

VENDOR AND VENDEE.

1. DECLARATIONS OF A VENDOR, MADE AFTER A SALE BY HIM, and after he has parted with the possession to his vendee, can not be received in evidence against the vendee, for the purpose of affecting or impeaching the *bona fides* of such sale, or of defeating the vendee's title, on the ground that the sale was in fraud of the vendor's creditors. Nor are such declarations admissible as being part of the *res gestæ*. *Hirschfeld* v. *Williamson*, 150.
2. CREDITOR OF A VENDOR IN ATTACKING THE VALIDITY OF A SALE by him, on the alleged ground of fraud, can not question the authority of the vendor's agent by whom such sale was made. *Id.*

See EJECTMENT, 3; USE AND OCCUPATION, 1; WATER RIGHTS, 8.

VENDOR'S LIEN.

See LIENS, 5.

VENUE.

1. A DEFENDANT HAS A STATUTORY RIGHT TO HAVE THE PLACE OF TRIAL CHANGED to the county of his residence, where the county designated in the complaint is not the proper county for the trial of the action. *Bailey* v. *Sloan*, 472.
2. A MOTION FOR A CHANGE OF VENUE IS ADDRESSED TO THE SOUND DISCRETION of the trial court, and the action of such court thereon will not be reversed unless it appears that such discretion has been grossly abused. *Territory of New Mexico* v. *Kinney*, 801.
3. ORDERS OF THE LOWER COURT OVERRULING A MOTION FOR A CHANGE OF VENUE and for a continuance will not be reversed unless the record discloses an abuse of discretion. *Territory of New Mexico* v. *Lopez*, 821.
4. AN ACTION FOR THE DIVERSION OF WATER FROM THE PLAINTIFF'S DITCH may be brought in either of the counties in which such ditch is situated, although the defendant's place of business is in the other county, where the act complained of is committed. *People's Ditch Co.* v. *King's River and Fresno Canal Co.*, 473.

VERIFICATION.

1. VERIFICATION OF BILL IN EQUITY.—A bill in equity, even for an injunction, need not be verified, unless it is intended to be used as evidence on an application for a provisional injunction. *Hughes* v. *Northern Pacific Railway Co.*, 21.
2. VERIFICATION OF ANSWER BY FOREIGN INSURANCE COMPANY.—A foreign insurance company that has appointed an agent here upon whom process may be served for it, as provided in sections 7 and 8 of the foreign corporation act (Or. Laws, 617), is not absent from the state, so that any agent or attorney thereof may verify its answer to a complaint, but such answer must be verified by the agent appointed under the statute to stand for the corporation, or by some other agent or attorney who has personal knowledge of the facts involved in the allegations therein. *West* v. *Home Insurance Co.*, 243.
3. VERIFICATION BY AN AGENT HAVING KNOWLEDGE OF THE FACTS.—Where an agent verifies an answer on the ground that the allegations thereof are within his personal knowledge, for the purpose of this verification, the allegations in the answer are to be taken as part of his statement, and it must appear therefrom that the truth or falsity of such allegations is within his personal knowledge. *Id.*
4. WHERE AN ANSWER CONTROVERTS SUNDRY ALLEGATIONS IN THE COMPLAINT by simply denying any knowledge or information thereof sufficient to form a belief, and such answer is verified by an agent of the defendant who states in the verification that the facts contained in the answer are within his knowledge, it does not appear that such agent was authorized to verify the same, because of his personal knowledge of the material allegations therein, but the contrary. *Id.*

5. PERSONAL KNOWLEDGE OF AN ALLEGATION IN AN ANSWER, within the purview of section 79, is a personal knowledge of its truth or falsity; and if the allegation is a negative one, this necessarily includes a knowledge of the truth or falsity of the allegation denied. *Id.*
6. VERIFICATION OF A COMPLAINT IN WHICH NOTHING IS STATED ON INFORMATION OR belief need not contain the statutory words, "except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true." *Kelly* v. *Kelly*, 143.

See PATENT, 1.

VIGILANCE COMMITTEE.

See DAMAGES, 3.

WARRANTS.

1. BONA FIDE PURCHASER OF WARRANT.—Where a warrant is issued by the auditor of the city and county of San Francisco, in pursuance of the mandate of the court, payable to the plaintiff in the proceeding for *mandamus* or his attorney, a *bona fide* purchaser thereof from such attorney acquires a good title as against such plaintiff. Such warrant is not a negotiable instrument. *Sweeney* v. *Sutro*, 557.
2. COUNTY WARRANTS—WHO MAY SUE.—County warrants payable to bearer are not negotiable as bills of exchange and promissory notes. All holders take them subject to any defense that may be made against the original payee. Nevertheless, the property therein passes by delivery when they are payable to the holder. Hence, when the holder is a citizen of another state, he may maintain action thereon in the federal court, even when the payee can not maintain such action. *Jerome* v. *Comm'rs Rio Grande Co.*, 540.
3. SAME—DUE AS UPON DIRECT PROMISE.—Such instruments are not assignable within the meaning of the act of congress of 1875, regulating the jurisdiction of federal courts, 18 Stat. 470. They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the first holder. *Id.*
4. SAME—REMEDY.—In such case the remedy (in the United States courts) of the holder in the first instance is by action at law prosecuted to judgment, as a foundation for *mandamus* to compel the levy and collection of a tax for their payment. *Id.*
5. UPON WARRANTS issued for interest on a judgment, an action will not lie. *Id.*

WARVELLE on Abstracts, Review of, 78.

WATER RIGHTS (EDITORIAL).

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WATER RIGHTS.

1. POWERS OF CONGRESS OVER NAVIGABLE STREAMS.—Congress has no power, even by express statute, to authorize a public nuisance destroying or materially obstructing the navigability and navigation of navigable streams within a state, for purposes wholly unconnected with commerce or post-roads. Its power over such streams is limited to the regulation of commerce and establishing post-roads, and it can not authorized the navigability of a navigable stream to be totally or partially destroyed for purposes having no connection with or tendency to benefit the operations of commerce or the carrying of the mails. *Woodruff* v. *North Bloomfield G. M. Co.*, 183.
2. POWERS OF THE STATE OVER NAVIGABLE STREAMS.—A state can not, except under its power of eminent domain, and upon making just compensation, interfere with the navigable streams within its territory, in any manner, or for any purpose, other than that of regulating, preserving, and protecting the public easement of navigation therein. *Id.*
3. ACT ADMITTING CALIFORNIA INTO THE UNION.—The provision of the act admitting California into the Union "upon the express condition * * * that all the navigable rivers within said state shall be common highways and forever free as well to the inhabitants of said state as to the citizens of the United States," is valid as a law under the authority of congress to regulate commerce, which the state has no authority to violate, and with which it can not interfere. *Id.*
4. THE STATE HAS THE RIGHT TO CONTROL AND REGULATE THE PUBLIC USE OF THE NAVIGABLE WATERS within its boundaries, subject only to restraints upon such right arising out of the power of congress over commerce. *People* v. *Williams*, 572.
5. THE RIGHT OF THE STATE TO CONTROL AND REGULATE THAT PORTION OF CHANNEL STREET between Fourth and Fifth streets, in the city and county of San Francisco, which is covered by the waters of the bay of San Francisco, and navigable by vessels engaged in commerce, was not surrendered by the statute of March 26, 1851, granting to the city of San Francisco the tide-lands known as the beach-and-water lots, and establishing a permanent water-front for such city; nor by the statute dedicating certain streets in such city to public use as streets: Stat. 1858, p. 324: nor by the statute of March 20, 1868, dedicating a certain portion of Channel street to be an open channel, and authorizing such city to extend streets across it by arched or draw bridges; nor by the statute of March 30, 1868, establishing a board of tide-land commissioners; nor by the statute of April 1, 1872, offering to dedicate such portion of Channel street to the city and county of San Francisco on certain conditions, which have never been complied with. *Id.*
6. NORTHERN PACIFIC AUTHORIZED TO BRIDGE A NAVIGABLE WATER ON THE LINE OF ITS ROAD.—The Northern Pacific Railway Company was authorized by said acts "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railway" from Lake Superior to Portland, Or., "with all the powers, privileges, and immunities necessary to carry into effect the purpose" of said acts; the same "to be constructed in a substantial and workmanlike manner, with all the necessary draws, * * * bridges, etc., * * * equal in all respects to railways of the first class:" and it is necessary to cross the Wallamet river with such road in order to reach Portland from the eastward. *Held*, that the right of the Northern Pacific Railway Company to build and maintain a drawbridge across said river or other navigable water on the line of its road to Portland, without causing any unnecessary injury or obstruction to the usefulness thereof, is clearly implied in said acts; but that congress, not having prescribed the exact location or particular character of said bridge, the right of the corporation to construct it is subject to the judgment of the proper court, as to whether it is being constructed without unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby or likely to be. *Hughes* v. *Northern Pacific Railway Co.*, 21.
7. A RIPARIAN PROPRIETOR MAY RESTRAIN THE DIVERSION OF ANY WATER FROM HIS STREAM, on the part of one who has conducted water into it by artificial means, un-

less the latter show that he has not taken from the stream more water than he led into it. *Wilcox* v. *Hausch*, 481.

8. ONE IN THE POSSESSION OF LAND UNDER AN UNEXECUTED CONTRACT FOR THE SALE THEREOF can not assert the rights of a riparian proprietor in an adjoining stream. *Smith* v. *Logan*, 391.
9. RIGHTS OF A PRIOR APPROPRIATOR OF WATER MAY BE LOST BY AN ADVERSE USE thereof by another, for a sufficient length of time, and the prior appropriator's acquiescence therein. *Id.*
10. PRIOR APPROPRIATOR OF WATER WHO FOR MANY YEARS MAKES NO USE thereof, but allows another to construct a ditch and divert such water without notifying the latter of his prior appropriation, will be presumed to have abandoned the same. *Dorr* v. *Hammond*, 357.
11. RIGHTS TO THE USE OF WATER ACQUIRED BY APPROPRIATION, and used by the appropriator for the purpose of irrigating certain lands on which he was trespassing, do not become appurtenant to such lands, and pass to one in the possession under a contract for the sale thereof with the owner. *Smith* v. *Logan*, 391.
12. ANY RIGHTS ACQUIRED BY A SETTLER ON PUBLIC LANDS BORDERING UPON A STREAM, the waters of which had been previously appropriated, are taken subject to such appropriation. *Lytle Creek Water Co.* v. *Perdew*, 866.
13. WHEN THERE IS NOTHING IN THE RECORD TO INDICATE THAT WHEN ALL THE WATERS of a certain stream were appropriated any of the lands by or through which such stream flowed had passed into private ownership, it will be presumed that such lands were public lands of the United States. *Id.*
14. IN AN ACTION BY AN APPROPRIATOR OF THE WATER OF A CERTAIN STREAM TO RESTRAIN A DEFENDANT FROM DIVERTING the same, when the court finds that the plaintiff has a separate title to the use of all the water for a certain length of time out of a longer period, and that other appropriators had a right to the use thereof, but fails to find as to the order in which the persons interested in the appropriation used it, or as to the times when the periods during which the plaintiff would be entitled to the exclusive use would recur, no decree fixing the rights of the plaintiff or prohibiting the defendant from interfering therewith, can be entered, unless the other persons entitled to the use of such water are made parties to the action. *Id.*
15. LEGISLATURE HAS POWER TO PROVIDE THAT THE OWNER OF AN EXISTING WATER DITCH upon or across his own land, or the land of another, shall not prohibit a third person from using and enlarging the same; but it can not limit or direct the compensation to be paid for the property so taken, or the damages occasioned by enlarging the ditch, or otherwise. *Trippe* v. *Overacker*, 352.
16. PROPRIETOR OF AN IRRIGATING DITCH, WHETHER UPON HIS OWN LAND or that of another, has a property ownership both in the ditch and the right of way therefor, and a third person can not use or enlarge the same without the owner's consent, except upon payment of just compensation as provided by the constitution. *Id.*
17. COVENANTS IN RELATION TO THE USE OF WATER, WHEN RUN WITH THE LAND.—Where the owners of two adjoining tracts of land, separated by a stream, covenant and agree between themselves as such owners that the waters of such stream should be taken and conveyed to a reservoir on the land of one owner, by ditches and flumes constructed at their joint expense, and that from such reservoir the other owner might construct ditches across such land and convey one half of the water to his own premises, such covenants run with the land; and the successor in interest of the owner on whose land the reservoir is situated can not, by going to a point higher up on the stream, and taking water therefrom and conveying it to his land, claim the whole of it for his own use. Nor will such exclusive right be created by the statute of limitations in the absence of an adverse use. *Weill* v. *Baldwin*, 551.
18. GRANTEE OF LAND BY DEED, WHICH GIVES HIM THE RIGHT TO TAKE SUFFICIENT WATER from certain ditches, "to irrigate the land conveyed and for domestic purposes, to an amount not exceeding two hundred inches," upon condition that he should "pay *pro rata* as the amount of water he uses on the land conveyed shall bear to the whole amount of water that is conveyed in said ditches, for any needed repairs of said ditches," has the option of using whatever amount of water he deems sufficient for these purposes, and is not liable for the expenses incurred in repairing the ditches beyond a *pro rata* proportion, based upon the quantity of water actually used or demanded by him. *Brown* v. *Evans*, 387.
19. WHERE, HOWEVER, SUCH GRANTEE SERVES THE GRANTOR WITH NOTICE THAT HE REQUIRES a specific quantity of water, and the same is furnished him, he is estopped from denying that he did not need the same and did not use it. And in an action against him to recover his proportionate share of such expenses, such notices, et

long as they remain unrevoked, are admissible in evidence to show the amount of water used by him. *Id.*

20. JUDGMENT REVERSED ON THE AUTHORITY OF ANAHEIM WATER CO. v. SEMI-TROPIC WATER CO., 12 Pac. C. L. J. 158. *Santa Ana Valley Irrigating Company* v. *Anaheim Water Company*, 487.

See BOARD OF HARBOR COMMISSIONERS, 1; CORPORATIONS, 2; EXECUTIONS, 1; INJUNCTION, 6; NUISANCE, 4.

WHARVES.

See BOARD OF HARBOR COMMISSIONERS, 1.

WILLS.

1. WRITING PROPOSED AS AN OLOGRAPHIC WILL CAN NOT BE ADMITTED TO PROBATE, where any part of the date, such as the year, is not written by the deceased, although the rest of the writing complies with the statutory requirements in reference to such wills. *Estate of Billings*, 140.

2. WHERE AN UNMARRIED PERSON HAS MADE A WILL, AND AFTERWARDS MARRIES, the marriage, whether followed by the birth of issue or not, operates by presumption of law, in case of the survival of the wife or children, as a revocation of the will, unless some specific provision has been made by the will itself, or by marriage contract for the wife, or by some settlement or provision for any surviving children. Such presumption of revocation depends upon the question of survivorship, and does not admit of evidence to the contrary unless provision has been made for the wife or children surviving. *Sanders* v. *Simcich*, 868.

3. IN DETERMINING THE SPECIAL ISSUES SUBMITTED TO THEM, IN PROCEEDINGS FOR THE PROBATE of a will, the jury should not take into consideration family difficulties, except as bearing on the testamentary capacity of the deceased. *Estate of Lang*, 773.

4. COURTS WILL NOT PRESUME, BECAUSE A TESTATOR IS A DRUNKARD, that therefore he is of unsound mind. *Id.*

5. THE INTENT WITH WHICH A TESTATOR TORE HIS SIGNATURE FROM HIS WILL, while of unsound mind, does not constitute an element of revocation. *Id.*

6. A LEGACY WHICH THE TESTATOR DIRECTS TO BE PAID OUT OF THE FIRST MONEYS realized from his estate, after the payment of debts and funeral expenses, does not become due and payable, and consequently does not bear interest, until after such debts and funeral expenses are paid. *Estate of James*, 775.

7. A DEVISE OF CERTAIN REAL ESTATE IS NOT VOID FOR RESTRAINING THE POWER OF ALIENATION beyond the time authorized by statute, where a testatrix gives the same to her two daughters, "in common, for the term of their natural lives, and after their death, or the death of either of them, the share of the one dying to her children in fee simple, the children of each daughter to take one half thereof; or in case of the death of either of said daughters without issue, then the children of the other daughter to take all of the same;" provided that neither of such daughters could sell the same; and provided, that no one of their children should have the power to sell his interest until after all of the children taking shall attain majority; "and if any of said children shall die during minority, then the brothers or sisters, by my said daughters, of the child or children so dying, shall take all of the said property in the same manner as though the child or children dying had never been born; and upon the death of all the children, of either of my daughters, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee; and that all of the children of both my daughters who shall attain the age of majority, and none other, shall be and become, at such time as all living children of my said daughters shall attain to the age of majority, sole and absolute owners in fee simple of said property." *Buchanan* v. *Schulderman*, 685.

See ESTATES OF DECEASED PERSONS, 3; EVIDENCE, 16; FINDINGS, 10; MEXICAN GRANTS, 6.

WITNESSES.

1. CRIMINAL TRIAL, EXCLUSION OF WITNESSES ON.—The exclusion of witnesses from the court-room during the progress of a criminal trial is within the discretion of the court. It is not error for the trial court to permit the prosecution to call a witness who has inadvertently violated its order excluding witnesses. *People* v. *O'Loughlin*, 164.

2. CHINESE WITNESSES.—Chinese persons are, under the constitution and laws of the United States guaranteeing to them "the equal protection of the laws," competent witnesses. *In re Tung Yeong*, 647.
3. A CHINESE PERSON IS NOT INCOMPETENT AS A WITNESS WHO TESTIFIES ON HIS EXAMINATION before being sworn, that he believed in the Chinese religion, and knew that he was to tell the truth, although the record does not show what such religion teaches in regard to the existence of a supreme being, or in regard to future rewards and punishment. *Territory of New Mexico* v. *Yee Shun*, 666.
4. THE PARTY OBJECTING TO THE COMPETENCY OF A WITNESS for a want of religious belief must show such want by evidence *aliunde*. *Id.*

See CONTINUANCE; COSTS, 1; LACHES, 4.

WOOD'S Collyer on Partnership, Review of, 175.

WRIT OF ERROR.

1. WRIT OF ERROR WILL BE DISMISSED WHEN THE RECORD FAILS TO DISCLOSE that a final judgment has been rendered. *Stevens* v. *Solid Muldoon Printing Co.*, 498.

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